

**United States Department of Labor  
Employees' Compensation Appeals Board**

I.S., claiming as widow of W.S., Appellant	)	
	)	
and	)	<b>Docket No. 08-116</b>
	)	<b>Issued: March 25, 2009</b>
<b>DEPARTMENT OF LABOR, MINE SAFETY &amp; HEALTH ADMINISTRATION, Pikeville, KY,</b>	)	
<b>Employer</b>	)	
	)	

*Appearances:*  
John Harlan Callis III, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On October 15, 2007 appellant, through her representative, filed a timely appeal from the July 2, 2007 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's denial.

**ISSUE**

The issue is whether the Office properly denied appellant's May 31, 2007 request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

**FACTUAL HISTORY**

The employee, a mine inspector, sustained an injury to his neck and low back on June 7, 1977 when his vehicle was struck from behind. The Office accepted his claim for cervical

sprain, lumbar sprain and cervical spondylosis. The employee received compensation for disability.

The employee died on November 25, 2004. The immediate cause of death was asystole (stopped heart), due to aspiration pneumonia, due to coronary arteriosclerosis.

On December 21, 2004 appellant filed a claim for compensation by widow. On the back of the form, Dr. Anthony C. Stumbo, a Board-certified internist, indicated that the employee's death was due to his coronary condition.

On April 6, 2005 the Office asked appellant to provide a medical report from her husband's physician explaining in detail how the accepted cervical and lumbar strains resulted in his passing. Appellant submitted an April 13, 2005 report from Dr. Stumbo:

"[The employee] worked as a federal mine inspector. On June 7, 1977 while working, his four-wheel drive was struck from behind by another motor vehicle with sufficient violence that the driver's seat of the four-wheel drive removed from the floor of the vehicle. Consequently, [he] experienced the abrupt onset of chest pain. Due to injuries sustained [the employee] became totally and permanently disabled from gainful employment.

"I am of the opinion his injury contributed to his heart problems and ultimate demise."

In a decision dated May 18, 2005, the Office denied appellant's claim for benefits. It found that Dr. Stumbo's report was not sufficient to establish that the accepted lumbar strain, cervical sprain and cervical spondylosis aggravated or accelerated the employee's underlying cardiac condition. The Office noted no objective evidence of aggravation: "Given the decedent's age, underlying disease processes involving diabetes and cardiac conditions it would [be] necessary for a physician to address the objective evidence demonstrating the underlying cardiac condition was materially worsened by the accepted orthopedic conditions." In addition, it stated that the physician would need to provide a detailed medical report based on a review of cardiac records from all sources addressing whether the cardiac disease followed its natural progression given the employee's age without any intervention from work injuries.

Appeal rights attached to the Office's May 15, 2005 decision notified appellant that if she had any additional evidence or legal argument that she believed established her claim for benefits, she could request reconsideration. The Office advised that any such request must be accompanied by relevant evidence not previously submitted. It further advised that any request for reconsideration must be filed within one year of the date of its May 15, 2005 decision.

On August 1, 2005 appellant filed a request for reconsideration. She submitted no evidence and made no argument. On August 27, 2005 the Office denied that request on the grounds that she neither raised substantive legal questions nor included new and relevant evidence.

In an undated letter received by the Office on May 31, 2007, appellant told her husband's story and stated that the debilitating injuries from his accident caused his diabetes and blood pressure to worsen. She asked the Office to reconsider her claim for spousal compensation.

In a decision dated July 2, 2007, the Office denied appellant's May 31, 2007 request. It found that the request was untimely and failed to present clear evidence of error in the Office's May 18, 2005 decision.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretion to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at anytime on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”<sup>1</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretion under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provide that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>2</sup>

The term “clear evidence of error” is intended to represent a difficult standard.<sup>3</sup> If clear evidence of error has not been presented, the Office should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>4</sup>

### **ANALYSIS**

Appellant had one year from the Office's May 18, 2005 decision denying her claim or until May 18, 2006, to request reconsideration. Her undated request, received on May 31, 2007, is therefore untimely. To require the Office to reopen her claim for reconsideration, appellant must present clear evidence of error in the Office's May 18, 2005 decision. Appellant must submit evidence that shows, on its face, that the May 18, 2005 decision was erroneous.

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> 20 C.F.R. § 10.607 (1999).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

<sup>4</sup> *Id.*, Chapter 2.1602.3.d(1).

Appellant's May 31, 2007 request does not show, on its face, that the Office's May 18, 2005 decision was erroneous. Her request presents only her personal opinion that her husband's debilitating injuries caused his diabetes and blood pressure to worsen and, presumably, contributed to his eventual death. However, causal relationship is a medical issue,<sup>5</sup> so her lay opinion on the cause of her husband's death is not the kind of evidence needed to reopen her claim.

Appellant previously submitted the April 13, 2005 opinion of Dr. Stumbo, a Board-certified internist, who unequivocally reported that the employee's June 7, 1977 employment injury contributed to his heart problems and ultimate demise. Although this was supportive of appellant's claim for spousal compensation, the Office explained in its May 18, 2005 decision that Dr. Stumbo needed to offer a fuller explanation. Dr. Stumbo needed to present objective evidence demonstrating a material worsening of the employee's underlying cardiac condition by the accepted employment injury. He needed to review the employee's cardiac records and determine whether the underlying cardiac disease followed its natural progression, in light of the employee's other medical problems.

Because appellant seeks compensation under the Act, she bears the burden of proof to establish her entitlement to benefits.<sup>6</sup> It is up to her to submit sufficient medical opinion evidence necessary to establish clear evidence of error in the denial of her claim.

Appellant's own opinion is not particularly relevant and does not resolve the medical question outstanding. For this reason, the Board finds that the Office properly denied her May 31, 2007 request for reconsideration. The Board will affirm the Office's July 7, 2007 decision.

### CONCLUSION

The Board finds that the Office properly denied appellant's May 31, 2007 request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>5</sup> *Mary J. Briggs*, 37 ECAB 578 (1986).

<sup>6</sup> *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein; *see Harold Hendrix*, 1 ECAB 54 (1947).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 2, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 25, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board