

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

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A.B., claiming as widow of F.B., Appellant )

and )

DEPARTMENT OF THE NAVY, FORT )  
LEJEUNE, NC, Employer )

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**Docket No. 11-675  
Issued: October 14, 2011**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 20, 2011 appellant filed a timely appeal from a December 15, 2010 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether the employee's death on February 9, 2009 was causally related to his federal employment.

**FACTUAL HISTORY**

OWCP accepted that the employee, a warehouseman, sustained permanent aggravation of asthma as a result of exposure to dust in federal employment. The employee received compensation for wage loss until his death on February 9, 2009.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

On May 8, 2009 appellant filed a claim for compensation by widower (Form CA-5) alleging that the employee's death was casually related to the employment injury. The reverse of the claim form was completed by Dr. B. Gentry, a family practitioner, who checked a box "yes" that the employee's death was related to the employment injury. In a narrative statement dated April 23, 2009, he stated that Dr. Leif Paulson was the employee's primary care manager, but he was currently deployed and unavailable. Dr. Gentry stated that the employee had multiple pulmonary problems, including chronic obstructive pulmonary disease, moderate persistent asthma, bronchiolitis obliterana, multiple pulmonary nodules and recurrent pulmonary infections.

Appellant submitted a death certificate dated February 24, 2009, signed by Dr. Shreyana Patel, an internist, who indicated the cause of death was acute respiratory failure, hypotension, respiratory distress congestive heart failure and acute renal failure.

In a hospital report dated January 22, 2009, Dr. Sean McKay, an internist, noted the employee had been admitted on January 15, 2009 for gout exacerbation and then was transferred to the intensive care unit on January 17, 2009 due to altered mental status, fever and decreased urine output. He described the hospital treatment and advised appellant was discharged on January 22, 2009.

OWCP referred the medical records to Dr. Thomas Truncale, an osteopath, for a second opinion evaluation. In a report dated June 15, 2009, Dr. Truncale provided a review of medical records. The employee was found at home on February 9, 2009 and was pronounced dead. He opined that the employee's death was not casually related to the accepted aggravation of asthma. Dr. Truncale stated that appellant's hospital treatment commencing January 15, 2009 did not establish it was due to an asthma exacerbation. He stated there was no evidence that the employee's asthma was poorly controlled or that the employee had a prior history of intensive care treatment for asthma. Dr. Truncale concluded the employee likely had an acute coronary artery event that caused his death. The record also contains a June 19, 2009 report from him indicating that he had reviewed additional records. Dr. Truncale reiterated his opinion with respect to the death of the employee.

By decision dated July 14, 2009, OWCP denied the claim for compensation. It found the weight of the evidence rested with Dr. Truncale.

Appellant requested reconsideration of her claim. She submitted a September 22, 2009 note from Dr. Patel, who stated he was providing an amendment to the list of causes of death. Dr. Patel stated that the employee "died as permanent exacerbation of asthma leading to acceleration of his death along with multiple other medical conditions he was experiencing at time of death. Patient died in the hospital at New Hanover Regional Medical Center." Appellant also submitted on November 10, 2009 treatment reports (SF 600) from the employing establishment medical clinic regarding the employee's treatment.

In a decision dated January 14, 2010, OWCP reviewed the merits of the claim and denied modification.

Appellant again requested reconsideration.

In a report dated April 21, 2010, Dr. Paulson opined that although the original death certificate did not mention asthma as a cause of death, this omission was incorrect. He stated the employee “suffered from moderate to severe respiratory conditions such as Moderate Persistent Asthma and Bronchiolitis Obliterans which predisposed [the employee] to recurrent chronic pulmonary infections.” Dr. Paulson concluded that the employee’s asthma “as well as his other chronic respiratory condition(s) weakened him to such a degree that while they may not have been the primary cause of death they were a significant and contributing factor.”

By decision dated December 15, 2010, OWCP reviewed the case on its merits and again denied modification.

### **LEGAL PRECEDENT**

An 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 complete factual and medical background.<sup>2</sup> The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale.<sup>3</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>4</sup>

FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination.<sup>5</sup> The implementing regulations state that if a conflict exists between the medical opinion of the employee’s physician and the medical opinion of either a second opinion physician or OWCP’s medical adviser, it shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>6</sup>

### **ANALYSIS**

In this case, OWCP relies on the opinion of the second opinion physician Dr. Truncale, who reviewed the medical evidence of record. Dr. Truncale provided an opinion that the employee’s death was not related to the employment-related aggravation of asthma, noting the employee’s history and treatment prior to his death. He found there was no evidence to support the death was causally related to the employment injury.

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<sup>2</sup> *Carolyn P. Spiewak (Paul Spiewak)*, 40 ECAB 552 (1989).

<sup>3</sup> *Kathy Marshall (Dennis Marshal)*, 45 ECAB 827 (1994).

<sup>4</sup> *Edna M. Davis (Kenneth L. Davis)*, 42 ECAB 728 (1991).

<sup>5</sup> 5 U.S.C. § 8123.

<sup>6</sup> 20 C.F.R. § 10.321 (1999).

On the other hand, appellant has submitted reports supporting causal relationship. Dr. Patel, who completed the death certificate and apparently saw the employee at the time of death, submitted a September 22, 2009 note stating that the aggravation of asthma did accelerate the employee's death. An attending physician, Dr. Paulson, who had treated the employee since 2006,<sup>7</sup> opined that the asthma had predisposed the employee to infections and had weakened his condition, contributing to his death.

In view of this disagreement between a second opinion and attending physicians on a difficult issue of casual relationship, the Board finds that a conflict under 5 U.S.C. § 8123(a) has been created. The case will be remanded for proper resolution of the conflict by referral to a referee physician. In this regards the Board notes there is some confusion regarding the location of the employee's death. Dr. Truncale believed the employee died at home, while Dr. Patel indicated the employee died at the hospital. If the employee died at the hospital then presumably there would be contemporaneous hospital reports. On remand OWCP should secure any relevant medical reports at the time of death, to ensure the referee physician has all of the available medical evidence on which to base a decision. After such further development as it deems necessary, it should issue an appropriate decision.

### **CONCLUSION**

The Board finds that the case is not in posture for decision as there is an unresolved conflict in the medical evidence.

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<sup>7</sup> The earliest report in the record from Dr. Paulson is dated October 20, 2006.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 15, 2010 is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: October 14, 2011  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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