

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EVELYN FENDER, widow of THOMAS A. FENDER and DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Charleston, S.C.

*Docket No. 96-499; Submitted on the Record;  
Issued April 22, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant has met her burden of proof to establish that the employee's death was causally related to his accepted employment injury.

In the present case, the Office of Workers' Compensation Programs has accepted that the employee, a moulder, sustained aggravation of chronic bronchitis and aggravation of chronic obstructive pulmonary disease during his federal employment. The employee received compensation for temporary total disability from April 22, 1972 until his death on November 21, 1992.

Appellant filed a claim on April 1, 1993 alleging that the employee's death was causally related to his employment injury. Appellant submitted a death certificate and an attending physician's report, completed by Dr. W.E. James, III, Board-certified in cardiovascular disease, which indicated that the employee died of primary lymphoma of the brain; that another significant condition contributing to the death but not resulting in the underlying cause was chronic obstructive lung disease; and that the employee's death was not due to the employment injury. The Office denied appellant's claim by decision dated April 28, 1993.

Appellant thereafter requested a hearing before an Office hearing representative. The hearing representative, by decision dated April 19, 1994, remanded the case for further development. The hearing representative noted that prior to the hearing, Dr. James had submitted additional reports dated May 18, 1993 and March 2, 1994, which while not sufficiently rationalized were generally supportive of appellant's claim.

The Office referred the case record to Dr. Ira M. Jackler, Board-certified in pulmonary disease, for a second opinion evaluation. The Office again denied appellant's claim by decision dated August 9, 1994 on the grounds that the evidence of record established that the employee's death on November 21, 1992 was not causally related to the employment-related conditions.

Appellant thereafter requested that the Office reconsider her case. In support of this request for reconsideration, appellant alleged that the employee may have been exposed to radioactive sand which was a known cause of cancer and which may have played a part in the employee's throat and brain cancer. Appellant submitted a number of articles pertaining to cancer studies. Appellant also submitted a number of letters the employee had written to the Office during 1973 and 1974 regarding his working conditions and his medical condition. Finally, appellant submitted an itemization of the employee's medical expenses for the period June to November 1994.

The Office denied modification of the prior decision on January 10, 1995, after merit review. In an accompanying memorandum to the Director, the Office noted that appellant had submitted no additional medical evidence to contradict the opinion of Dr. Jackler, an independent medial specialist, who provided a well-reasoned medical opinion that the compensable pulmonary condition neither caused nor contributed to the employee's death. The Office also noted that the condition that the employee developed cancer due to exposure to radiation and/or exposure to chemicals at work would constitute a new and separate claim. Appellant would have to establish that the employee had been exposed to radioactivity and cancer causing elements at work, and medical opinion evidence would have to explain a causal relationship of the cancerous condition to the specific exposure identified.<sup>1</sup>

The Board finds that the appellant has not met her burden of proof in this case to establish that the employee's death was causally related to factors of his federal employment.

Appellant has the burden of proving by the weight of the reliable, probative and substantial evidence that the employee's death was causally related to his employment. This burden includes the necessity of furnishing medical opinion evidence of a cause and effect relationship based on a proper factual and medical background.<sup>2</sup> The mere showing that an employee was receiving compensation for total disability at the time of his death does not establish that his death was causally related to his employment.<sup>3</sup>

In the present case, the Office initially accepted the employee's claim for chronic bronchitis and obstructive pulmonary disease. The employee died on November 21, 1992 after receiving total disability benefits since April 1972. However, as noted above, the fact that the employee was receiving disability benefits at the time of his death does not establish that the death was employment related. The medical evidence of record must substantiate with medical rationale how the accepted employment-related condition caused or contributed to the employee's death.

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<sup>1</sup> The Board notes that the Office issued nonmerit decisions on December 13, 1995 and February 21, 1996 denying appellant's applications for review of the January 10, 1995 decision. As these decisions were issued after the appellant filed this appeal on November 29, 1995 and the Board and the Office may not simultaneously have jurisdiction over the same case, these decisions are null and void. *Douglas E. Billings*, 41 ECAB 880 (1990).

<sup>2</sup> *Lorraine Lambert (Arthur R. Lambert)* 33 ECAB 1111 (1982).

<sup>3</sup> *Elinor Bacorn (David Bacorn)*, 46 ECAB 857 (1995).

In the additional reports appellant submitted from Dr. James, dated May 18, 1993 and March 2, 1994, he explained that while the primary cause of the employee's death was obviously his lymphoma and its complications, the employee's debilitated state and marginal respiratory status duly accelerated his deterioration and probably shortened his life and therefore indirectly contributed to his death. Dr. James had previously indicated at the time of the employee's death that his death was due to lymphoma of the brain and that the death was not due to the employment injury. Dr. James did not indicate why he changed his opinion regarding the cause of death. Furthermore, Dr. James did not adequately explain his new opinion regarding the cause of the employee's death. Dr. James referred to but did not explain the cause of the employee's debilitated state. The medical record indicates that the employee's pulmonary condition had stabilized since 1972. Dr. James did not explain whether the employee was debilitated due to the accepted conditions or due to his cancer or other nonwork-related medical conditions. Furthermore, while Dr. James concluded that appellant's marginal respiratory status "probably" shortened his life and therefore indirectly contributed to his death, the Board has previously held that medical conclusions couched in speculative language are of diminished probative value.<sup>4</sup> Dr. James did not provide a medical explanation as to how the employee's accepted employment-related conditions did in fact accelerate the deterioration of his condition in 1992 and shorten his life. A physician's opinion supporting causal relationship is not dispositive of the issue on causal relationship simply because it is rendered by a physician.<sup>5</sup> To be of probative value the physician must provide medical rationale which explains why the condition is causally related to the employment injury. Appellant did not submit a well-rationalized medical report which explained how the employee's death was causally or accelerated by the accepted employment conditions. Appellant therefore did not meet her burden of proof.

In a report dated July 28, 1994, Dr. Jackler stated that the employee's exposure to pulmonary toxins while working at the employing establishment had nothing to do with his development of lymphoma. Dr. Jackler noted that the employee did die of lymphoma, thus he did not "see any connection between the patient's death and his exposure to the Charleston Shipyard exposure." Dr. Jackler's report was based upon a proper review of the record and is of probative value. The Office mischaracterized Dr. Jackler as an impartial medical examiner, when in fact he was selected to act as a second opinion physician. Dr. Jackler's report is therefore not entitled to special weight. Nevertheless, the Board concludes that the weight of the medical evidence does not establish that the employee's death was causally related to the accepted employment injury.

Finally, the Board notes that following the August 9, 1994 decision denying her claim, appellant requested reconsideration and alleged that the employee's cancer could also have been caused by his employment. The Office properly advised appellant that these allegations would constitute a new claim of injury and would have to be substantiated by evidence of the employee's exposure to cancer causing agents at work, accompanied by medical evidence that such established agents did in fact cause the employee's cancer and his ultimate death.

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<sup>4</sup> *Patsy L. Rubio*, 37 ECAB 179 (1985).

<sup>5</sup> *See Michael Stockert*, 39 ECAB 1186 (1988).

The decision of the Office of Workers' Compensation Programs dated January 10, 1995 is hereby affirmed.

Dated, Washington, D.C.  
April 22, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member