

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

F.D., claiming as widow of S.D., Appellant	)	
	)	
and	)	<b>Docket No. 10-1719</b>
	)	<b>Issued: February 22, 2011</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Spring Valley, CA, Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Jim C. Gordon, Jr., Esq., for the Director*

Oral Argument November 10, 2010

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 15, 2010 appellant filed a timely appeal of a May 13, 2010 merit 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 appellant met her burden of proof to establish that the employee's death was causally related to factors of his federal employment.

On appeal, appellant contends that the Office erred in its selection of a second opinion physician and in weighing the medical evidence of record.

## **FACTUAL HISTORY**

This case has previously been before the Board. In a January 24, 2000 decision,<sup>1</sup> the Board found that the factual evidence established a compensable factor under *Cutler*,<sup>2</sup> in that the employee's postal route required more than eight hours to prepare and complete. The Board remanded the case to the Office for further development. On remand, 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. In a second appeal, the Board set aside a nonmerit Office decision dated June 2, 2006.<sup>3</sup> The Board found that the Office improperly denied appellant's request for a merit review as she had submitted relevant new factual evidence. On March 26, 2008 the Board set aside an April 20, 2007 Office decision denying his claim.<sup>4</sup> The Board found the case was not in posture on whether appellant established the compensable factors of harassment and retaliation. In the fourth appeal, the Board issued a September 24, 2009 decision setting aside a July 17, 2008 Office decision and remanded the case for further development. The Board found the evidence sufficient to establish the factor of retaliation as compensable.<sup>5</sup> The Board also found that further development was warranted on the issue of whether the employee's death was caused or aggravated by his employment. The facts and the circumstances of the case as set forth in the Board's prior decisions are hereby incorporated by reference.<sup>6</sup>

In a November 19, 2009 report, Dr. Khalid Rehman, a second opinion Board-certified internist with subspecialties in hematology and oncology, concluded that the employee's colon cancer probably existed around July 1996. He advised that the accepted work factors did not worsen the employee's colon cancer. Dr. Rehman referenced scientific literature and studies, which did not establish that psychological stress caused cancer to spread faster. According to him, the clinical studies and literature noted a controversy as to whether stress could alter the immune function. Dr. Rehman stated that it had not been proven that adjustment disorders or depression either caused cancer or hastened the progress of cancer. Therefore, the employee's colon cancer was not caused or hastened by his depression and adjustment disorder.

By decision dated December 2, 2009, the Office denied appellant's death benefits claim. It found the opinion of Dr. Rehman constituted the weight of the medical evidence and

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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. By decision dated December 31, 1998, an Office hearing representative affirmed the denial.

<sup>2</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>3</sup> Docket No.06-1937 (issued March 9, 2007).

<sup>4</sup> Docket No. 07-1857 (issued March 26, 2008).

<sup>5</sup> Docket No. 08-2190 (issued September 24, 2009).

<sup>6</sup> The employee died on April 12, 2001 and 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.

established that the employee's death was not causally related to the accepted compensable factors of employment.

On March 11, 2010 appellant requested reconsideration and submitted a March 3, 2010 report from Dr. Paul Rosch, a Board-certified internist, who reviewed Dr. Rehman's report and disagreed with the conclusion that there was no scientific proof that stress could accelerate the growth of cancer. Dr. Rosch noted that Dr. Rehman relied on studies which were 12 to 26 years old. He noted that four of the six clinical studies cited by Dr. Rehman referenced breast and ovary cancer and none concerned colon cancer. Dr. Rosch related that current studies, specifically papers dated 2003 and 2009 by Dr. David Spiegel, a Stanford University psychiatrist, supported that depression and stress may impair the ability to fight off infection and the progression of the cancer in a patient with cancer. He stated that the impact of stress on the colon was well established in the pathogenesis of irritable bowel syndrome, regional ileitis and ulcerative colitis, with colon cancer developing in ulcerative colitis patients by a significant percentage. Dr. Rosch referenced a position paper by the American Gastroenterological Association indicating that patients with inflammatory bowel disease should be screened for colon cancer. Based on his review of the current medical literature, clinical studies and papers, he concluded that the employee's colon cancer was hastened by his stress due to the accepted work factors.

By decision dated May 13, 2010, the Office denied modification of the December 2, 2009 decision.

### **LEGAL PRECEDENT**

The Federal Employees' Compensation Act<sup>7</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>8</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>9</sup> This burden includes the necessity of furnishing rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship.<sup>10</sup>

Section 8123(a) of the Act<sup>11</sup> provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary

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<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> *Id.* at § 8102(a).

<sup>9</sup> *D.H. (G.H.)*, 58 ECAB 636 (2007); *Viola Stanko (Charles Stanko)*, 56 ECAB 636 (2005).

<sup>10</sup> *L.R. (E.R.)*, 58 ECAB 369 (2007); *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

<sup>11</sup> 5 U.S.C. § 8123(a).

shall appoint a third physician who shall make an examination.<sup>12</sup> The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination.<sup>13</sup> This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>14</sup>

### ANALYSIS

The Office accepted compensable factors of overwork, harassment and retaliation as compensable factors of employment in the employee's emotional condition claim. The issue is whether his accepted emotional condition caused or hastened the employee's colon cancer and resulting death. The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion.

On November 19, 2010 Dr. Rehman, a second opinion Board-certified internist with subspecialties in hematology and oncology, concluded that the employee's colon cancer was not caused or hastened by his stress and depression. Based on his review of the scientific literature and studies, it was not proven that psychological stress caused cancer to spread faster in cancer patients.

On March 3, 2010 Dr. Rosch disagreed with Dr. Rehman's conclusion. He stated that Dr. Rehman had relied on old studies that did not concern colon cancer. Dr. Rosch opined that recent literature and clinical studies supported a finding that depression and stress could potentially increase progression of cancer in a cancer patient. He referenced studies showing the impact of stress on the colon and evidence of a high percentage of ulcerative colitis patients developing colon cancer. Dr. Rosch related that the American Gastroenterological Association advised that patients with inflammatory bowel disease should be screened for colon cancer. Based on his review of the medical literature and relevant studies, he opined that the employee's colon cancer was hastened by his accepted emotional condition.

The Board finds a conflict in the medical opinion evidence between Dr. Rosch, an attending physician who opined that the employee's stress contributed to his colon cancer, and Dr. Rehman, an Office referral physician, who opined that the employee's colon cancer was not caused or aggravated by his stress and depression. The case is remanded to the Office for the referral of the case record and a statement of accepted facts to a Board-certified impartial medical specialist to determine whether the employee's colon cancer was caused or hastened by the accepted emotional condition.

On appeal appellant contends that Dr. Rehman was not an appropriate referral specialist as he had no experience in psychiatry or psychology. She also contends that Dr. Rosch's

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<sup>12</sup> *J.J.*, 60 ECAB \_\_\_\_ (Docket No. 09-27, issued February 10, 2009); *F.R.*, 58 ECAB 607 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

<sup>13</sup> 20 C.F.R. § 10.321.

<sup>14</sup> *R.H.*, 59 ECAB 382 (2008); *Elaine Sneed*, 56 ECAB 373 (2005).

qualifications and psychiatric expertise are superior to those of Dr. Rehman. In view of the conflict in the medical opinion evidence, the Board finds appellant's arguments regarding Dr. Rehman and Dr. Rosch to be moot.

**CONCLUSION**

The Board finds this case is not in posture for a decision as there is a conflict in the medical opinion evidence requiring further development.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 13, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision.

Issued: February 22, 2011  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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