

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

)	
F.D., claiming as widow of S.D., Appellant)	
)	
and)	Docket No. 13-235
)	Issued: August 26, 2013
U.S. POSTAL SERVICE, POST OFFICE,)	
Spring Valley, CA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 15, 2012 appellant filed a timely appeal of an August 23, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her death benefits claim. Pursuant to the Federal Employees' Compensation Act¹ (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 appellant established that the employee's death was causally related to factors of his federal employment.

On appeal appellant contends that the impartial medical specialist selected in this case was not qualified in the appropriate specialty. She also contends that OWCP failed to accept the factors of retaliation and harassment as compensable.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a January 24, 2000 decision, the Board found that the factual evidence established a compensable factor in that the employee's postal route required more than eight hours to prepare and complete.² The Board remanded the case to OWCP for further development. On remand, OWCP accepted an 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 March 9, 2007 decision, the Board set aside an OWCP nonmerit decision dated June 2, 2006.³ The Board found that it improperly denied appellant's request for merit review as she submitted new and relevant factual evidence. In a March 26, 2008 decision, the Board set aside an April 20, 2007 OWCP decision denying appellant's claim.⁴ The Board found the case was not in posture on the question of whether appellant established harassment or retaliation as compensable employment factors. In a September 24, 2009 decision, the Board remanded the case for further development of the medical evidence. The Board found the evidence of record sufficient to establish retaliation as a compensable factor.⁵ The Board also found that development of the medical evidence was warranted on whether the employee's death was caused or aggravated by the employment factors. In a February 22, 2011 decision, the Board set aside a May 13, 2010 OWCP decision and again remanded the case for further development.⁶ It found an unresolved conflict in medical opinion between Dr. Khalid Rehman, a second opinion Board-certified internist with subspecialties in hematology and oncology, and Dr. Paul Rosch, a Board-certified internist for appellant, on whether the employee's colon cancer was caused or hastened by the accepted emotional condition. The facts of the case as set forth in the Board's prior decisions are hereby incorporated by reference.⁷

On January 19, 2012 OWCP referred the case record to Dr. Shamoan Ahmad, a Board-certified internist with a subspecialty in oncology, to resolve the conflict in the medical opinion evidence. The statement of accepted facts provided to the physician listed as the accepted factors that the employee's carrier route required more than eight hours a day to complete and the employee had been subjected to harassment and retaliation at the employing establishment.

² Docket No. 99-1439 (issued January 24, 2000). On May 26, 1998 OWCP 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 OWCP hearing representative affirmed the denial. The Board found a compensable factor under *Lillian Cutler*, 28 ECAB 125 (1976).

³ Docket No.06-1937 (issued March 9, 2007).

⁴ Docket No. 07-1857 (issued March 26, 2008).

⁵ Docket No. 08-2190 (issued September 24, 2009).

⁶ Docket No. 10-1719 (issued February 22, 2011).

⁷ 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.

On May 16, 2012 OWCP received Dr. Ahmad's undated report. Dr. Ahmad reviewed the employee's medical records and stated his agreement with the second opinion report of Dr. Rehman that the employee's colon cancer was not caused or hastened by his depression or adjustment disorder. He noted that the results of some studies had indicated a link between various psychological factors and an increased risk of developing cancer, no direct cause and effect relationship had been proven. In response to the inquiry as to whether the employee's diagnosed metastatic colon cancer was connected to the work-related emotional condition, Dr. Ahmad responded "No." He responded "N/A" to the remaining inquiries asking for further opinion on aggravation, findings and nonindustrial cause.

By letter dated May 22, 2012, OWCP notified Dr. Ahmad that clarification of his medical opinion was sought on whether the employee's stress condition aggravated the tumor growth. Dr. Ahmad was asked to submit additional rationale in support of his stated response of "No" when asked to address causal relation and aggravation.

In a June 25, 2012 response, Dr. Ahmad resubmitted a copy of his prior undated report. He restated his agreement with Dr. Rehman's opinion that the employee's colon cancer was not caused or hastened by his depression and adjustment disorder. Dr. Ahmad noted that in the absence of substantiated proof, the studies indicating a link between psychological factors and increased risk for cancer could not be asserted in this case. He noted that the studies were of "animal models" that could not be extrapolated to humans in the absence of human studies. In response to the question on causal relation, Dr. Ahmad replied "No. There is no evidence to support that the claimant's cancer was medically connected to the work or aggravated by it. There is not literature to support this notion."

By decision dated August 23, 2012, OWCP denied appellant's claim for survivor's benefits. It found the opinion of Dr. Ahmad, the impartial medical specialist, established that the employee's colon cancer and death were unrelated to the accepted emotional condition or compensable work factors.

LEGAL PRECEDENT

FECA⁸ 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.⁹ 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.¹⁰ This burden includes the necessity of furnishing rationalized

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Id.* at § 8102(a).

¹⁰ *D.H. (G.H.)*, 58 ECAB 636 (2007); *Viola Stanko (Charles Stanko)*, 56 ECAB 636 (2005).

medical opinion evidence, based on a complete factual and medical background, showing causal relationship.¹¹

Section 8123(a) of FECA¹² provides that, if there is 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 an examination.¹³ 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 OWCP medical adviser, OWCP shall appoint a third physician to make an examination.¹⁴ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁵

ANALYSIS

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

In a February 22, 2011 decision, the Board found an unresolved conflict in the medical opinion evidence between Dr. Rehman, a second opinion Board-certified internist with subspecialties in hematology and oncology, and Dr. Rosch, appellant's Board-certified internist, requiring further development of the evidence on the issue of whether the employee's colon cancer was caused or hastened by the accepted emotional condition. On remand, OWCP properly referred the employee's case record for review by Dr. Ahmad, selected as the impartial medical referee.

The Board finds that the reports of Dr. Ahmad are not sufficient to resolve the conflict in medical opinion. In both reports, Dr. Ahmad stated agreement with the report and conclusions of Dr. Rehman, the second opinion specialist, who found that the employee's colon cancer had not been caused or aggravated by the accepted emotional condition. He provided reference to studies performed over 30 years regarding the relationship between cancer, stress and psychological factors and noted conflicting results. In addressing OWCP's questions concerning the issues of causal relationship, Dr. Ahmad provided a brief "No" without further elaboration.

By letter dated May 22, 2012, OWCP requested clarification from Dr. Ahmad, asking that he address with rationale the issues of causal relationship and aggravation. The Board has held that, when OWCP 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 or

¹¹ *L.R. (E.R.)*, 58 ECAB 369 (2007); *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

¹² 5 U.S.C. § 8123(a).

¹³ *J.J.*, Docket No. 09-27 (issued February 10, 2009); *F.R.*, 58 ECAB 607 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁴ 20 C.F.R. § 10.321.

¹⁵ *R.H.*, 59 ECAB 382 (2008); *Elaine Sneed*, 56 ECAB 373 (2005).

elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in his original report.¹⁶

In a supplemental June 25, 2012 report, Dr. Ahmad advised again that he agreed with Dr. Rehman's conclusion that the employee's colon cancer was not aggravated or caused by his adjustment disorder and depression. He again referenced conflicting animal studies that he stated could not be extrapolated to humans and that the employee did not have a cancer caused by a virus. Dr. Ahmad again responded "No" that there was no evidence to support that the employee's cancer was caused or aggravated by his work as "[t]here is no literature to support this notion."

The Board finds that Dr. Ahmad's reports are not sufficiently rationalized such that his medical opinion is of diminished probative value. In *Frederick Justiniano*,¹⁷ the Board set aside the report of an impartial specialist who stated his agreement with the opinion of an OWCP second opinion physician without offering adequate medical rationale to support his own medical conclusions. In the present appeal, Dr. Ahmad relied too extensively on the opinion of Dr. Rehman without providing an adequate explanation for his own conclusions on the questions pertaining to causal relation and aggravation.

The conflict in medical opinion is unresolved. When an 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, OWCP must submit the case record to another impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue.¹⁸

Upon return of the case record, OWCP should refer appellant to another impartial specialist. The impartial specialist should provide an opinion addressing whether the employee's colon cancer was aggravated by the accepted compensable employment factors of overwork, harassment and retaliation. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision.

On appeal appellant contends that Dr. Ahmad is not an appropriate specialist as he has no experience in psychiatry or psychology. In view of the Board's findings of a conflict in the medical opinion evidence, necessitating referral to another impartial medical specialist the Board finds appellant's argument regarding Dr. Ahmad to be moot.

CONCLUSION

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

¹⁶ *F.D.*, Docket No. 09-1346 (issued July 19, 2010); *V.G.*, 59 ECAB 635 (2008); *Nancy Keenan*, 56 ECAB 687 (2005); *Talmadge Miller*, 47 ECAB 673 (1996); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810(11)(e) (September 2010).

¹⁷ 45 ECAB 491 (1994).

¹⁸ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 23, 2012 is set aside and the case remanded for further proceeding consistent with the above opinion.

Issued: August 26, 2013
Washington, DC

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

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

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