

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

L.C., claiming as widow of, T.C., Appellant)	
)	
and)	Docket No. 23-0986
)	Issued: December 8, 2023
DEPARTMENT OF THE INTERIOR, BUREAU)	
OF RECLAMATION, Grand Coulee, WA,)	
Employer)	
)	

Appearances:
Howard L. Graham, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 14, 2023 appellant, through counsel, filed a timely appeal from a March 20, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated March 3, 2022, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of the claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 24, 2018 appellant filed a claim for compensation by widow, widower, and/or children (Form CA-5). Regarding the nature of the injury which caused the death of her husband, a former powerplant dispatcher, she alleged that the employee's work-related high blood pressure caused a stroke on December 18, 2017 and his death on December 28, 2017. The employee's January 3, 2018 death certificate listed the immediate causes of death as hemorrhagic stroke and hypertension.

In an August 7, 2018 attending physician's report, page 2 of the Form CA-5, Dr. Andrew Castrodale, a Board-certified family medicine physician, attributed the employee's death to hemorrhagic stroke with hypertension as a contributing factor. He opined that the employee's poorly controlled hypertension in the work setting led to his hypertensive episode resulting in stroke and death. Dr. Castrodale noted that the employee had recently begun working 7 days of 12-hour shifts straight, rotating bi-weekly between days and nights. This adversely affected the employee's intrinsic hormone regulation on blood pressure, ultimately leading to the hypertensive episode resulting in stroke and death.

In a report dated September 28, 2018, Dr. Jacob Chaffee, a Board-certified family medicine physician, noted that the employee came under his care in 2009 for essential hypertension, which was under good control. He related that the employee did not have underlying endocrine or cardiac abnormalities which would have contributed to or created a predisposition for the hemorrhagic stroke. Moreover, the comprehensive brain imaging tests did not show any structural abnormalities including AV malformation or aneurysm. Dr. Chaffee noted that the employee was very diligent in management of his blood pressure. However, in December 2013 the employee's blood pressure became more labile, his blood pressure varied significantly with his constantly changing schedule. He reported that his blood pressure varied significantly with his frequent switches between swing, graveyard, and day shifts. Dr. Chaffee opined that the employee's labile blood pressure was attributable to the employee's constant shift changes, which aggravated his high blood pressure. He concluded that the employee's cause of death correlated with the employee's shift work and "[employee's] body's inability to manage hormones associated with blood pressure."

On May 23, 2019 Dr. David I. Kroh, an OWCP district medical adviser and Board-certified internist, reviewed the statement of accepted facts (SOAF) and medical records including Dr. Chaffee's September 28, 2018 opinion. He related that stroke risk factors include high blood pressure and elevated blood cholesterol. Dr. Kroh opined that these risk factors are applicable to both type of strokes. With respect to job control and stroke, he advised that the employee's shift changes could not be ruled out as a possible causal factor in the employee's hemorrhage stroke. Dr. Kroh opined that the greater contributing factors to the employee's hemorrhagic stroke was the employee's long-standing hypertension and influence from his

irregular work hours. He explained that the irregular work hours caused the employee's hypertension to be labile and, therefore, increased his risk for a stroke.

OWCP referred the medical record for further review by a second opinion physician. On July 12, 2019 Dr. Robert Thompson, a Board-certified cardiologist, noted the employee's history of injury, reviewed medical records, and dispatcher job of working 12-hour shifts. He noted that the employee's had a history of chronic high blood pressure, which was intermittently poorly controlled, but under control three months prior to his stroke. Dr. Thompson observed that the employee's blood pressure was so high that it caused an artery to burst and bleed. He opined that the stroke would not have occurred if the employee had actually been taking his medication. In other words, Dr. Thompson explained that it was unlikely that the employee's blood pressure would have been high enough to stress an artery and causing a hemorrhage if he had been taking his prescribed blood pressure medication. He opined that no employment factors caused or aggravated the employee's cerebral hemorrhage and death. In concluding, Dr. Thompson attributed the employee's death to chronic high blood pressure.

By decision dated August 30, 2019, OWCP denied appellant's claim for survivor's benefits. It attributed the weight of the medical evidence to Dr. Thompson, the second opinion physician.

On September 6, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated November 25, 2019, OWCP's hearing representative set aside the August 30, 2019 decision and remanded the case for further development of the evidence. The hearing representative instructed OWCP to amend the SOAF and request a supplemental report from Dr. Thompson. In the supplemental report, Dr. Thompson was to provide a rationalized medical explanation as to whether the employee's work schedule as outlined in the SOAF contributed in any way to his death.

In a supplemental report dated December 23, 2019, Dr. Thompson reviewed the amended SOAF and the employee's work schedule. He found no direct relationship between the employee's work and his cerebral hemorrhage, but noted that an argument could be made that the employee's chronic hypertension had been aggravated by his work schedule. Dr. Thompson stated that, three months prior to the employee's cerebral hemorrhage, his blood pressure had been normal. Thus, he concluded that there was no reasonable connection between the cerebral hemorrhage and the employee's long work hours. Dr. Thompson attributed the cerebral hemorrhage to the blood vessel degeneration caused by many years of high blood pressure.

By decision dated February 7, 2020, OWCP denied appellant's claim for survivor's benefits, finding that the weight of medical evidence was attributed to Dr. Thompson, OWCP's second opinion physician.

On February 26, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. An oral hearing was held on June 9, 2020.

In a note dated May 20, 2020, Samantha Brunner, a physician assistant, reviewed Dr. Thompson's report. She related that the employee did not have a stable work schedule

during his 12 years of employment, noting severe fluctuations in work hours and shifts worked. The employee related that his blood pressure varied significantly when switching his work schedule from graveyard shift to day shift. Ms. Brunner concluded that Dr. Thompson's assessment was incomplete and inaccurate, noting that three physicians agreed that the employee's work caused or aggravated his underlying high blood pressure resulting in a hemorrhage stroke and death.

Dr. Chaffee, in a July 1, 2020 note, reviewed Dr. Thompson's report and disagreed with his conclusion that the employee's work did not contribute to his death. He opined that, contrary to Dr. Thompson's statement, the employee was very diligent with his medication regimen, health maintenance routine, and follow-up appointments as reported in multiple medical records. The employee related that his blood pressure would vary significantly when his work schedule was switched from graveyard shift to day shift. Dr. Chaffee concluded that literature established a clear connection between the employee's marked work schedule fluctuations and stroke risk resulting in an aggravation of his underlying hypertension leading to a hemorrhagic stroke and death.

By decision dated July 15, 2020, OWCP's hearing representative set aside the February 7, 2020 decision, finding a conflict in the medical opinion evidence between Dr. Chaffee, for appellant, and Dr. Thompson, an OWCP referral physician. The hearing representative also found that the SOAF was incomplete, and that Dr. Thompson's opinion had not been based on the totality of the employee's employment regarding the effects of shift work on the employee's health and the cause of his death.

In a letter dated November 20, 2020, OWCP requested that the employing establishment provide a detailed record and history of the employee's hours and shifts throughout his entire employment, including a breakdown of timelines for each shift with hours.

On December 10, 2020 the employing establishment responded to the November 20, 2020 request. It noted that the employee was hired as a powerplant operator on December 25, 2005 with an 8-hour rotating shift (days, swing, and nights) with 10 days on and 4 days off; on October 12, 2008 the employee was promoted to senior powerplant operator with an 8-hour rotating shift (days, swing, and nights) 10 days on 4 days off; on February 13, 2010 the employee was promoted to powerplant dispatch assistant with an 8-hour rotating shift (days, swing, and nights) 10 days on 4 days off. The employee worked this schedule until November 12, 2017 when he began a 12-hour rotating schedule (days/nights) 7 days on 7 days off.

In a report dated October 20, 2021, Dr. Michael J. Ptasnik, a physician Board-certified in internal medicine and cardiovascular medicine, conducted a record review impartial medical evaluation on behalf of OWCP. Based upon a review of the medical record, an updated SOAF, and the employee's work history, he opined that the employee's cerebral hemorrhage was due to persistent chronic hypertension not adequately controlled over years of therapy. Other contributing factors included the obesity and dyslipidemia. With respect to the employee's work schedule, Dr. Ptasnik stated that the employee's shift work was stable from December 2005 through November 12, 2017. While the shift work was not optimal for controlling the employee's blood pressure, he opined that it was not a significant factor in the employee's persistent hypertension, or directly related to the cause of his death. Dr. Ptasnik observed that

the employee's new shift work began a few weeks before his death, and likely did not significantly contribute to his death.

By decision dated March 3, 2022, OWCP denied appellant's claim for survivor's benefits. It accorded the special weight of the medical evidence to the opinion of Dr. Ptasnik, the impartial medical examiner.

On February 28, 2023 appellant, through counsel, requested reconsideration asserting that Dr. Ptasnik used the wrong causation standard as he opined that the employee's shift work was not a significant contributing factor. Dr. Ptasnik further argued that OWCP improperly relied on a December 23, 2019 report from Dr. Thompson, who opined that there was no direct relationship between the employee's shift schedule and cerebral hemorrhage.

By decision dated March 20, 2023, OWCP denied appellant's request for reconsideration of the merits of the claim, pursuant to 5 U.S.C. § 8128(a). It found that appellant failed to submit new and relevant legal argument or evidence in support of the request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁵ A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶ When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁷

³ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his [or her] own motion or on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of its decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁶ *Id.* at § 10.606(b)(3).

⁷ *Id.* at § 10.608(a), (b).

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of the claim.

On reconsideration, appellant, through counsel, asserted that Dr. Ptasnik used the wrong causation standard in concluding that the employee's work schedule was not a significant contributing factor of his death. The Board finds that this constitutes a new legal argument, which is relevant to the underlying issue of whether the employee's death was caused, aggravated, precipitated, or accelerated by the employee's shift work.⁸

As appellant has advanced a new and relevant legal argument, she is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.⁹ Following any further development as deemed necessary, OWCP shall issue an appropriate merit decision regarding her survivor's benefits claim.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of the claim.

⁸ *Supra* note 6.

⁹ See *M.L. (E.L.)*, Docket No. 20-0605 (issued January 27, 2021); *D.T. (L.S.)*, Docket No. 19-1060 (issued October 20, 2020); *J.T.*, Docket No. 19-1829 (issued August 21, 2020); *T.P.*, Docket No. 18-0608 (issued August 2, 2018). See *L.K.*, Docket No. 15-0659 (issued September 15, 2016).

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 8, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board