United States Department of Labor
Employees' Compensation Appeals Board

W.P., claiming as widow of E.P., Appellant	)	
and	)	**Docket No. 11-1479**
	)	**Issued: January 26, 2012**
U.S. CUSTOMS SERVICE,	)	
Elk Grove Village, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 8, 2011 appellant, through his attorney, filed a timely appeal from a February 8, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 December 8, 2009 was causally related to her federal employment.

FACTUAL HISTORY

The employee filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries on May 23, 1993 when she inhaled mold spores while in the performance of duty. OWCP accepted the claim for aggravations of bronchial asthma, chronic obstructive pulmonary

[1] 5 U.S.C. § 8101 *et seq.*

disease (COPD), arrhythmia, ventricular tachycardia and aphasia, as well as a consequential stroke on October 19, 1994. The employee received compensation for wage loss until her death on December 8, 2009. A death certificate was signed by Dr. Gary Giordano, an osteopath, who reported the immediate cause of death as "gram negative sepsis syndrome." Additional causes were listed as multiorgan system failure and recurrent bacterial and fungal pneumonia.

The record indicates that on September 10, 2009 the employee underwent coronary artery bypass surgery by Dr. Michael Kralik, a surgeon. In a report dated December 8, 2009, Dr. Giordano indicated that the employee had been admitted to the hospital on November 22, 2009 and was treated for respiratory failure, intestinal bleeding, anemia and multifactorial hypotension. He noted that the employee had been exposed to a fungus while working and fungal pneumonia had been attributed to the 1994 incident. Dr. Giordano stated that there had been a steady decline in appellant's condition since that incident. He further stated that expert witnesses in the fields of infectious diseases, pulmonary and cardiology should be consulted as to the cause of death.

In an autopsy report dated December 15, 2009, Phillip Zollars, M.D., indicated that an autopsy was performed on December 12, 2009. He stated that the employee "likely died as a result of multisystem failure secondary to shock and infection with underperfusion of organ systems. No evidence of acute infection (bacterial or fungal) were identified."

On January 29, 2010 appellant, the employee's spouse, filed a Form CA-5 (claim for compensation by widow) with respect to the death of the employee on December 8, 2009. The reverse of the claim form contains an attending physician's report from Dr. Megan Jhaver, an internist, who checked a box "yes" that the employee's death was due to the employment injury. Dr. Jhaver stated that the employee's "overall weakened condition was contributed to her chronic heart and lung condition. These conditions may have been caused by the injury she sustained from mold exposure" while a federal employee. Dr. Jhaver concluded that the employee's chronic conditions did not "allow her survival odds that would have existed for a patient without these chronic conditions."

In a report dated April 27, 2010, an OWCP medical adviser reviewed the medical evidence of record. He opined that the employee's death was not causally related to exposure to spores and molds. The medical adviser referred to the employee's weight, hypertension and the medication Inderal as "more likely resulting in her uncontrolled asthma at beginning." He stated that atrial fibrillation and hypertrophic cardiomyopathy were most likely an unfortunate personal disease that resulted in stroke and aphasia and eventually leading to diastolic heart dysfunction and secondary pulmonary hypertension. The medical adviser stated that appellant's hospital treatment, especially before and after the coronary artery bypass, "was mostly striking for a case of unfortunate wound infection and difficult postoperative complications case for obese hypertensive hypercholesterolemic patient on warfarin." He indicated that during the hospital stay there was no reference to severe bronchospasm or a difficult to manage pulmonary issue, such as would be expected from a tough to control asthma patient. The medical adviser also noted that the employee was not on intravenous or oral steroids.

By decision dated May 12, 2010, OWCP denied appellant's claim for compensation. It found the weight of the evidence was represented by the medical adviser.

Appellant requested reconsideration and submitted additional evidence. In a report dated June 15, 2010, Dr. Jhaver noted the findings of OWCP's medical adviser. She noted that the employee had not been taking Inderal at the time of her death. Dr. Jhaver stated that it was well known that asthma and COPD are exacerbated by mold exposure. She further stated that if these conditions are severe and prolonged they can result in pulmonary hypertension and right-sided heart failure. Dr. Jhaver noted that the employee underwent bypass surgery in September 2009, and died secondary to complications from her procedure and hospital stay. The employee "developed renal failure requiring hemodialysis. She also suffered from acute respiratory failure requiring a tracheostomy as she could not be weaned from the ventilator. This is a complication that is sometimes seen in patients with underlying pulmonary conditions such as asthma and COPD."

In a report dated July 8, 2010, Dr. Kralik stated that he treated the employee in 2009. He noted that she had severe pulmonary dysfunction that by history was due to a work-related fungal exposure. Dr. Kralik further stated:

> "In the final days the biggest change was [the employee] respiratory deterioration. She began to require high oxygen concentration and high ventilator pressures. This had not been the case in the first two months of [the employee's] postoperative course. At that point the issue was not that she was too weak to breathe on her own. It became the inability of the lungs to oxygenate the blood and release carbon dioxide. Cultures were inconclusive at that time as to the cause of [the employee's] respiratory failure but it was my impression that it was a fungal infection."

OWCP requested a supplemental report from its medical adviser. In a report dated January 31, 2011, the medical adviser stated that Dr. Jhaver referred to chronic lung disease as a cause of pulmonary hypertension, resulting in cardiac complications that could worsen the employee's overall condition. He stated that based on the available evidence "left heart disease is a much [more] likely explanation of elevated pulmonary arterial pressures (pulmonary hypertension) rather than the chronic lung disease by itself. Left heart disease is not related to her industrial injury." The medical adviser also stated, "Rather than attributing the cause of death to asthma, or her industrial exposure, I would suggest going over the contributing element such as issues of infection control and cleanness of the surgical team during the entire perioperative period."

By decision dated February 8, 2011, OWCP reviewed the case on its merits. It denied modification of the previous decision finding that the employee's death was not casually related to federal employment.

LEGAL PRECEDENT

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 her employment. This burden includes the necessity of furnishing medical opinion evidence of a cause and effect

relationship based on a complete factual and medical background.[2] The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale.[3] The mere showing that an employee was receiving compensation for total disability at the time of her death does not establish that her death was causally related to her employment.[4]

FECA provides that, if there is a 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 the examination.[5] The implementing regulations refer to this as a referee examination and provide that OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[6]

ANALYSIS

Appellant has filed a claim for compensation based on the December 8, 2009 death of the employee. It is evident from the record that the medical issue presented is a difficult one involving pulmonary and cardiac conditions, as well as recovery from surgery and other factors. It is also evident that there is a medical disagreement between OWCP's medical adviser and attending physicians Dr. Jhaver and Dr. Kralik on the issue of whether the employee's death was causally related to federal employment.

Drs. Jhaver and Kralik supported causal relationship. Dr. Kralik indicated that there was respiratory deterioration prior to death related to the mold exposure. Dr. Jhaver stated that the mold exposure exacerbated the asthma and COPD, resulting in pulmonary hypertension and heart disease that contributed to the employee's death. OWCP's medical adviser, however, disagreed and opined that the death was not causally related, finding no evidence of a pulmonary contribution. He also found that the heart disease was not employment related and the death was more likely attributed to infection control in the postoperative period.

In view of the conflict in the medical evidence on this issue, the Board finds the case must be remanded for a referee examination pursuant to 5 U.S.C. § 8123(a). After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds there is a conflict between OWCP's medical adviser and the employees' attending physicians regarding causal relationship between the employee's death and her federal employment. The case is remanded for resolution of the conflict.

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[2] *Carolyn P. Spiewak (Paul Spiewak)*, 40 ECAB 552 (1989).

[3] *Kathy Marshall (Dennis Marshal)*, 45 ECAB 827 (1994).

[4] *Edna M. Davis (Kenneth L. Davis)*, 42 ECAB 728 (1991).

[5] 5 U.S.C. § 8123(a).

[6] 20 C.F.R. § 10.321 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 8, 2011 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 26, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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