

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

A.S., claiming as widow of, M.S., Appellant and DEPARTMENT OF THE NAVY, PEARL HARBOR NAVAL SHIPYARD, Pearl Harbor, HI, Employer)))))))))	Docket No. 13-768 Issued: August 7, 2013
---	---	---

Appearances: *Case Submitted on the Record*
John F. Dillon, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On February 13, 2013 appellant, through counsel, filed a timely appeal of a January 18, 2013 decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for death benefits. 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 has met her burden of proof to establish that the employee's death was causally related to exposure to asbestos at work.

FACTUAL HISTORY

On November 12, 2010 the employee, then a 77-year-old asbestosis worker, filed an occupational disease claim alleging that on April 7, 2009 he first became aware of his chronic

¹ 5 U.S.C. § 8101 *et seq.*

obstructive pulmonary disease and asbestosis and its relationship to his federal employment. He retired from the employing establishment on June 3, 1988. On June 1, 2011 OWCP accepted the employee's claim for asbestosis.

The employee died on January 23, 2011 and on April 6, 2011 appellant filed a claim for compensation (Form CA-5) due to the death of her husband. Appellant attributed his death to congestive heart failure/asbestosis due to his work exposure to asbestosis and submitted a copy of the death certificate. The death certificate listed the date of death as January 23, 2011 and the cause of death as cardiac secondary to congestive heart failure. Winston Walker, a nurse, was listed on the certificate as the person who pronounced the employee's death. Derek Turnage, the coroner, was the person deciding the cause of death based on his investigation. Appellant also submitted a death certificate for the employee's first wife who died on May 1, 2006, a marriage certificate for the employee and appellant, and an itemized list of funeral expenses.

In a May 18, 2011 report, OWCP's medical adviser reviewed the evidence of record and concluded that the employee's death was due to nonemployment-related factors. The medical adviser noted that the death certificate listed the cause of death as cardiac arrest secondary to congestive heart failure. Based on the death certificate and medical evidence of record, he concluded that the employee's work-related asbestosis was not a cause of the employee's death.

In a June 14, 2011 attending physician's form, Dr. Ghulam Arain, an attending Board-certified internist, attributed the employee's death to cardiac arrest and congestive heart failure. He listed asbestosis, chronic obstructive pulmonary disease (COPD), heart disease and prostate cancer as contributing causes of the employee's death. In support of this conclusion, Dr. Arain stated that the underlying asbestosis and chronic pulmonary obstructive disease were the main cause of the employee's gradual decline.

On December 1, 2011 OWCP advised appellant regarding the evidence required to establish her survivor's claim. It informed her that the evidence currently in the record was insufficient to establish her claim.

In a March 27, 2012 report, Dr. Arain stated that he reviewed the medical records for the employee from Highland Community Hospital and noted that he had treated the employee several times during his admittance to the hospital. He related that the death certificate was prepared by a coroner, who was not a medical person, who did not have all of the relevant information on the employee when pronouncing his death. At the time of the employee's death, he had significant lung disease with x-ray findings consistent with asbestosis and echocardiogram findings consistent with pulmonary hypertension. Dr. Arain related that in elderly patients with multiple medical problems that it is sometimes difficult to list one cause of death. In the case of the employee, Dr. Arain opined that his declining health and asbestosis were a significant cause of the complications causing the chronic obstructive pulmonary disease and cardiac disease.

By decision dated January 18, 2013, OWCP denied appellant's claim for survivor benefits. It found that the employee's death was not caused or aggravated by his accepted work-related asbestosis.

LEGAL PRECEDENT

FECA 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.²

Appellant 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 employment. This burden includes the necessity of furnishing rationalized medical opinion evidence of a cause and effect relationship, based on a complete factual and medical background, showing causal relationship. The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale.³

Section 8123(a) of FECA⁴ 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.⁵ 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.⁶

ANALYSIS

Appellant claimed that the employee's death on January 23, 2011 was causally related to his federal employment as his accepted condition of asbestosis caused or contributed to his death. By decision dated January 18, 2013, OWCP relied upon the May 18, 2011 medical adviser's report when it denied appellant's claim for survivor benefits. The Board finds that there is a conflict in medical opinion between the medical adviser and Dr. Arain, for appellant, on the issue of whether the employee's death was causally related to his federal employment.

In a May 18, 2011 report, the medical adviser reviewed the employee's medical record and the death certificate. He concluded that the employee's death was not caused or aggravated by his accepted condition of asbestosis. In support of this conclusion, the medical adviser relied upon the cause of death listed in the death certificate and the medical evidence he reviewed.

Dr. Arain an attending Board-certified internist, based upon a review of the medical evidence and his treatment of the employee, concluded that the employee's asbestosis was a contributing cause of his death. He also noted that the death certificate was not issued by a medical person when listing the cause of death. Dr. Arain also explained how the exposure to asbestosis and pulmonary hypertension aggravated the employee's congestive heart failure and,

² 5 U.S.C. § 8133.

³ *L.R. (E.R.)*, 58 ECAB 369 (2007); *Viola Stanko (Charles Stanko)*, 56 ECAB 436 (2005).

⁴ 5 U.S.C. § 8123(a).

⁵ *J.J.*, Docket No. 09-27 (issued February 10, 2009); *F.R.*, 58 ECAB 607 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

⁶ 20 C.F.R. § 10.321.

thus, contributed to his death. He stated that x-rays revealed significant lung disease evincing asbestosis and echocardiogram findings consistent with pulmonary hypertension and found that the employee's declining health and asbestosis significantly caused complications resulting in COPD and cardiac disease.

Due to the unresolved conflict in the medical evidence between the medical adviser and Dr. Arain, the Board will set aside OWCP's decision and remand the case for referral of the employee's record to an impartial medical specialist to resolve the conflict. After such further development of the record as it deems necessary, OWCP shall issue a *de novo* decision on whether the employee's death on January 23, 2011 was causally related to the accepted employment condition of asbestosis.

CONCLUSION

The Board finds the case is not in posture for a decision due to an unresolved conflict in medical opinion evidence.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 18, 2013 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: August 7, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board