

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of the Estate of JOHNNIE W. McDONALD and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Muskogee, OK

*Docket No. 01-857; Submitted on the Record;  
Issued January 15, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the employee established that his hepatitis C condition was causally related to factors of his federal employment.

On September 18, 1995 the employee, then a 47-year-old air conditioning mechanic, filed an occupational disease claim alleging that he contracted hepatitis C during the course of his employment, when exposed to blood in the morgue of the employing establishment. The employee asserted that one of his daily duties was to check the morgue for needed HVAC repairs and that the door handle and handles to the "boxes" often had blood on them. The employee indicated that he first realized that the disease was caused by his employment on August 31, 1995 and stated that he tested positive for hepatitis two months after one of his coworkers, who also worked in his air conditioning shop, contracted the disease. The employee stopped working on January 30, 1995 and used sick leave until June 5, 1995, when he retired on medical disability.

By decision dated November 30, 1995, the Office of Workers' Compensation Programs denied the employee's claim finding that fact of injury was not established. In a letter dated December 27, 1995, the employee requested an oral hearing and his case was set for hearing on September 26, 1996. The employee, however, died on August 15, 1996 from cardiopulmonary arrest, pancreatitis and cirrhosis.

The hearing was subsequently held on October 23, 1997 by request of Vicki Liebig, personal representative of the employee's estate and attorney Robert Hayden. During the hearing, affidavits were submitted from Bob Furrh, the employee's former supervisor and operations foreman from 1981 to 1993. He stated that the employee had contact with blood and body fluid in both the morgue and the "boxes" and that he had observed numerous cuts on appellant's hands and arms as a result of working in and around various machinery.

In an October 21, 1997 report, Dr. Lori Ford, a Board-certified gastroenterologist, who discussed her care of the employee for decompensated liver cirrhosis resulting in ascities from September 1995 until his death. She indicated that the employee told her that his liver disease was found after a car accident in 1994 when he was found to have elevated liver enzymes and his hepatitis C antibody was positive, which was later confirmed as chronic active hepatitis with early micronodular cirrhosis. Dr. Ford reported that the employee had no history of blood transfusions, promiscuous sexual activity, tattoos or alcoholism. However, his wife had received a blood transfusion in 1986 and was exposed to hepatitis B and C at that time. She stated that hepatitis was known to be a viral infection of the liver and that most cases were related to blood transfusions. Dr. Ford discussed the low probability of the employee having contracted the illness from sexual contact but that he worked in a morgue and was exposed to blood products on a regular basis. She stated that blood is an obvious reservoir for hepatitis C and that any contact with blood in an open wound could ideally provide the necessary exposure. Dr. Ford opined that there was a reasonable degree of medical probability that the employee's hepatitis C was acquired through his working conditions. She stated that, although his wife was positive for the illness, she was diagnosed in 1987 and for her to transmit the illness to her husband and him to develop cirrhosis from hepatitis C would be quite rare because of the speed involved.

Following the hearing, the employing establishment controverted the claim and submitted a medical report from Dr. Richard Jesudass, a Board-certified internist, dated November 6, 1997 and Dr. David Potts, a Board-certified internist, dated November 10, 1997.

Dr. Jesudass discussed literature on the transmission of hepatitis C and specific facts of the employee's case, which had either been established or remained unknown. Dr. Jesudass indicated that the employee irrefutably contracted the illness, as evidence of active inflammation and fibrosis in the liver was confirmed by biopsy sometime after 1995 and that his exspouse had known hepatitis C, possibly acquired through blood transfusion. He indicated that the exact time, source or mode of the employee's infection was unknown and might never be known. The record showed no documented exposure to infected blood or needle sticks and sharp objects had ever been reported by appellant during his employment. Dr. Jesudass concluded that based on the scientific evidence published in the medical literature and the facts of the case, it was reasonable to conclude that the employee acquired his illness several decades ago and remained asymptomatic until detection following a motor vehicle injury. He further concluded that approximately 20 to 40 percent of infected individuals do not have any of the known risk factors for acquiring the infection and that not all hepatitis infections will have a definite cause. Dr. Jesudass stated that the risk that the employee was exposed through sexual contact with an exspouse was possible and more likely the cause than occupational exposure, especially when no reported injury or contact with infected blood was ever made. He further stated that the employee's contention that he had direct contact with infected blood and its products was without merit because bodies housed in the morgue were kept in plastic bags; there was no flow of blood or serum once death occurred and it was highly unlikely that these agents were present on doorknobs, refrigeration units and ventilation fans. Dr. Jesudass stated that casual contact with old, coagulated, dried blood and or blood products was highly unlikely to sustain the viability of the hepatitis virus and had never been documented to result in infection of an individual. He concluded that there was no convincing evidence to support the employee's claim and that he most likely did not acquire the infection from occupational exposure.

Dr. Potts indicated that, although the employee apparently had some contact with blood, it was a stretch to assume that he had a wet blood/body fluid exposure to his person or that if such exposure had occurred, that it would have gone unreported. He noted that, contrary to the contention of appellant's attorney that the employee was exposed twice daily, appellant was actually documented as only having logged in to the morgue area five times in five years. Dr. Potts discussed the numeric probabilities of various means of possible acquisition of the virus including needle sticks, exposure through his spouse and blood exposure through household items. He further noted that, with regard to the speed that the employee developed cirrhosis, his father contracted hepatitis C in 1986 and had cirrhosis within three to four years.

By decision dated January 28, 1998, an Office hearing representative set aside the November 30, 1995 decision and remanded the case for further medical development. Following a request by the Office, appellant's attorney submitted a copy of the employee's previous medical records since 1994 on March 31, 1998.

The Office referred the case file record, together with a statement of accepted facts, to Dr. Peter Louis, a Board-certified internist and gastroenterologist, for a determination of whether the employee's hepatitis condition was work related. In the statement of accepted facts the Office noted that, during his employment, the employee often worked in a morgue for inspection, preventative maintenance and repair of equipment where he was exposed to blood and bodily fluids. The statement further noted that the employee also incurred numerous cuts throughout his federal employment.

In a report dated May 8, 1998, Dr. Louis reviewed all available medical records and the employee's previous work history, together with the statement of accepted facts. In response to whether the employee contracted hepatitis C through exposure as a result of his federal employment, he stated:

"There is no documentation in the available medical records that [the employee] ever received medical treatment for the numerous cuts allegedly incurred during his employment, particularly when exposed to blood and bodily fluids in the morgue. Further, in my review of the medical literature there has never been any documentation that casual, superficial contact with old, coagulated, dry blood and/or products resulted in the infection of hepatitis C in an individual. Further, medical data further suggests hepatitis C strongly appears to be transmitted in a manner closely resembling that of hepatitis B. Thus, close personal contact and parenteral inoculation played a vital role in transmission of the virus.

"It is worthy to note that both [the employee] and his spouse were positive for hepatitis B and C. It is well known that hepatitis B occurs with increased frequency among sexual partners of acutely infected individuals as well as among chronically exposed person. Although sexual contact had been implicated as a route of a transmission of hepatitis C, the results are still controversial. Other means of transmission of hepatitis C among household members are shared toothbrushes and razor blades. The medical facts as presented would strongly suggest a close relationship for a means of transmission between [the employee] and his spouse in that both individuals are positive for hepatitis B and C....

“I am ... in agreement with Dr. Jesud[a]ss, the exact time, source or mode of infection, documented risk factors of hepatitis C for [the employee] may never be known. Based on the information presented and available medical records, information published concerning the epidemiology, mode of transmission of hepatitis C, as well as natural course history of the disease, I am in total agreement with Dr. Jesud[a]ss, staff gastroenterologist medical service, department of veterans affairs in which the preponderance of evidence strongly supports, that [the employee] most likely did not acquire the infection from occupational exposure as outlined in the statement of accepted facts.”

By decision dated August 19, 1998, the Office denied the occupational disease claim. On September 9, 1998 appellant requested an oral hearing on behalf of the employee’s estate, which was held April 27, 1999. By decision dated October 15, 1999, an Office hearing representative found that the medical report of Dr. Louis was flawed and, therefore, did not carry the weight of the medical evidence. The Office hearing representative, therefore, remanded the case to the Office for a supplemental report from Dr. Louis or review by another specialist.

Based on the remand order, the Office requested a report from Dr. Louis clarifying his opinion of causal relationship of the employee’s illness, based upon the accepted facts of the case. In a report dated January 21, 2000, Dr. Louis reported that he reviewed the medical records and statement of accepted facts and further considered the scientific information as to the transmission of hepatitis C, the probable risks of acquiring the illness from occupational sources and the natural history of the illness in this case. Dr. Louis stated that in accepting that the employee was exposed to blood, he had previously explained that human blood following death had been observed as old, coagulated, dried blood and/or products and that it was improbable that the hepatitis C virus existed such that it was contracted in a morgue environment. Dr. Louis further stated that he found no literature to document the viability of hepatitis C in blood and body fluid to transmit infection under conditions described in the statement of accepted facts. Dr. Louis also addressed research pertaining to transmission of the illness, including the penetration of soft tissue, involved living human to living human transmission. Dr. Louis discussed statistics which showed that 40 percent of hepatitis C cases were sporadic with no identifiable causal factors; that 1 to 2 percent of cases were found to be caused through occupational exposure; that 38 percent of cases were found to be caused by sexual contact and 17 percent by household contact. He concluded that there was no convincing evidence to support that the employee acquired hepatitis C from the occupational exposures as outlined in the statement of accepted facts.

By decision dated February 3, 2000, the Office found that the medical evidence of file failed to establish that the employee’s condition was caused by his federal employment.

In a letter dated March 1, 2000, the employee’s estate requested an oral hearing.

Following a hearing held August 22, 2000, an Office hearing representative affirmed the February 3, 2000 decision finding that the evidence was insufficient to establish that the employee’s hepatitis C condition was causally related to his federal employment.

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

Dr. Ford, the employee's treating physician, concluded that based upon a reasonable degree of medical probability, appellant's hepatitis C condition was acquired through his working conditions. She discussed that appellant could have contracted the illness through other factors and stated that, although his spouse had contracted the illness in 1986, the employee had divorced his wife years before with no further intimate contact. Dr. Ford based her conclusion of causal relationship on the fact that the employee had regular contact with blood in the morgue of the employing establishment and that any contact that he might have had with infected blood with open wounds could ideally provide the necessary exposure.

On the other hand, Dr. Louis, the second opinion physician, provided his medical opinion that appellant had not likely contracted hepatitis C through exposure to blood at the workplace. In his report, Dr. Louis discussed the various avenues of transmission of hepatitis C including transmission through blood, penetration of soft tissue involving living human to living human transmission and further discussed the employee's specific risk factors. He noted that the employee's likelihood of contracting hepatitis C through occupational exposure was extremely low and that the blood to which the employee was exposed in the morgue was likely old and coagulated, which would almost never cause infection. Dr. Louis further discussed that 40 percent of all hepatitis C cases are sporadic with no identifiable factors found under any circumstances and that the cause of appellant's condition may never be found.

Section 8123(a) of the Federal Employees' Compensation Act<sup>1</sup> provides that, "[i]f 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."

The Board finds that a conflict exists between Dr. Ford, appellant's treating physician, and Dr. Louis, the second opinion referral. The case will be remanded for an impartial medical specialist to resolve the conflict in the medical opinions. On remand, the Office should refer the case record with all relevant medical records and a statement of accepted facts to an appropriate physician to reevaluate the evidence pursuant to section 8123(a) of the Act. Following this and such further development as the Office deems necessary, it shall issue a *de novo* decision.

The August 22 and February 3, 2000 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC  
January 15, 2002

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<sup>1</sup> 5 U.S.C. § 8123(a).

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member