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VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

GARNELL R. JOHNSON (Deceased), Employee
JUDY D. JOHNSON (Spouse), Claimant

Opinion by WILLIAMS
Commissioner

v. VWC File No. 240-09-95

JANUARY 20, 2011

NEWPORT NEWS SHIPBUILDING & DRY
DOCK COMPANY, Employer
- SELF-INSURED

David B. Oakley, Esquire
For the Claimant.

Jonathan H. Walker, Esquire
For the Defendants.

REVIEW on the record by Commissioner Diamond, Commissioner Dudley and Commissioner Williams at Richmond, Virginia.

The claimant has requested Review of the Deputy Commissioner's February 17, 2010 Opinion denying death benefits. The claimant assigns error to the findings that she failed to meet her burden of proving that the decedent's death was causally related to his compensable injury by accident and that she was not entitled to benefits as the surviving spouse. We AFFIRM.

Garnell R. Johnson ("the decedent") filed a claim for benefits on September 12, 2008 alleging that he sustained a compensable injury by accident to his left knee on August 2, 2007. On July 14, 2009, Judy D. Johnson, widow of the decedent, ("the claimant") filed a claim alleging that the decedent suffered a compensable left knee injury work that caused complications, ultimately causing his death. The claimant sought wage loss benefits from August 2, 2007 through August 18,

2008, payment of lifetime medical expenses and death benefits to the dependents or funeral expenses.

At the hearing held on January 22, 2010, the parties stipulated to the following: that the decedent suffered a compensable injury by accident on August 2, 2007, which required the decedent to undergo left knee surgery on September 12, 2008; that the claimant was married to the decedent at the time of his death; that the decedent's son, who continues to be a full-time student, was also a full-time student at the time of the decedent's death; that the decedent's average weekly wage was $881.55 and that the decedent was entitled to lifetime medical benefits. The claimant withdrew her claim for temporary total disability benefits. The employer defended the remaining claim for death benefits on the ground that the decedent's death was not causally related to the August 2, 2007 work accident.

The claimant testified that, on September 18, 2008, as she was leaving for work, she was unable to get a response from the decedent so she began CPR. She testified that he then responded and spoke to her, but she noted that he was listless, lethargic and his breath was "in and out." (Tr. at 15). She testified that her son went with the decedent to the hospital and that she went to work. She indicated that, after her son informed her over the telephone of the decedent's death, she notified her supervisor and went to the hospital.

Dr. Gary Bluemink, expert witness, testified that he was a physician pathologist in private practice in Virginia. He testified that, upon his review of the decedent's medical records as a physician, he had determined that the cause of the decedent's death was pulmonary embolization to a reasonable degree of medical probability. He explained that the decedent had deep vein thrombosis ("DVT") of one limb prior to his surgery and continued to suffer from DVT.

Dr. Bluemink noted that, prior to his death, the decedent suffered shortness of breath with no pain, which were symptoms consistent with suffering from a recurrent pulmonary embolization.

On cross-examination, Dr. Bluemink admitted that he could not absolutely exclude other diagnoses as a potential cause of the decedent's death. He confirmed that he was only opining in this matter as a physician with clinical experience and not as a pathologist. Dr. Bluemink acknowledged that Dr. Wick opined that there were three different possible causes of the decedent's death. He disagreed that it was impossible to determine the decedent's death without an autopsy. He could not recall any cases where pulmonary embolism was suspected and then a different diagnosis was determined to be the cause of the death. He was able to recall 30 cases where the evidence reflected that the individual had suffered a pulmonary embolism but, by the time of the autopsy, enzymes in the body had digested the pulmonary embolus and it was no longer present.

On redirect examination, Dr. Bluemink testified that there is always a possibility that there is some other cause of death other than an embolism, but he opined that, in this case, it was more probable than not that the embolism was the cause of death as opposed to any other possible cause of death.

Medical records reveal that the decedent was under the care of Dr. Jon H. Swenson after a non-work-related left knee arthroscopy in 2006. On June 5, 2006, Dr. Swenson indicated that a non-invasive study was positive for DVT and that the decedent would need treatment for anticoagulation. He continued this treatment for several months.

The decedent suffered his compensable injury by accident on August 2, 2007 and treated again with Dr. Swenson. The medical note indicates that the decedent explained that he was attempting to get down into a submarine and, as he was holding an overhead bar, his foot became

caught and his knee twisted. He complained that he was suffering from increased pain since the accident. Dr. Swenson diagnosed the decedent with twisting injury to his left knee and prescribed medication.

On July 22, 2008, Dr. Swenson recommended ACL reconstruction to treat the decedent's continuing discomfort and instability. He discussed the risks and benefits of an arthroscopy with the decedent noting that "[r]isks of the surgery include risk of continued laxity of the knee, stiffness of the knee, risk of damage to nerves/vessels, infection, wound healing problems, blood clots, blood loss."

On September 2, 2008, the decedent treated with Dr. Swenson complaining of increasing pain in the lateral aspect of his right knee. Dr. Swenson diagnosed the decedent with knee pain, administered an injection into the decedent's right knee and indicated that surgery was scheduled for the decedent's left knee on September 12, 2008.

The decedent's pre-surgical forms reflect his history of blood clots (DVT) and his treatment with Coumadin Oral Tablets for anticoagulation. His preoperative admission information form similarly reflects that he had suffered a blood clot in his left leg in 2006.

On September 12, 2008, the decedent underwent an anterior cruciate ligament reconstruction using autograft hamstring tendon performed by Dr. Swenson. Within the operative note, Dr. Swenson reported that the decedent tolerated the procedure well and was taken to the recovery room in stable condition. A follow-up telephone call sheet dated September 15, 2008 indicates that the decedent had not experienced any problems following the surgery.

On September 18, 2008, records from Mary Immaculate Hospital reflect that the decedent was having difficulty breathing and suffering from chest pain. The decedent's daughter had

reported to the medics that the decedent had begun choking while he was brushing his teeth. It was noted that the decedent had stopped breathing in transit to the hospital.

The triage report indicates that the decedent had no past medical or surgical history except for left knee surgery. It is noted that resuscitation efforts were attempted but that the decedent was pronounced deceased at 9:41 a.m. Dr. James W. Forest-Lam noted that he discussed the decedent's care with Dr. John Marshall, the decedent's treating physician, who advised that the decedent had no major health problems except for a minor lipid problem and that he felt like a "PE" diagnosis was reasonable. An Addendum to the hospital report indicates:

> Pt family came in to inquire about death certificate. Pt family given information regarding paper work. Questions answered for family. Family inquiring about cause of death. Family educated that unless an autopsy is performed there is no way to give a cause of death we can only state that the pt died from sudden cardiac death.

The Spiritual Assessment form indicates that there was a discussion about autopsy but after talking to the doctor the family decided not to have an autopsy completed. The death certificate lists the cause of death as sudden cardiac death.

On August 14, 2009, Dr. Gary G. Bluemink, a board certified pathologist with anatomic and clinical certifications, reviewed the decedent's medical records in his capacity as a "physician with clinical practice experience." He noted:

> It is my medical opinion that Mr. Garnell Johnson displays in his medical record previous occurrence of deep venous thrombosis involving gastrocnemius veins of the lower extremity on June 16, 2006, following arthroscopy and sinovectomy performed on June 5, 2006. It appears from the record that the patient was treating with anticoagulant therapy for a period of approximately three months as evidenced in the record. Several years later the patient was evaluated and operated upon at Mary Immaculate Surgery Center on September 12, 2008, for arthroscopy and anterior cruciate ligament reconstruction on the left knee. The patient was not apparently given any kind of prophylactic or supportive measures or evaluation for deep vein thrombosis following surgery and expired on the same day en route from

> home to the Emergency Room. It appears from the progress noted in the records that the initial and subsequent surgery were for work related injury.
>
> It is my clinical experience opinion, and also shared as comments in record by the Emergency Room physicians, that the patient sustained a lethal pulmonary embolus. Leg vein thrombosis is a frequent accompaniment of orthopedic surgery and is considered a complication of the surgery. I have already indicated in verbal communication and iterate in this letter that the pulmonary embolus would be the cause of death. My opinions are based on a reasonable degree of medical certainty.

Dr. Jon Swenson drafted a letter in response to a letter from the insurer dated July 17, 2009 and stated, "At this time, I am unaware of any medical documentation that would indicate a causal relationship between Mr. Johnson's surgery and death. However, this issue would likely be better addressed by some in a different medical specialty such as cardiology."

On September 15, 2009, Dr. Bluemink, after reviewing an emergency room medical note, amended a previous misstatement by noting that the decedent's death was not on the same day as his surgery. He indicated that his previous opinion remained unchanged.

Dr. Mark R. Wick, Associate Director of Surgical Pathology at the University of Virginia Health System, drafted a letter to employer's counsel on November 30, 2009. He indicated that he had received approximately 500 pages of material from the decedent's treating physicians and institutions. Dr. Wick noted:

> You will recall that Mr. Johnson abruptly developed dyspnea & chest pain and died in September 2008, shortly after having arthroscopic knee surgery. He had had a similar procedure in 2006, which was complicated by deep venous thrombosis and pulmonary embolism. Mr. Johnson had also incurred other previous orthopedic injuries but had no other known medical abnormalities at the time of his death.
>
> The clinicopathological differential diagnosis for the cause of death (COD) in this case centers on myocardial infarction, pulmonary thromboembolism (PTE), and dissecting aortic aneurysm. Because there are no available radiographic or biochemical data that could aid in refining the COD, an autopsy would have been necessary to assign a specific diagnosis with any reasonable degree of medical

> probability. It is entirely unscientific and unwarranted to assume that Mr. Johnson had suffered another PTE, simply because he had one in the past.

On January 5, 2010, Dr. Bluemink reiterated his opinion that the decedent had a recurrence of his DVT three days after his orthopedic surgery. He noted that orthopedic procedures on lower extremities are frequently complicated by DVT and risk of embolization. He stated that the decedent's symptoms at the time of his death were "perfectly compatible with a pulmonary embolus and show no conflicting discrepancies or other physical measurements or observations in the Emergency Room at the time of death."

Dr. Wick "strongly disagreed" with Dr. Bluemink's opinion that "the cause of death in this instance is self-evident on a *prima facie* basis." He further explained:

> I have personally autopsied at least 20 cases in my practice in which pulmonary embolism was the clinically-suspected cause of death, only to have postmortem findings show that another condition was responsible and that no embolism existed. If doctors were able to definitively assign the cause of death in the absence of necropsies, we would not do them.

On Review, the claimant argues that the Deputy Commissioner held her to a higher standard of proof given that a preponderance of the evidence is sufficient in these cases. She pointed out that the decedent's primary care physician also opined that it was reasonable that a pulmonary embolism caused the decedent's death and that the Deputy Commissioner erred in affording equal weight to the opinions of Drs. Wick and Bluemink. The claimant further argues that dependency was not contested in this case, that the Deputy Commissioner erred in finding that she did not establish dependency as required by 65.2-515 and that, if necessary, the record should be reopened in this case to allow for evidence to be taken on this issue.

The claimant alleges that the decedent's death is a compensable consequence of his left knee injury. Under the principle of compensable consequences, when a primary injury under the Workers' Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from that injury, whether it takes the form of a progression, a deterioration, or an aggravation, is compensable if it is a direct and natural result of the primary injury. Board of Supervisors v. Martin, 3 Va. App. 139, 141, 348 S.E.2d 540, 541 (1986). The factual determination regarding causation is usually proven by medical evidence. Clinch Valley Med. Ctr. v. Hayes, 34 Va. App. 183, 192, 538 S.E.2d 369, 373 (2000).

Under the more probable than not rule, for the disability to be compensable, it must be more probable than not that it was caused by the work-related factor. That is, a preponderance of evidence must show that work was the cause of the disability. Duffy v. Commonwealth, 22 Va. App. 245, 251, 468 S.E.2d 702, 705 (1996) (citing Shelton v. Ennis Bus. Forms, 1 Va. App. 53, 334 S.E.2d 297 (1985)). This rule denies compensation for failure of a claimant to sustain the burden of proof where it is just as probable that the disability resulted from a work-related cause as from a non-work-related cause. Shelton at 55, 334 S.E.2d at 299. "If it is just as likely that the disabling condition resulted from a cause which is not compensable as it is that it resulted from an injury compensable under the Act, the employee has failed to establish the requisite connection." Carter v. On-Site Cos., Inc., VWC File No. 212-57-45 (Apr. 1, 2004).

Dr. Bluemink and Dr. Wick, who performed reviews of the decedent's medical record, have directly conflicting opinions; thus, we agree with the Deputy Commissioner that the evidence in this case is basically in equipoise. Additionally, Dr. Bluemink based his opinion that the decedent's symptoms were consistent with a recurrent pulmonary embolism on the fact that the decedent

suffered shortness of breath but no pain shortly before his death. However, the emergency medical record clearly reflects that the decedent had chest pain in addition to breathing difficulties. Dr. Bluemink also failed to explain how the two other possible diagnoses that were proposed by Dr. Wick, myocardial infarction and dissecting aortic aneurysm, were, if at all, less likely to have been the cause of the decedent's death. Lastly, we note that the decedent's primary care physician, Dr. Marshall, did indicate to the attending physician on the day of the decedent's death that a "diagnosis of PE was reasonable given the circumstances." In reviewing the medical evidence, the Commission gives great weight to the opinion of the treating physician. Pilot Freight Carriers, Inc. v. Reeves, 1 Va. App. 435, 439, 339 S.E.2d 570, 572 (1986). If the treating physician's opinion is shaded by doubt, or there is expert medical opinion contrary to the treating physician's opinion, the "Commission is free to adopt that opinion which is most consistent with reason and justice." Williams v. Fuqua, 199 Va. 709, 714, 101 S.E.2d 562, 567 (1958). In this case, without further explanation of his opinion, we find that Dr. Marshall's statement is shaded by doubt as we are unable to interpret this brief, general comment as sufficient evidence that the cause of the decedent's death was more likely than not a pulmonary embolism.

The decedent's death certificate generally lists his cause of death as sudden cardiac death. Without further evidence to support that the decedent more likely than not suffered a pulmonary embolism as a result of his left knee surgery, we find that the claimant has failed to meet her burden of proving by a preponderance of the evidence that the claimant's death was causally related to his August 2, 2007 work injury.

Next, we address the claimant's dependency status under Code Section 65.2-515.[1] First, Rule 3.3 of the Rules of the Virginia Workers' Compensation Commission sets forth the circumstances under which the Commission will reopen the record for additional evidence. This rule provides that such evidence will be considered by the Commission only when it is absolutely necessary and advisable, and the party requesting that the evidence be considered is able to conform to the rules of the courts of the Commonwealth of Virginia for the introduction of after-discovered evidence. To meet these requirements, the evidence (1) must have been discovered after the hearing; (2) must not be cumulative, corroborative, or collateral; (3) could not have been discovered before the hearing by the exercise of due diligence; and (4) must be of such a character as to produce a different result. Miller v. Dixon Lumber Co., 67 O.I.C. 71 (1988) (citing Nicholson v. Coal Corp., 154 Va. 401, 153 S.E. 805 (1930)).

In her Written Statement, the claimant argues that she did not address her dependency status because she did not believe that dependency was contested. However, there were no stipulations at the Hearing to the claimant's dependency status and it is well-established that dependency is a necessary component to prove entitlement to death benefits under the Workers' Compensation Act ("the Act"). Moreover, evidence relating to the claimant's dependency status was available before and at the time of the hearing below. Therefore, we decline to reopen the record for consideration of additional evidence.

Code Section 65.2-515 defines a person conclusively presumed to be wholly dependent upon a deceased employee. It specifically provides that a wife is dependent upon her husband

[1] The Deputy Commissioner's finding based upon various stipulations by the parties, that the decedent's son, Garnell Johnson, Jr., would have qualified as a total dependent had the decedent's death been found compensable is not before us on Review; therefore, this finding is deemed to be final.

"whom she had not voluntarily deserted or abandoned at the time of the accident or with whom she lived at the time of his accident, if she is then actually dependent upon him."

It is not required that the spouse be totally dependent on the decedent, but the evidence must establish that she looked to her husband's contributions, in whole or in part, for support and maintenance of her accustomed standard of living. Caudle-Hyatt, Inc. v. Mixon, 220 Va. 495, 260 S.E.2d 193 (1979). To demonstrate dependency, the claimant is required to show that her husband made monetary contributions "with some degree of regularity," and that she relied upon them for reasonable necessaries consistent with her station in life. Armada, Inc. v. Lucas, 2 Va. App. 414, 345 S.E.2d 14 (1986). The relevant date for the test is the date of death. Dunbar v. Burgess Cab, Inc., VWC File No. 171-90-42 (June 27, 1996) (citing Nuckles v. Bechtel Corp., 51 O.I.C. 205 (1969)).

The evidence in the record simply fails to reflect that the claimant was living with the decedent at the time of his death or that she looked to the decedent's contributions in whole or in part for support and maintenance. Accordingly, the claimant failed to meet her burden of proving that she was dependent on the decedent at the time of his death, and thus she would not have been entitled to benefits had the case been found to be compensable.

The Opinion below is AFFIRMED.

This matter is hereby removed from the Review docket.

DIAMOND, COMMISSIONER, Dissenting:

I respectfully dissent.

The claimant proved that Garnell Johnson's death was causally related to his compensable injury by accident and that she was entitled to benefits as a surviving spouse.

First, the employer did not defend the claimant's request for benefits. This was an uncontested issue and the Commission should not create an issue where one does not exist. Furthermore, the claimant's testimony and evidence were sufficient to prove that she was a statutory dependent.

Second, the medical evidence proves that there is a causal connection between Mr. Johnson's death and the initial work accident.

In 2006, Mr. Johnson underwent left knee surgery and developed slight swelling in his left leg. A non-invasive study showed that Mr. Johnson was positive for deep vein thrombosis. He was prescribed medication, Lovenex, and followed with Coumadin.

Mr. Johnson injured his left knee in a compensable work accident on August 2, 2007. He filed a claim for benefits on September 10, 2008.

On September 12, 2008, Mr. Johnson, age 49, underwent arthroscopy of his left knee and anterior cruciate ligament reconstruction using autograft hamstring tendon at Mary Immaculate Ambulatory Surgery Center. The medical report indicated that the claimant was taking Coumadin at that time. Dr. John Swenson performed the surgery. Mr. Johnson was scheduled for a follow-up appointment on September 18, 2008.

On September 18, 2008, the Newport News Fire Department received a call that Mr. Johnson was having "breathing difficulty" as his chief complaint and "chest pain" as his secondary complaint. The responders noted that Mr. Johnson's daughter "stated he was in the bathroom brushing his teeth when he started choking." The report also noted Mr. Johnson had surgery three days ago. In route to Mary Immaculate Hospital, Mr. Johnson stopped breathing and was unresponsive. Mr. Johnson died at the hospital. The medical report noted, "[Dr. John Marshall] feels

diagnosis of PE is reasonable given the circumstances." Dr. Swenson stated that he was not requesting an autopsy. After a discussion with the doctor, Mr. Johnson's family decided not to have an autopsy. Dr. Marshall did not complete the death certificate.

Dr. Bluemink opined that Mr. Johnson was not "given any kind of prophylactic or supportive measures or evaluation for deep vein thrombosis following surgery." He opined that Mr. Johnson "sustained a lethal pulmonary embolus." Dr. Gluming also opined that the cause of death was pulmonary embolization and that deep vein thrombosis persisted. These conclusions are consistent with the treating physician's diagnosis at the hospital. As Mr. Johnson's treating physician, his opinion is entitled to great weight, and Dr. Bluemink and Dr. Gluming's opinions provide additional expert testimony.

Dr. Wick's opinion should not receive greater weight because he did not consider the treating physician's opinion. Dr. Wick merely believes that an autopsy was required to reach a diagnosis.

We do not require autopsies to establish cause of death or to establish a causal connection. See Morgan v. City of Norfolk School Board, VWC File No. 178-40-01 (Oct. 9, 1997)(autopsy performed but heart was dissected away from the lungs for donation prior to the autopsy.) If Mr. Johnson had not died, we would still give the treating physician's opinion greater weight. The claimant may also prove her case through circumstantial evidence. Basement Waterproofing and Drainage v. Beland, 43 Va. App. 352, 356, 597 S.E.2d 286, 288 (2004) (citing Van Geuder v. Commonwealth, 192 Va. 548, 557, 65 S.E.2d 565, 571 (1951)).

The Majority uses the secondary complaint as a basis for not accepting Dr. Marshall's opinion and fails to give a credible explanation why it is disregarding the treating physician's

opinions, given that the expert testimony and evidence is "basically in equipoise." The treating physician's opinion is not shaded by doubt. There is no solid reason to disregard his opinion. In fact, his opinion is consistent with the facts. We have evidence that Mr. Johnson previously suffered from deep vein thrombosis following surgery and was having breathing difficulty as his chief and initial complaint on September 18, 2008. There is no evidence that he suffered a heart attack. The emergency room physician believed that the claimant died from pulmonary embolism, not a heart attack, and Dr. Swenson and the other treating physician did not believe an autopsy was necessary. If there had been a question on the cause of death, they would have recommended an autopsy. This evidence as a whole establishes that it is more likely than not that there was a causal relationship between the workplace surgery and Mr. Johnson's death.

I, therefore, respectfully dissent.

APPEAL

You may appeal this decision to the Virginia Court of Appeals by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Virginia Court of Appeals within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Virginia Court of Appeals.

cc: Judy D. Johnson
Newport News Shipbuilding & Dry Dock Company/
Northrop Grumman Shipbuilding