



employing establishment regarding the employee's exposure to toxins in the workplace.<sup>2</sup> The law and the facts of the case as set forth in the Board's order are incorporated by reference. The factual and procedural history of the case is set forth below.

On December 16, 2009 the employee, then a 56-year-old customer service supervisor filed an occupational disease claim (Form CA-2) alleging that he sustained small cell carcinoma of the lung<sup>3</sup> due to occupational exposures to toxic chemicals. He asserted that the employing establishment was built on a site contaminated with carcinogenic chemicals. The employee noted that during the past few years, seven of his 54 coworkers were diagnosed with cancer and four additional coworkers were diagnosed with serious thyroid conditions. He stopped work on November 3, 2009 and did not return.

In a January 8, 2010 letter, OWCP advised the employee of the additional evidence needed to establish his claim, including a detailed history of his occupational exposures to carcinogens and a report from his attending physician explaining how and why those specific exposures would cause small cell lung cancer.

By decision dated March 1, 2010, OWCP denied the employee's claim because the medical evidence failed to establish that his lung cancer was causally related to occupational chemical exposures. It accepted unspecified workplace events as factual.

On March 10, 2010 the employee requested a telephonic hearing, held June 15, 2010. At the hearing, he stated that he worked at the employing establishment from when it opened in 1992 through October 2009. Beginning in 2005, 10 of 54 coworkers were diagnosed with cancer and an additional four with thyroid conditions. The employee asserted that the soil beneath the employing establishment remained contaminated and carcinogenic. He noted that he had smoked one pack of cigarettes a day for a 30-year period, but quit smoking when diagnosed with cancer.

After the hearing, the employee submitted a June 3, 1991 interim corrective action report and August 28, 1998 closure report from Clayton Environmental Consultants, a firm retained by the employing establishment to monitor the abatement of toxins found during the construction of the employing establishment. Property records revealed that from the 1920's to 1940's, the site was a lumber yard. In the 1930's, the site also included a gas station. From 1982 to 1985, the site was used by an automobile dealer and repair shop. Site excavation in the fall of 1990 revealed six 1,000 gallon underground petroleum storage tanks. In November 1990, the employing establishment encountered soil contamination while removing three of the tanks, resulting in the removal of 5,023 cubic yards of petroleum contaminated soil from December 4, 1990 to February 12, 1991. Testing confirmed the release of total petroleum hydrocarbons as high as 156 parts per million as well as toluene and xylene, necessitating an excavation pit of 25

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<sup>2</sup> Docket No. 10-2374 (issued June 28, 2011).

<sup>3</sup> A November 25, 2009 computerized tomography scan showed a right lower lobe mass, ground glass infiltrate and fatty infiltration of the liver. On December 2, 2009 Dr. Philip Kaplan, an attending osteopathic physician Board-certified in critical care, diagnosed a right lung mass with adenopathy. Dr. Chris Bonnet, an attending, Board-certified internist, diagnosed lung cancer on December 18, 2009.

by 90 feet and between six and seven feet in depth. In December 4, 1997 soil tests at several areas around the building showed the continued presence of one, two dichloroethane, benzene, one, four dichlorobutane and toluene. In 1998 soil testing showed toluene at 40 micrograms per kilogram (mg/kg), xylene at 170 mg/kg, benzoapyrene at 380 mg/kg and benzofluoraethane at 360 mg/kg. At the western border of the site, soil samples from beneath a sidewalk remained contaminated with petroleum and had a noticeable petroleum odor. Soil bores analyzed in 1998 showed lead at 19 mg/kg and chromium at 20 mg/kg. Based on analysis of the 1998 soil bores, the State of Michigan granted closure of the property on November 4, 1998, certifying that there were no toxins present in analyzed soil that exceeded Tier 1 residential risk standards.

Following the hearing, the employee submitted pathology reports diagnosing small cell anaplastic carcinoma of the right lung on December 8, 2009 bronchoscopy. In a July 22, 2010 report, Dr. James Fontanesi, an attending Board-certified radiation oncologist, noted the employee's account of soil contamination at the employing establishment. Dr. Fontanesi opined that "various industrial contaminants have been associated with the development of malignancies; however [the employee's] smoking history probably has the strongest bearing on the development of his lung cancer."

By decision dated and finalized August 10, 2010, OWCP's hearing representative affirmed OWCP's March 1, 2010 decision denying the employee's claim on the grounds that causal relationship was not established. OWCP further found that as appellant did not submit a scientific analysis of the soil beneath the employing establishment, he had not proven any occupational exposure to toxic substances.

Counsel appealed to the Board on September 27, 2010. On December 2, 2010 the Solicitor of Labor filed a motion to remand the case to OWCP to obtain additional evidence from the employing establishment regarding possible toxic exposures. It stated it would "request that the [employing establishment] provide information [regarding] whether appellant was exposed to any known toxins, the frequency and duration of ... exposure, [if any,] and whether [the employing establishment] took precautions to minimize exposure [or its] effect..." It also would request the employing establishment to "provide information on [the employee's] contention concurring the high incidence of illness among the employers" at that facility. By order issued June 28, 2011, the Board granted the motion to remand as OWCP would "further develop the record to determine whether [the employee] was exposed to toxins or other substances and issue a *de novo* decision regarding whether the exposure resulted in lung cancer."

In a September 21, 2011 letter, OWCP advised the employing establishment that additional information was required to properly adjudicate the claim for lung cancer. It requested that the employing establishment provide "comments from a knowledgeable supervisor on the accuracy of all statements provided by the employee relative to this claim." The employer was asked to describe any toxic exposures in the work environment, including the frequency and duration of such exposure and any precautions taken. OWCP requested that the employing establishment address the employee's allegations of serious illnesses among his coworkers.

In response, the employing establishment submitted a memorandum date stamped on October 7, 2011. A supervisor stated that there was "no supervisor that has been here at the

employing establishment long enough to know the accuracy of [the employee's] statements, *therefore we do not concur.*" *The supervisor asserted that the employee's official duties did not expose him to any toxins and there were no precautions taken as there were no exposures.* The supervisor noted that there were "a number of employees with health issues, breast cancer, lung cancer, stomach cancer, skin cancer, some thyroid issues, several heart attacks, but nothing has shown any of them to be work related." The supervisor attached a copy of the employee's position description, outlining managerial duties.

On October 21, 2011 the employee died. His death certificate lists the cause of death as metastatic small cell lung cancer.

By decision dated November 17, 2011, OWCP denied the employee's claim on the grounds that causal relationship was not established. It found that the employing establishment's October 7, 2011 statement indicating that there was no supervisor competent to respond to OWCP's inquiries was sufficient to establish that the employee was not exposed to toxic substances at work.

In a November 22, 2011 letter, counsel requested a telephonic hearing, held March 20, 2012. At the hearing, appellant confirmed that many of the employee's coworkers recently developed cancer.

On February 20, 2012 appellant filed a claim for death benefits (Form CA-5) due to the employee's death from Stage IV metastatic small cell lung cancer.

In a June 28, 2012 decision, OWCP's hearing representative affirmed the November 17, 2011 decision denying the employee's claim, finding that causal relationship was not established. The hearing representative found that although the employee documented that toxic soil was removed from the building site where he worked for 20 years, he had not established as factual that there were toxic chemicals in the soil beneath the building itself. The hearing representative noted that the employing establishment denied the employee's exposure to any known carcinogens in the workplace. The hearing representative further found that the medical evidence of record was insufficient to establish a causal relationship between the employee's lung cancer and any occupational exposures such that appellant was not entitled to survivor's benefits.

### **LEGAL PRECEDENT**

FECA provides for the payment for compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>4</sup> The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of performance."<sup>5</sup>

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<sup>4</sup> *Id.* at § 8102(a).

<sup>5</sup> This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

In a claim for survivor's benefits, an award of compensation 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 or her employment.<sup>6</sup> Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the employee's death was causally related to factors of his employment.<sup>7</sup> This burden includes the necessity of furnishing a rationalized medical opinion based on an accurate factual and medical background and supported by medical rationale explaining the nature of the cause and effect relationship between the employee's death and specific employment factors.<sup>8</sup>

### ANALYSIS

The employee died on October 21, 2011. The death certificate lists the cause of death as metastatic small cell lung cancer. Thus, in order to prevail in her claim for death benefits, appellant must demonstrate that factors of her husband's federal employment caused his demise.

The Board notes that appellant has submitted detailed evidence establishing that prior to construction of the employing establishment in 1992, the site was contaminated with petroleum hydrocarbons, toluene and xylene. Postabatement soil testing on December 4, 1997 showed the continued presence of one, two dichloroethane, benzene, chromium, one, four dichlorobutane and toluene. In 1998 soil testing revealed toluene, xylene, benzo(a)pyrene and benzofluoranthene. Unexcavated soil beneath a municipal sidewalk remained contaminated with petroleum. The State of Michigan granted closure of the property on November 4, 1998, certifying that the toxins present in soil bore areas were below residential use risk standards. Appellant also submitted a July 22, 2010 report from Dr. Fontanesi, an attending Board-certified radiation oncologist, finding that while industrial contaminants were associated with the development of malignancies, the employee's smoking history likely had the "strongest bearing on the development of his lung cancer."

Pursuant to the first appeal in this case, the Director moved to remand the case for OWCP to request evidence from the employing establishment regarding whether the employee was exposed to toxins at work. It noted that the employee had provided probative evidence documenting the presence of multiple toxins at the site of his workplace, and it noted OWCP's procedures provided that the employer had the obligation "to assist in the development of the case record, especially where the content of the evidence is of the type that is more readily accessible to it or another government source."<sup>9</sup> Following the Board's order remanding case dated June 28, 2011, OWCP requested that the employing establishment provide additional information regarding appellant's claim.

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<sup>6</sup> *Juanita Terry (Rex Terry)*, 31 ECAB 433 (1980).

<sup>7</sup> *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001); *Judith L. Albert (Charles P. Albert)*, 47 ECAB 810 (1996).

<sup>8</sup> *Kathy Marshall (Dennis Marshall)*, 45 ECAB 827, 832 (1994).

<sup>9</sup> E.g. *Robert M. Brown*, 30 ECAB 175 (1978); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Occupational Illness*, Chapter 2.806.4(b)(4) (September 2010).

The employing establishment submitted an October 7, 2011 memorandum stating that there was “no supervisor that has been here at the [employing establishment] long enough to know the accuracy of [the employee’s] statements”; that “there were no tasks that [appellant] performed that resulted in exposure to anything other than him smoking in the garage”; that “there were no precautions as there was no exposure”; that “[h]is duties did not vary from the official description,” that “no, he was not exposed to any known toxins”; that “[t]here was no precaution as there was no exposure”; and that “there have been a number of employees with health issues, breast cancer, lung cancer, stomach cancer, skin cancer, some thyroid issues, several heart attacks, but nothing has shown any of them to be work related.” Based on this memorandum, OWCP denied appellant’s claim by decisions issued November 17, 2011 and March 20, 2012, finding that causal relationship was not established. The Board finds, however, that OWCP failed to properly develop this claim, as requested in its request to remand.

Information pertaining to any toxic exposures is essential to an ultimate determination as to whether the employee sustained any injury or condition causally related to his employment. The employing establishment’s reluctance or refusal to submit requested evidence relating to an employee’s claim should not be an impediment to a successful prosecution of the claim.<sup>10</sup> In the present case, the type of information being sought, including any dust, air, vapor and water tests conducted in the employing establishment from 1992 through October 2009, is normally within the custody of the employing establishment and not readily available to appellant.<sup>11</sup> Accordingly, appellant should not be penalized for the employing establishment’s failure to submit such information.<sup>12</sup>

Proceedings under FECA are not adversarial in nature, and OWCP is not a disinterested arbiter.<sup>13</sup> While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>14</sup> In this case, OWCP undertook development of the factual evidence needed as the foundation for a proper medical opinion by requesting information from the employing establishment regarding the employee’s toxic exposures. As OWCP undertook this development, it had an obligation to secure a response adequately addressing the relevant issues.<sup>15</sup>

The case will be remanded to OWCP to appropriately determine the nature and extent of the employee’s exposure to any toxic chemicals, which had been demonstrated to be present at the employing establishment site in 1991, from 1992 through October 2009. Such response should refer to specific industrial hygiene tests documenting the presence or absence of any

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<sup>10</sup> *T. W.*, Docket No. 12-1882 (issued March 12, 2013).

<sup>11</sup> *Id.*; see *Marco A. Padilla*, 51 ECAB 202 (1999).

<sup>12</sup> *Id.*

<sup>13</sup> *Vanessa Young*, 55 ECAB 575 (2004).

<sup>14</sup> *Richard E. Simpson*, 55 ECAB 490 (2004).

<sup>15</sup> See *Peter C. Belkind*, 56 ECAB 580 (2005).

toxins in the employee's work environment. Following such factual and medical development, OWCP shall issue a *de novo* decision in the case.

**CONCLUSION**

The Board finds that the case is not in posture for a decision. The case will be remanded to OWCP for further development regarding the employee's claimed occupational toxic exposures.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 28, 2012 decision of the Office of Workers' Compensation Programs is set aside, and the case remanded for further development consistent with this decision.

Issued: June 12, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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