

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

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F.D., claiming as widow of S.D., Appellant )

and )

U.S. POSTAL SERVICE, POST, OFFICE, )  
Spring Valley, CA, Employer )

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**Docket No. 08-2190**  
**Issued: September 24, 2009**

*Appearances:*  
*Appellant, pro se*  
*No appearance, for the Director*

Oral Argument June 11, 2009

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On August 5, 2008 appellant filed a timely appeal of a July 17, 2008 decision of the Office of Workers' Compensation Programs denying her claim for death benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this appeal.

**ISSUE**

The issue is whether appellant has established that the employee's death was causally related to factors of his federal employment.

**FACTUAL HISTORY**

This case is before the Board for the fourth time. In a January 24, 2000 decision, the Board found that the factual evidence established a compensable employment factor in that the

employee's postal route required more than eight hours to prepare and complete.<sup>1</sup> The Board remanded the case to the Office for further development. On August 13, 2001 the Office accepted the claim for adjustment disorder with mixed anxiety and depressed mood. It authorized compensation for the period July 12 to October 23, 1997, the date the emotional condition was found to have resolved.

The employee died on April 12, 2001. The cause of death was metastatic colon cancer. Appellant, the employee's widow, filed a claim for survivor's benefits (Form CA-5) on September 3, 2003 alleging that the employee's death was causally related to his accepted employment injury. On March 9, 2007 the Board set aside a nonmerit decision of the Office, finding that appellant submitted relevant new factual evidence.<sup>2</sup> On March 26, 2008 the Board set aside an April 20, 2007 Office decision denying appellant's claim for death benefits.<sup>3</sup> The Board found that the case was not in posture for decision as to whether the employee had been harassed or retaliated against in his federal employment. The facts of the case as set forth in the Board's prior decisions are incorporated by reference.

On June 20, 2003 Dr. Paul Rosch, a Board-certified internist, reviewed the employee's medical records and factual evidence related to his occupational disease claim. He advised that the employee was subjected to severe and persistent stress at work. Dr. Rosch stated: "[a]lthough not easy to prove, it is also my opinion that job stress contributed to the development and fairly rapid downhill course of his colon cancer." He noted that stress had been shown to accelerate the spread and growth of malignant tumors and emotional stress had been shown to depress natural killer cells and other immune system components responsible for resistance to carcinogens. Dr. Rosch noted exceptions for attributing the employee's cancer to stress, but concluded that they could be dismissed in this case due to well-documented harassment at work, the temporal relationship of his symptoms of colon cancer and the absence of other competent contributing causes. He stated that severe and persistent emotional stress at work "was not only responsible for his emotional breakdown but also contributed to the development and unusually rapid downhill course of his colon cancer."

On April 30, 2004 Dr. Rosch reported that the employee's inability to complete his work duties within eight hours also created an atmosphere of severe and persistent stress. He reiterated his opinion that stress could weaken the immune system's resistance to cancer.

On August 16, 2004 Dr. Suresh B. Katakhar, a Board-certified oncologist, reviewed the employee's medical records and a statement of accepted facts at the request of the Office. He noted that there had not been a definitive link documented with stress in human malignancies as stated by Dr. Rosch but that the employee had cancer while undergoing stress at work. While the stress did not cause the employee's colon cancer, Dr. Katakhar noted that it could cause

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<sup>1</sup> Docket No. 99-1439 (issued January 24, 2000). On May 26, 1998 the Office denied the employee's emotional condition claim on the basis that he failed to establish a compensable factor of employment. An Office hearing representative affirmed the denial on December 31, 1998. The Board adopted the decision of the hearing representative to find that the employee had not substantiated allegations of harassment or discrimination.

<sup>2</sup> Docket No.06-1937 (issued March 9, 2007).

<sup>3</sup> Docket No. 07-1857 (issued March 26, 2008).

problems over time. On September 7, 2004 he further clarified his opinion, stating that the employee's colon cancer was unrelated to the accepted mixed anxiety disorder or adjustment disorder. Dr. Katakkar also stated that depression did not cause or induce any cancer in the employee.

On March 14, 2005 the Office received a report by Dr. Bernard S. Siegel, a Board-certified surgeon, who reviewed materials submitted by appellant regarding the employee's medical records and work history, stating his agreement with the opinion of Dr. Rosch. Dr. Siegel determined that the work stress the employee was under "contributed to the rapid progression of his disease."

Appellant submitted a copy of a transcript in proceedings before an administrative judge in the employee's Equal Employment Opportunity (EEO) claim. She also submitted two pages from the April 4, 2002 decision reached in that case. In an April 3, 2006 letter, the employing establishment's manager of human services expressed condolences to appellant on the loss of her husband and appreciation for his service as a letter carrier.

In an April 20, 2007 decision, the Office found that the evidence was insufficient to establish harassment or retaliation. As the two-pages from the EEO decision were redacted, it had no probative value. The Office found the medical evidence insufficient to establish that the employee's death caused by the accepted employment factor.

Following the Board's March 26, 2008 decision, the Office received a complete copy of the April 4, 2002 decision by Administrative Judge Dennis Carter on the employee's harassment and retaliation claims. Judge Carter found that the evidence submitted was insufficient to establish harassment and retaliation based upon religion, gender or protected activity. In addressing retaliation, Judge Carter stated:

"I find the evidence established that the responsible management officials were not completely truthful, but I do not find that the preponderance of the evidence established their lies were retaliation for EEO activity. After a thorough review of the record and assessing the credibility of the responsible management officials, I find that PM [Postmaster] Kelley was the driving force behind the close monitoring of the [c]omplainant's work performance because she was retaliating against the complainant because of his aggressive role in Project Hope, which made her look bad to higher management in the [d]istrict. I further find that Project Hope was the origin of the retaliatory actions the [c]omplainant identified as continuing harassment rendering his work environment hostile and abusive. The responsible management officials used the [c]omplainant as an example of what happens when an employee speaks out against management actions, *i.e.*, his work performance became closely monitored, his requests for help were continuously scrutinized and criticized, and when he spoke up at stand-ups he was ignored. Notwithstanding this finding, the [c]omplainant failed to establish that Project Hope involved Title VII, ADA, EPA, or Rehab[ilitation] Act issues. In fact, the preponderance of the evidence did not show that the [c]omplainant engaged in protected EEO activity known to the responsible management officials until after he filed the EEO complaint that served as the basis for this hearing.

Accordingly, I find that even though the [a]gency's articulated reasons for its actions were retaliatory linked to the [c]omplainant's active involvement with Project Hope, the preponderance of the evidence did not establish that Project Hope involved EEO issues. Thus, since the [c]omplainant was not engaged in opposition to discriminatory practices, he cannot recover for the [a]gency's retaliatory actions in this forum."

By decision dated July 17, 2008, the Office again found that the evidence was insufficient to establish harassment or retaliation. It also found the medical evidence insufficient to support that the employee's death was caused or contributed to by the accepted employment factor.

### **LEGAL PRECEDENT -- ISSUE 1**

The Federal Employees' Compensation Act<sup>4</sup> provides that the United States shall pay compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>5</sup> However, an award of compensation in a survivor's claim may not be based on surmise, conjecture or speculation or on appellant's belief that the employee's death was caused, precipitated or aggravated by his employment. A claimant 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 employment.<sup>6</sup> This burden includes the necessity of furnishing rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship.<sup>7</sup>

### **ANALYSIS**

In a prior appeal, the Board determined that the employee established a compensable factor under *Cutler*,<sup>8</sup> as his postal route required more than eight hours to prepare and complete. The Office subsequently accepted the employee's claim for an adjustment disorder with mixed anxiety and depressed mood. The employee died on April 12, 2001 due to metastatic colon cancer. Appellant claims that his death was caused by or contributed to from the stress encountered in his employment, particularly harassment and retaliation. The Office denied these as compensable factors, noting that the two-page decision of an EEO administrative judge was redacted such that it was of no probative value.

Since the Board's most recent decision, the case record was supplemented with a copy of the April 4, 2002 decision of Judge Carter in the employee's EEO claim. The judge reviewed evidence submitted on the questions of whether appellant was discriminated on the basis of

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Id.* at § 8102(a).

<sup>6</sup> *D.H. (G.H.)*, 58 ECAB \_\_\_\_ (Docket No. 07-314, issued July 18, 2007).

<sup>7</sup> *L.R. (E.R.)*, 58 ECAB \_\_\_\_ (Docket No. 06-1942, issued February 20, 2007); *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

<sup>8</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

gender or religion, retaliated against for prior EEO activity or subjected to a hostile work environment. Following investigation, a hearing was held in which nine witnesses and the employee appeared and testified. Applying EEO law and standards to the evidence, Judge Carter found that the employee was not discriminated against on the basis of his gender, religion or protected EEO activity. As to retaliatory conduct based on the employee's involvement in Project Hope, Judge Carter found that the nature of the project did not involve EEO issues: "[S]ince the complainant was not engaged in opposition to discriminatory practices, he cannot recover for the [a]gency's retaliatory actions in this forum."

The Board has generally held that the findings of other federal administrative agencies or courts are not dispositive with regard to questions arising under the Federal Employees' Compensation Act. The decisions of other tribunals are made pursuant to different statutes that apply varying standards for establishing eligibility for benefits.<sup>9</sup> While not dispositive, however, the Board may give weight to decisions based on the factual findings made in proceedings before another forum.<sup>10</sup> As applicable to this case, the Board has held that the term "harassment" as applied by the Board is not equivalent to the term as defined or implemented by other agencies, such as the EEO, which is charged with statutory authority to investigate and evaluate such matters in the workplace.<sup>11</sup> Rather, in evaluating claims for workers' compensation under the Federal Employees' Compensation Act, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or coworkers.<sup>12</sup>

Judge Carter reviewed the evidence and considered testimony from multiple parties at the employing establishment. He determined that, even though the responsible management officials had engaged in retaliatory conduct based on the employee's involvement in Project Hope, the employing establishment was not responsible under EEO law since Project Hope did not involve EEO issues.

Under the Act, however, the Board finds that the evidence from the EEO pertaining to the employee's claim is sufficient to establish retaliation on the part of his supervisors. Persuasive evidence from Judge Carter establishes that the postmaster was the driving force behind abusive actions such as the close monitoring of the employee's work performance as retaliation against the complainant because of his aggressive role in Project Hope, which made her look bad to higher management in the district. The Board also concludes from the judge's decision that Project Hope was the origin of the retaliatory actions the employee identified as continuing harassment rendering his work environment hostile and abusive. Employing establishment management used the employee as an example of what would happen if an employee spoke out against management, *i.e.*, his work performance became closely monitored, his requests for help were continuously scrutinized and criticized and when he spoke up at stand-ups he was ignored.

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<sup>9</sup> See *Andrew Fullman*, 57 ECAB 574 (2006).

<sup>10</sup> See *Kelly S. Simpson*, 57 ECAB 197 (2005); *Ernest J. Malagrida*, 51 ECAB 287 (2000).

<sup>11</sup> *Ronald K. Jablanski*, 56 ECAB 616 (2005).

<sup>12</sup> *Id.* See also *Beverly R. Jones*, 55 ECAB 411 (2004).

Appellant has established retaliation as a compensable employment factor. On return of the case, the Office should prepare an updated statement of accepted facts listing the two compensable employment factors.

Based on this determination, the medical evidence requires further development. Dr. Rosch, a Board-certified internist, and Dr. Siegel, a Board-certified surgeon, opined that appellant's the previously accepted *Cutler* factor had contributed to the rapid progression of the employee's colon cancer and generally provided support for this conclusion. Dr. Katakkar, a second opinion physician Board-certified in oncology, reviewed the employee's medical records and a statement of accepted facts. He advised that appellant's colon cancer was not caused by stress in the employment but generally agreed with Dr. Rosch that stress could cause a problem over a period of time. In a supplemental report dated September 7, 2004, Dr. Katakkar found that the employee's colon cancer was unrelated to the accepted mixed anxiety disorder or adjustment disorder. He did not address whether the stress of employment may have aggravated or contributed to the progression of the employee's colon cancer prior to death. The medical evidence, while not sufficient to establish appellant's claim, is sufficient to require further development of the medical evidence.<sup>13</sup>

On remand, the Office should prepare a new statement of accepted facts to include the factors of employment, as noted. It should refer the employee's record to an appropriate specialist in oncology for an opinion on whether the employee's death was caused or contributed to by his federal employment.

### **CONCLUSION**

The Board finds the employee was subjected to retaliation in his federal employment. The case is not in posture for a decision on whether his death was caused or contributed by his employment as further development of the medical evidence is warranted.

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<sup>13</sup> See *Virginia Richard (Lionel F. Richard)*, 53 ECAB 430 (2002).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 17, 2008 be affirmed, in part, as to the denial of harassment as a compensable factor. The decision is set aside and the case remanded for further proceedings before the Office consistent with this decision.

Issued: September 24, 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