

July 9, 2002 death certificate was submitted to the record and listed the cause of death as hypertension and atherosclerotic heart disease.

On June 3, 2003 the Office requested that appellant's submit additional evidence in support of her claim.

In a June 20, 2003 statement, appellant attributed the employee's death to a failure on the part of the employing establishment to honor his work restriction when it authorized use of a motor car for travel from Bremerton, Washington to Emeryville, California.²

On July 8, 2003 Dr. Timothy R. Symonds, an attending family practitioner, reported that the employee had died of a massive heart attack on July 4, 2002 while driving home from a vacation.³ He noted that the employee had a history of diabetes mellitus and hypertension as well as long-standing tobacco use. In light of appellant's diagnosed conditions, Dr. Symonds stated that he was unable to connect the employee's death to any work-related exposures.⁴

In an undated physical limitation form, Dr. Edgar T. Briones, an attending physician, noted that the employee was restricted from driving a car from May 3 to November 1, 2002.

In a December 3, 2003 decision, the Office denied appellant's claim for survivor benefits finding that the medical evidence did not establish that the employee's death on July 4, 2002 was causally related to his federal employment.

On January 31, 2006 appellant requested reconsideration. She submitted copies of several medical surveillance examinations performed during 2001 and 2002, together with an October 20, 1997 notification of abnormal physical examination. Appellant again contended that the employee's supervisors had ignored his physical restrictions and he had been required to operate a motor vehicle a month prior to his death.

In a March 15, 2006 decision, the Office denied reconsideration finding that the request was untimely filed and failed to establish clear evidence of error.

On January 23, 2007 appellant again requested reconsideration of the denial of her claim. She addressed her January 31, 2006 request, contending that she had not received any decision. On February 2, 2007 the Office forwarded a copy of the March 15, 2006 decision to appellant.

On March 9, 2007 appellant requested reconsideration. She again contended that the employee had been issued travel orders by his supervisors after being restricted from driving.

² The record reflects that on June 4, 2002 the employee was authorized to travel between Washington and California. He departed on June 6, 2002 and returned on June 9, 2002.

³ A coroner's investigation of July 4, 2002 noted that the employee was traveling north on Interstate 5 with his wife and uncle. They had just eaten and were proceeding on their way to Washington when the employee started coughing and became short of breath. His uncle called for paramedics, who responded and transferred the employee to their vehicle. While on route to a local hospital, the deceased coded and the paramedics were unable to resuscitate him.

⁴ The record contains several treatment records of Dr. Symonds from 1999.

Appellant argued that the Office had not reviewed all the evidence submitted in support of her claim.

In an April 23, 2007 decision, the Office found that appellant's request for reconsideration was untimely filed and failed to establish clear evidence of error in the denial of her claim for survivor benefits.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.⁵ The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁷ The Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review establishes clear evidence of error on the part of the Office.⁸ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office. To show clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.¹¹ The Board makes an independent determination of

⁵ 5 U.S.C. § 8128(a).

⁶ See 20 C.F.R. § 10.607; *Alan G. Williams*, 52 ECAB 180 (2000).

⁷ See *Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004); *Valetta C. Coleman*, 48 ECAB 367 (1997).

⁸ 20 C.F.R. § 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent decision. The application must establish, on its face, that such decision was erroneous." See *Alberta Dukes*, 56 ECAB 247 (2005); *Gladys Mercado*, 52 ECAB 255 (2001).

⁹ See *Jack D. Johnson*, 57 ECAB 593 (2006); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

¹¹ *Id.*

whether a claimant has submitted evidence of clear error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.¹²

ANALYSIS

On December 3, 2003 the Office issued the most recent merit decision denying appellant's claim for survivor benefits. Her request for reconsideration was dated March 9, 2007, more than one year after the December 3, 2003 merit decision. Because her request was not timely filed within one year of the Office's most recent merit decision, she must establish clear evidence of error in the denial of her claim.

The Office denied appellant's claim for survivor benefits on the basis that it was not established that the employee's death was causally related to his federal employment. To establish clear evidence of error, appellant must submit evidence relevant to this issue which establishes that the Office clearly erred in the denial of her claim. This she has failed to do. On reconsideration, appellant noted that the employee had been disqualified from driving beginning May 3, 2002; however, he received travel orders authorizing a trip to California which was taken June 6 to 9, 2002. Appellant noted that this was approximately one month prior to the employee's death on July 4, 2002, apparently arguing that this contributed to his death from the acute myocardial infarction. The record before the Office at the time of the December 3, 2003 merit decision included the July 8, 2003 report of the employee's attending physician, Dr. Symonds. He noted that the employee had significant risk factors for heart disease, including hypertension, diabetes mellitus and long-standing tobacco use. Based on these factors, Dr. Symonds stated that he was unable to connect the employee's death to any work-related factors. Notwithstanding appellant's contentions, the issue of whether an injury or death is causally related to factors of federal employment is fundamentally a medical question.¹³ At the time the Office denied her claim, the record failed to contain medical opinion relating the employee's death to any aspect of his federal employment. Moreover, in support of her request for review, appellant did not submit any additional evidence relevant to the underlying issue in this case. Her argument does not raise a substantial question as to the correctness of the Office's decision denying her claim or *prima facie* shift the weight of the evidence in her favor.

¹² See *Joseph R. Santos*, 57 ECAB 554 (2006); *John Crawford*, 52 ECAB 395 (2001).

¹³ See, e.g., *Sandra D. Pruitt*, 57 ECAB 126 (2005); *Beverly R. Jones*, 55 ECAB 411 (2004).

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as it was untimely and failed to establish clear evidence of error in the denial of her claim for survivor benefits.

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2007 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 2, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board