

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BETTY J. SMITH, claiming as widow of DONALD R. SMITH and  
DEPARTMENT OF THE NAVY, U.S. MARINE CORPS BASE,  
Camp Pendleton, Calif.

*Docket No. 96-1426; Submitted on the Record;  
Issued September 4, 1998*

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DECISION and ORDER

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

The issue is whether the employee's death on April 22, 1987 was causally related to his federal employment.

This case has a complex procedural history and has been before the Board on three prior occasions regarding whether the employee's pulmonary condition was employment related.<sup>1</sup> The employee, then a 49-year-old sewage disposal plant operator, sustained an employment-related temporary chemical pneumonitis due to exposure to chlorine on May 29, 1979. He took disability retirement on April 1, 1982 and died on April 22, 1987. In the most recent Board decision, issued November 18, 1987, the Board affirmed a December 15, 1986 Office of Workers' Compensation Programs decision, finding that the weight of the medical evidence rested with the opinion of the impartial medical examiner who opined that the employee's pulmonary condition was not employment related. The facts and background of the case contained in the three prior decisions are incorporated herein by reference.

Appellant continued to timely request reconsideration, and in Office decisions dated February 26, 1988, August 31, 1988, May 10, 1990 and March 25, 1991, the Office denied the claim, continuing to find that the employee's lung condition was not employment related. Appellant again requested reconsideration and on October 3, 1991 the Office reopened the claim to determine if the employee's pulmonary condition or death were employment related. On October 7, 1991 the Office accepted that the employee's pulmonary condition was employment related and awarded appellant benefits from the date the employee retired, June 1, 1982, until his death on April 22, 1987. By decision dated January 12, 1993, the Office found that the employee's death was not related to the May 29, 1979 employment injury. Appellant, through counsel, timely requested reconsideration, and in decisions dated November 18, 1994 and

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<sup>1</sup> Docket No. 83-1676 (issued January 25, 1984); Docket No. 85-2051 (issued February 10, 1986); Docket No. 87-1146 (issued November 18, 1987).

September 27, 1995 the Office declined to modify the prior decisions. The instant appeal follows.

The relevant medical evidence regarding the employee's cause of death<sup>2</sup> includes the death certificate, signed by Dr. S. Roche, that lists the cause of death as severe chronic obstructive lung disease. In an autopsy report dated May 4, 1987, Dr. Roy L. Byrnes, a Board-certified pathologist, advised that the employee died as a result of advanced honeycomb alterations of the lung with extensive emphysema alternating with pulmonary fibrosis. Tissue examination revealed an advanced state of disease with no normal lung tissue found grossly or microscopically. A moderate degree of nonocclusive coronary arteriosclerosis was noted with no evidence of myocardial scarring or necrosis. Final anatomic diagnoses at autopsy were advanced pulmonary emphysema and pulmonary fibrosis (honeycomb lung disease); pulmonary atelectasis, basal, bilateral; cor pulmonale, secondary to emphysema and fibrosis. Dr. Byrnes concluded that he was "inclined to feel" that at least a major portion of the employee's lung disease was compatible with the 1979 employment injury.

In a March 18, 1988 report, Dr. Judd Shellito, an Office medical consultant who is Board-certified in internal medicine and pulmonary disease, stated that while pulmonary conditions were apparently the cause of the employee's death because no other major abnormalities were revealed at autopsy and the interstitial fibrosis showed a temporal relationship to his employment, a causal relationship between the employment injury and the employee's death could not be established because chlorine exposure did not cause interstitial fibrosis.

Dr. Martha Warnock, a Board-certified pathologist, reviewed autopsy tissue and slides and, in a September 26, 1989 report, diagnosed chronic nonspecific active alveolitis and honeycombing, chronic bronchitis and bronchiolitis, mild emphysema and focal pleural fibrosis and thickening. She advised that the major process appeared to be an active chronic alveolitis with honeycombing, which was consistent with, although not diagnostic of, a hypersensitive pneumonia still in an active phase. She stated that a possible source of exposure was organic dust at the employing establishment and concluded:

"If hypersensitivity pneumonitis, which cannot be diagnosed with certainty from post mortem slides, is a diagnosis that fits with clinical and radiographic findings, and if investigation of the occupational setting indicates that [the employee] could have been exposed to sensitizing spores, I would favor an occupational cause for [his] lung disease."

By report dated May 7, 1990, Dr. R.B. Albee, an Office medical adviser, stated that the medical evidence was insufficient to establish a causal relationship between the employee's death and factors of employment because hypersensitivity pneumonitis had been identified as an

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<sup>2</sup> The record also contains extensive medical documentation of the employee's pulmonary disease prior to his death. Appellant also submitted excerpts from publications regarding interstitial lung disease. The latter is, however, of general application and not determinative of whether the employee's death was employment related; see *Dominic E. Coppo*, 44 ECAB 484 (1993).

active, ongoing process that led to his death but the workplace had not been identified as the origin of the antigen.

Dr. Nachman Brautbar, a Board-certified internist, who had reviewed the employee's medical records and job description, submitted an extensive report dated February 20, 1991, in which he advised that the employee's death was employment related, stating:

“It is my conclusion ... that [the employee] was exposed to multiple pulmonary irritants including chlorine gas, methane gas and organic irritants in the form of sewage fumes. He died with a pathologic picture of pulmonary fibrosis which has been described in association with exposure to organic material such as sewage products or molds.... Based on this information, it is concluded that the death of [the employee] was industrially related.”

On December 9, 1991 the Office referred the medical record including reports from Dr. Roche and from Fallbrook Hospital dated April 22, 1987, a set of questions and a statement of accepted facts to Dr. Barry R. Horn who is Board-certified in internal medicine and pulmonary disease for a second-opinion evaluation.<sup>3</sup> In an extensive report dated June 5, 1992, Dr. Horn diagnosed reactive airways dysfunction syndrome and acute cardiac event. He noted that individuals can have long-term, persistent airway inflammation after an acute exposure to chlorine and advised that it was reasonable for the employee to have retired on disability as a consequence of the inhalational injury in 1979. Regarding the cause of death, Dr. Horn relied, in part, on the records of Dr. Roche and April 22, 1987 nursing notes from Fallbrook Hospital. He noted that the employee had post mortem evidence of hypersensitivity pneumonitis and after review of the literature and further consultation, concluded that there was no evidence that would indicate that individuals would have this condition after they were removed from the causative exposure, noting that there was no evidence that worsening lung disease caused the employee's death and opined that, while cardiac examination on autopsy did not demonstrate changes suggestive of an acute cardiac event, the employee died of either a myocardial infarction or a life-threatening rhythm disturbance that caused cardiac arrest. In a supplementary report dated July 20, 1992, Dr. Horn reiterated his conclusion that the employee's reactive airways dysfunction syndrome due to exposure to chlorine did not contribute to his death.

The Board finds that this case is not in posture for decision due to a conflict in the medical opinion evidence.

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 or her federal 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>4</sup> The medical

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<sup>3</sup> Dr. Horn was initially identified by the Office as an impartial medical examiner. The record does not indicate that the Office notified appellant that Dr. Horn had been selected as such and, in the January 12, 1993 decision, Dr. Horn was identified as an Office consultant.

<sup>4</sup> *Kathy Marshall (Dennis Marshall)*, 45 ECAB 827 (1993); *Timothy Forsyth (James Forsyth)*, 41 ECAB 467 (1990).

evidence required to establish a causal relationship is rationalized medical evidence, *i.e.*, medical evidence, which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the employee's diagnosed condition or death and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition or death and the implicated employment factors.<sup>5</sup>

Section 8123 of the Federal Employees' Compensation Act provides that if there is 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 an examination.<sup>6</sup>

In this case, in its January 12, 1993 decision, the Office found that the weight of the medical evidence rested with the opinion of Dr. Horn. The Board, however, finds that a conflict in the medical opinion exists between the opinion of Dr. Horn, who furnished a medical opinion for the Office and advised that the employee's cause of death was not employment related, and the opinion of Dr. Brautbar who opined that the employee died of an employment-related lung condition. The Board further notes that medical records from Fallbrook Hospital dated April 22, 1987 and treatment records from Dr. Roche, which were relied upon by Dr. Horn in forming his opinion, are not contained in the case record. Upon remand, therefore, the case shall be referred to an appropriate Board-certified specialist, accompanied by a statement of accepted facts and the complete case record, including the missing hospital records and Dr. Roche's treatment records, for a rationalized medical opinion addressing the cause of the employee's death. After such further development as the Office may deem necessary, the Office shall issue a *de novo* decision.

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<sup>5</sup> See Gary L. Fowler, 45 ECAB 365 (1994); Victor J. Woodhams, 41 ECAB 345 (1989).

<sup>6</sup> 5 U.S.C. § 8123; see Shirley L. Steib, 46 ECAB 309 (1994).

The decision of the Office of Workers' Compensation Programs dated September 27, 1995 is hereby set aside and the case is remanded for further development consistent with this decision.

Dated, Washington, D.C.  
September 4, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member