

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

L.R., (Widow of E.R.) Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
EDWARDS AIR FORCE BASE, CA, Employer)

Docket No. 09-805
Issued: November 13, 2009

Appearances:
Thomas Martin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 3, 2009 appellant filed a timely appeal of an October 30, 2008 merit decision of the Office of Workers' Compensation Programs finding that her husband's death was not causally related to his federal employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the issue.

ISSUE

The issue is whether the employee's death on August 2, 2002 was causally related to his federal employment.

FACTUAL HISTORY

This case has previously been before the Board.¹ In a February 20, 2007 decision, the Board found the case was not in posture for decision. The report of Dr. Donal Sweeney, an impartial medical specialist, was insufficient to resolve the conflict as to whether the employee's

¹ 58 ECAB ___ (Docket No. 06-1942, issued February 20, 2007).

welding duties caused or contributed to his lung cancer and resulted in his death. The Board remanded the case to the Office for further development of the medical evidence. The facts and history as contained in the prior decision are incorporated by reference.

On July 23, 2007 the Office referred the medical record to Dr. Steven Simons, Board-certified in pulmonary disease, for an impartial medical evaluation to resolve the conflict.

In a report dated September 11, 2007, Dr. Simons reviewed the employee's employment history and death due to metastatic lung cancer in 2003. The employee had a 41-year history of cigarette smoking and worked as a welder for approximately 39 years. Dr. Simons also reviewed and commented on the medical literature relied upon by the previous physicians in the case. He opined that the cause of the employee's death was due to cigarette smoking. In response to whether the employee's death was caused, aggravated, precipitated or accelerated by his federal civilian employment as a welder between 1964 and 1994, Dr. Simons opined that the medical literature supported the contention that there were other determinants of lung cancer, which included environmental factors. He noted that welding in general may be associated with increased risk, but the literature was by no means conclusive. Dr. Simons stated that regarding the "specific risks from welding in general, as well as the nature, quantity and specifics of this gentleman's exposure in the workplace. It is clear, given the above limitations, that this cannot be quantified with any degree of precision whatever to facilitate the derivation of any valid conclusion." He concluded that the employee's death was typical of the lung cancer as it results from cigarette smoking. Given the clinical course, there was no reason to find any other agent as aggravating, precipitating or accelerating the cancer, "particularly given the paucity of specific data in this case."

By decision dated September 27, 2007, the Office denied the claim for benefits on the grounds that the weight of the medical evidence did not support that the employee's death was causally related to his employment.

On October 24, 2007 appellant's representative requested a hearing, which was held on February 26, 2008. Counsel reiterated that the employee worked with numerous carcinogens as a welder, including nickel, which was found to cause lung cancer. He submitted copies of previously received reports. In a February 23, 2008 report, Dr. Markovitz noted that he had previously related that cigarette smoking was the predominant cause of lung cancer. He also noted that some lung cancers were due to a combination of factors. Dr. Markovitz noted that welding fumes played a key role as a cocarcinogen and explained that he had performed additional research on the topic. He reviewed numerous articles including a recent report entitled *Scan J. Work Environ Health* (2007-33:379-86). This study showed a statistically increased risk of lung cancer among welders. Dr. Markovitz opined that the research revealed that welding fumes were toxic to the lungs and concluded that there was a causal connection between the lung cancer and the employee's workplace. The study was submitted with his report.

By letter dated March 10, 2008, appellant's representative argued that Dr. Markovitz supported that the employee's death was work related. He questioned Dr. Simons' report and noted that he did not base his opinion on any independent studies to support his conclusion.

By decision dated May 5, 2008, the Office hearing representative vacated the February 26, 2008 decision. She remanded the case so that the evidence from Dr. Markovitz could be reviewed by Dr. Simons.

By letter dated August 4, 2008, the Office requested that Dr. Simons review the study on the risk of lung cancer and welding.² It requested that Dr. Simons provide his observations and/or conclusions with rationale as to whether the study noted by Dr. Markovitz altered his opinion in any manner.

On September 10, 2008 the Office again requested that Dr. Simons provide an opinion incorporating the October 2007 study. In a memorandum of telephone call of the same date and again on October 29, 2008, it contacted Dr. Simons' office to inquire into the status of the supplemental report. Dr. Simons did not provide a response.

In an October 30, 2008 decision, the Office denied appellant's claim. It found that, since no response was received from Dr. Simons, it could not alter the prior decision rendered on September 27, 2007, as the weight of the medical evidence did not establish any connection between the employee's lung cancer and the established work-related exposure.

LEGAL PRECEDENT

The United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.³

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 rationalized medical opinion evidence of a cause and effect relationship, based on a complete factual and medical background, showing causal relationship. The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale.⁴

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁵

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification

² By letter dated May 19, 2008, appellant's representative objected to the referral back to Dr. Simons. He noted that the physician was not Board-certified. In a letter dated June 24, 2008, the Office responded to appellant's representative and noted Dr. Simons' qualifications.

³ 5 U.S.C. § 8102(a); *see id.* § 8133 (compensation in case of death).

⁴ *Lois E. Culver*, 53 ECAB 412 (2002).

⁵ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.⁶ However, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.⁷

ANALYSIS

The Board finds this case is not in posture for decision.

The Office referred the record for a second impartial medical examination with Dr. Simons, Board-certified in pulmonary medicine, who was selected to address the conflict in opinion between the Office medical adviser and Dr. Markovitz, regarding whether the employee's welding duties caused or contributed to his lung cancer and resulted in his death. Dr. Simons reviewed the record and concluded that the employee's death resulted from cigarette smoking. In denying the claim, the Office relied upon Dr. Simons' impartial medical reports to determine that the employee's death was not caused or contributed to by his federal employment. However, Dr. Simons did not respond when the Office requested that he clarify his opinion in light of studies related to the increased risks of lung cancer among welders submitted by Dr. Markovitz. The initial opinion of Dr. Simons does not resolve this issue. As he was unable to clarify or elaborate on his original report, the Office should have referred the matter to another appropriate impartial medical specialist.⁸

Consequently, Dr. Simons' report is insufficient to resolve the medical conflict. For this reason, the case will be remanded to the Office for further development of the medical evidence including referral of the record to another impartial medical examiner. After such further development as the Office deems necessary, an appropriate decision should be issued regarding this matter.

⁶ *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

⁷ *Roger W. Griffith*, 51 ECAB 491 (2000); *Talmadge Miller*, 47 ECAB 673 (1996).

⁸ *See supra* note 7; *Harold Travis*, 30 ECAB 1071, 1078-79 (1979).

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the October 30, 3008 decision of the Office of Workers' Compensation Programs is set aside and remanded for further action consistent with this decision of the Board.

Issued: November 13, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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