United States Department of Labor
Employees' Compensation Appeals Board

D.W., claiming as widow of L.W., Appellant	)	
and	)	**Docket No. 10-598**
	)	**Issued: October 6, 2010**
DEPARTMENT OF THE NAVY, MARINE CORPS LOGISTICS BASE, Barstow, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 4, 2010 appellant filed a timely appeal from a July 28, 2009 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, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the employee's death on July 23, 2008 was causally related to his accepted employment injury.

FACTUAL HISTORY

On June 1, 1987 the employee, then a 24-year-old equipment mechanic, filed a claim accepted for bilateral carpal tunnel syndrome. The Office authorized appropriate surgery for carpal tunnel syndrome and subsequently accepted cervical disc herniation at C4-7 and surgery on November 8, 2001 for an anterior discectomy and fusion. It authorized a second cervical surgery on June 19, 2007 for removal of cervical plate at C6-7 and anterior cervical discectomy and fusion at C4-5. The Office paid wage-loss compensation for total disability.

In a report dated November 19, 2007, Dr. Wilbur C. Sanford, a Board-certified neurological surgeon, treated the employee for neurosurgical postoperative follow up. He explained that after the anterior cervical discectomy and fusion, the employee developed "a terrible infection in his spine, an osteomyelitis. [The employee] developed a transverse myelitis and I had to operate on him." Dr. Sanford performed a decompressive thoracic laminectomy from T8 to T12. He noted that the employee was "uncertain whether the infection was totally cured, but he is stronger."

The Office requested that an Office medical adviser address whether the employee's claim should be accepted for osteomyelitis. On February 4, 2008 the medical adviser reviewed the employee's history of injury and medical treatment. He opined that it was "more than likely this osteomyelitis that developed … was not related to the work-accepted cervical condition necessitating the thoracic decompression for transverse myelitis-osteomyelitis," but before the issue was resolved, he recommended that the Office secure an opinion from an internist specializing in infectious diseases.

The employee died on July 23, 2008. The death certificate indicated that the cause of death was still being determined. In an October 7, 2008 autopsy report, the coroner, Dr. Steven Trenkle, a Board-certified pathologist, performed an autopsy on July 25, 2008. He listed the cause of death as an accident due to "[c]omplications of chronic osteomyelitis of spine, years, due to blunt force injury of spine, years. Contributing cause: excessive use of pain medication with probable intravenous injection of crushed oral medications."

On October 21, 2008 appellant, the employee's widow, filed a claim for survivor's benefits.

On November 12, 2008 the Office informed appellant that, if she believed the employee's death was caused by his work injury or factors of his federal employment, she should submit supporting factual and medical documentation.

By decision dated January 5, 2009, the Office denied appellant's claim for compensation. It found that the medical evidence did not establish that the employee's death resulted from the accepted injuries.

On January 9, 2009 appellant requested a hearing, which was scheduled for April 27, 2009. By letter dated April 24, 2009, appellant's representative requested that the Office perform an examination of the written record, as the issue was purely medical. He noted that Dr. Trenkle, the coroner, found that the employee's death was due in part, to complications of chronic osteomyelitis of spine, due to the blunt force injury. Counsel asserted that the coroner's report linked the employee's death to complications from his work injury as well as to pain medication prescribed to treat his condition. He contended that the coroner's report was sufficient to require additional development of the medical evidence.

By decision dated July 28, 2009, an Office hearing representative affirmed the January 5, 2009 decision.

LEGAL PRECEDENT

An award of compensation in a survivor's claim may not be based on surmise, conjecture or speculation or an appellant's belief that the employee's death was caused, precipitated or aggravated by the employment.[1] Appellant has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the employee's death was causally related to an employment injury or to factors of his employment. As part of this burden, she must submit a rationalized medical opinion, based upon a complete and accurate factual and medical background, showing a causal relationship between the employee's death and an employment injury or factors of his federal employment. Causal relationship is a medical issue and can be established only by medical evidence.[2]

The medical evidence required to establish causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between an employee's diagnosed conditions 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 employee's death and the accepted conditions or employment factors identified by the employee.[3]

ANALYSIS

The Board finds that this case is not in posture for a decision as to whether the employee's death was causally related to his employment.

Dr. Trenkle, the coroner, determined that the cause of the employee's death was an accident due to complications of chronic osteomyelitis of spine, due to a prior blunt force injury of spine. The contributing cause of death was listed as: excessive use of pain medication with probable intravenous injection of crushed oral medications. The Office denied the claim finding that the medical evidence did not establish that the employee's death on July 23, 2008 arose from the accepted injuries.

The Board notes that on February 4, 2008, less than six months before the employee's death, an Office medical adviser reviewed the record regarding the diagnosed osteomyelitis. He opined that it was "more than likely this osteomyelitis that developed … was not related to the work-accepted cervical condition necessitating the thoracic decompression for transverse myelitis osteomyelitis." But the Office medical adviser recommended that the Office secure an opinion from an internist specializing in infectious diseases to address the issue of causal relation. The record reflects that, the Office did not further develop the medical evidence on the

[1] *Sharon Yonak (Nicholas Yonak),* 49 ECAB 250 (1997).

[2] *Mary J. Briggs,* 37 ECAB 578 (1986); *Umberto Guzman*, 25 ECAB 362 (1974).

[3] *Donna L. Mims*, 53 ECAB 730 (2002).

issue of whether the osteomyletis was work related. As this was a factor in the employee's death, the case necessitates further development as recommended by the Office medical adviser.

On November 19, 2007 Dr. Sanford noted that the employee was seen for postoperative follow-up care and had developed a terrible infection in his spine, an osteomyelitis for which surgery was performed. He noted that it was uncertain whether the employee was totally cured.

Proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done and must do so in a fair manner.[4]

The Office medical adviser recommended that the opinion of an internist and expert in infectious diseases be obtained to clarify whether the osteomyletis diagnosed by Dr. Sanford was due to the employee's accepted conditions or surgeries. The Office did not further develop the medical evidence. Once it undertakes development of the record, it has the responsibility to do so in a proper manner.[5] As the Office did not fully develop the evidence in this case, the Board will remand it for further development of the medical evidence.

On remand, the Office should refer the case record and a statement of accepted facts to an appropriate medical specialist for review and a rationalized medical opinion on whether the employee's osteomyletis was related to his accepted conditions or medical treatment and whether the employee's July 23, 2008 death was contributed to by his federal employment. After such further development as the Office deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[4] *See Melvin James*, 55 ECAB 406 (2004).

[5] *See Henry G. Flores, Jr.,* 43 ECAB 901 (1992); *see also Charles J. Jenkins*, 40 ECAB 362 (1988).

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision.

Issued: October 6, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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