

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

D.G., claiming as widow of W.G., Appellant)
)
and) **Docket No. 10-43**
) **Issued: July 23, 2010**
)
DEPARTMENT OF TRANSPORTATION,)
FEDERAL AVIATION ADMINISTRATION,)
Memphis, TN, Employer)

Appearances:

Gregory D. Jordan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 6, 2009 appellant filed a timely appeal from the July 22, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for merit review of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of the claim.¹

ISSUE

The issue is whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹ The last merit decision was a Board decision dated December 15, 2008. The Board has jurisdiction over final decisions of the Office. See 20 C.F.R. § 501.2(c). For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

This is the third appeal in this case. In the first appeal, the Board issued a decision on May 13, 2008 affirming the Office's determination that appellant had not met her burden of proof to establish that the employee's death on July 25, 2005 was causally related to his accepted emotional conditions.² The Office had accepted that as of July 1971 the employee, then a 48-year-old air traffic control specialist, sustained anxiety dissociative disease and chronic anxiety state due to his work duties.³ It paid compensation for periods of work stoppage beginning in July 1971. The employee retired from the employing establishment on disability retirement in June 1972. In late 1984, he underwent heart bypass surgery; there was no indication that this surgery was necessitated by an employment-related condition. On July 25, 2005 the employee died and on August 20, 2005 appellant, his widow, filed a claim for survivor's benefits claiming that his death was related to his accepted employment conditions.⁴ A certificate of death signed on July 25, 2005 by Dr. Lee N. Vieron, an attending Board-certified cardiologist, listed the immediate cause of death as respiratory arrest due to congestive heart failure.

In its May 13, 2008 decision, the Board considered a number of medical reports submitted by appellant but found that they did not contain adequate medical rationale on the issue of causal relationship between the employee's death and his accepted emotional conditions. For example, the Board evaluated an October 18, 2005 report in which Dr. Vieron suggested that employment-related anxiety contributed to the employee's death due to congestive heart failure and pneumonia. The Board found, however, that his opinion was of limited probative value because it was not based on a complete medical history and he failed to provide any discussion of the medical process of how stress could have contributed to the coronary artery disease that ultimately caused the employee's death. In a February 14, 2007 report, Dr. David H.S. Iansmith, an attending Board-certified cardiologist, stated that, from the time of his retirement until his death, the employee received benefits and had continuing difficulty in controlling his anxiety. The Board found that Dr. Iansmith's report was of limited probative value because it did not contain an opinion that the employee's accepted employment conditions contributed to his death.⁵

² Docket No. 08-529 (issued May 13, 2008). The Board also affirmed an Office decision denying appellant's request for further merit review.

³ The employee's claim was also accepted for temporary aggravation of Parkinsonism, but the medical records after the early 1970s only occasionally mention Parkinsonism or Parkinson's disease. The record reveals that the employee had developed diabetes and hypertension by the mid 1980s. These conditions have not been accepted as employment related.

⁴ The employee received Office benefits up until the date of his death.

⁵ The Board also found that some medical evidence showed that the employee's death was not related to his employment. Dr. Ajit B. Raisinghani, a Board-certified cardiologist serving as an Office referral physician, concluded in a July 26, 2006 report that the employee's employment-related conditions did not contribute to his death. He indicated that it would be difficult to attribute the medical problems leading to the employee's death, which developed some time after his retirement, to the employment-related anxiety condition he sustained so many years prior. Dr. Raisinghani also stated, "Furthermore, in terms of the claimant's life expectancy, he had exceeded the average life span of an American and, therefore, it would be difficult to conclude that the claimant's initial job and diagnosis of anxiety played a role in his eventual demise at the age of 82."

In the second appeal, the Office issued a decision on December 15, 2008 affirming the Office's determination that appellant had not met her burden of proof to establish that the employee's death on July 25, 2005 was causally related to his accepted emotional conditions.⁶ The Board found that a newly submitted undated report of Dr. Iansmith did not establish appellant's claim that the employee's accepted employment conditions contributed to his death. Dr. Iansmith indicated that the employee's employment-related anxiety problems caused or aggravated numerous medical problems which in turn led to his death.⁷

The Board found that Dr. Iansmith's opinion was of limited probative value regarding the cause of the employee's death because his opinion on causal relationship was not supported by adequate medical rationale. It noted that Dr. Iansmith did not provide any significant description of the particular medical conditions which had been accepted by the Office and did not provide any discussion of the employee's treatment for his anxiety-related condition during the more than 30 years between his work stoppage in 1972 and his death in 2005.⁸ The Board indicated that Dr. Iansmith generally discussed a medical article regarding the role of stress in aggravating heart disease, but found that this article of general application was of limited probative value regarding the cause of the employee's death.⁹ The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On July 6, 2009 appellant requested reconsideration of her claim. In an undated brief, Gregory D. Jordan, appellant's attorney, argued that the medical records showed the employee's work-related disease affected him throughout his life even after the source of the condition, his occupation as an air-traffic controller, was removed. He asserted that Dr. Iansmith clearly related the employee's death to the stress-related causes originating three decades before his death. Mr. Jordan quoted a portion of Dr. Iansmith's undated report which had previously been considered by both the Office and the Board. He indicated that Dr. Iansmith provided an article from the International Journal of Epidemiology that clearly showed that coronary disease was much more prevalent in those individuals suffering from stress, the exact cause of the employee's retirement.

⁶ Docket No. 08-2139 (issued December 15, 2008).

⁷ Dr. Iansmith discussed an article from the International Journal of Epidemiology which posited that coronary disease was among those conditions which might result from constitutional weaknesses as well as workplace stresses. Medical studies detailed in the article indicated that the proportion of deaths from coronary disease was well above average in people who worked in more professional positions.

⁸ The Board noted that Dr. Iansmith failed to explain how stress could have contributed to the coronary artery disease that ultimately caused the employee's death in 2005 and that he did not discuss nonwork factors which might have explained his heart condition.

⁹ The Board indicated that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship between a claimed condition and employment factors because such materials are of general application and are not determinative of whether the specifically claimed condition is related to the particular employment factors alleged by the employee. *See William C. Bush*, 40 ECAB 1064, 1075 (1989).

Mr. Jordan also quoted a portion of the October 18, 2005 report of Dr. Vieron which had previously been considered by both the Office and the Board.¹⁰ He asserted that the Office improperly relied on physicians who had never treated the employee and who did not have his full medical records, including Dr. Raisinghani and Dr. Eric Puestow, a Board-certified internist serving as an Office medical adviser. Mr. Jordan indicated that no statute was referenced in support of the opinion Dr. Raisinghani provided on July 26, 2006 that, if an individual lives past the average life expectancy, his death cannot be caused by a compensable condition. In reference to Dr. Raisinghani's July 26, 2006 report, he asserted that nowhere in the legal precedent did it state that the Office may deprive an individual of benefits if an Office physician "finds it difficult to relate the death" to work factors when two treating Board-certified physicians have stated that the death was related to work factors.¹¹

In a July 22, 2009 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹² the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.¹⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.¹⁵ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹⁶ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁷ While a reopening of a case may be predicated solely on a legal premise not previously

¹⁰ Mr. Jordan alleged that the Office improperly found that the reports of Dr. Iansmith and Dr. Vieron were not based on a complete medical history and did not contain adequate medical rationale on causal relationship.

¹¹ Appellant also submitted a copy of Dr. Iansmith's undated report which had already been considered by the Office.

¹² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

¹³ 20 C.F.R. § 10.606(b)(2).

¹⁴ *Id.* at § 10.607(a).

¹⁵ *Id.* at § 10.608(b).

¹⁶ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁷ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹⁸

ANALYSIS

In support of her July 6, 2009 reconsideration request, appellant submitted a brief of Mr. Jordan, her attorney, who quoted a portion of an undated report of Dr. Iansmith, an attending Board-certified cardiologist, and argued that his opinion clearly related the employee's death to the work-related stress originating three decades before his death. The submission of this argument would not require reopening of appellant's case as the Office had already considered the argument and had reviewed the undated report of Dr. Iansmith and determined that it was not sufficiently well rationalized to establish her claim.¹⁹ Mr. Jordan indicated that Dr. Iansmith provided an article from the International Journal of Epidemiology that clearly showed that coronary disease was much more prevalent in those individuals suffering from stress, but the Office had already reviewed this article and considered its probative value. Mr. Jordan also quoted a portion of an October 18, 2005 report of Dr. Vieron, an attending Board-certified cardiologist, but the Office had also previously considered this report.²⁰

Mr. Jordan asserted that the Office improperly relied on physicians who had never treated the employee and who did not have his full medical records, including Dr. Raisinghani, a Board-certified cardiologist serving as an Office referral physician, and Dr. Puestow, a Board-certified internist serving as an Office medical adviser. This argument is not new and thus would not require reopening of her claim for merit review.²¹ Neither Mr. Jordan nor appellant has presented legal argument showing that physicians must always examine individuals before providing an opinion, nor has it been shown that Dr. Raisinghani or Dr. Puestow did not have adequate medical records at their disposal. His argument has limited relevance as appellant's claim was not denied on the basis of the content of the Office physicians' reports, but rather on her failure to provide a well-rationalized opinion supporting causal relationship between the employee's death and the accepted conditions.²²

Appellant has not established that the Office improperly denied her request for further review of the merits of her claim under section 8128(a) of the Act, because the evidence and

¹⁸ *John F. Critz*, 44 ECAB 788, 794 (1993).

¹⁹ *See supra* note 15. Appellant also submitted a copy of Dr. Iansmith's undated report which had already been considered by the Office.

²⁰ Mr. Jordan generally alleged that the Office improperly found that the reports of Dr. Iansmith and Dr. Vieron were not based on a complete medical history and did not contain adequate medical rationale on causal relationship. However, he did not further explain the basis for this argument.

²¹ *See supra* note 17.

²² *See supra* note 16. Dr. Jordan indicated that Dr. Raisinghani improperly stated in his July 26, 2006 report that, if an individual lives past the average life expectancy, his death cannot be caused by a compensable condition. Dr. Raisinghani did not entirely base his opinion of causal relationship on the employee's life expectancy. Moreover, as previously noted, the denial of appellant's claim was not primarily based on the opinion of Dr. Raisinghani.

argument she submitted did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' July 22, 2009 decision is affirmed.

Issued: July 23, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board