

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

A.S., widow of M.S., Appellant)

and)

**DEPARTMENT OF THE NAVY, PEARL
HARBOR NAVAL SHIPYARD,
Pearl Harbor, HI, Employer**)

**Docket No. 14-891
Issued: September 25, 2014**

Appearances:

*John F. Dillon, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 10, 2014 appellant, through counsel, filed a timely appeal of a January 10, 2014 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 in establishing that the employee's death was causally related to exposure to asbestos at work.

On appeal counsel argues that the employee's asbestosis contributed to his death.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. On August 7, 2013 the Board set aside a January 18, 2013 decision denying appellant's claim for survivor benefits.² The Board found that there was an unresolved conflict between Dr. Ghulam Arian, an attending Board-certified internist, and an OWCP medical adviser on the issue of whether the employee's work-related asbestosis contributed to his death. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.³

Following the Board's August 7, 2013 decision, OWCP, by letter dated October 7, 2013, referred the employee's case file and medical records, including a statement of accepted facts and list of questions, to Dr. Kyle I. Happel, a Board-certified internist with subspecialty certifications in critical care medicine and pulmonary disease, for an impartial medical opinion.

In a December 12, 2013 report, Dr. Happel detailed the factual and medical history upon his review of the medical records and provided his analysis. He related that the employee exhibited multiple risk factors for coronary artery disease, which included hypertension, smoking and hypercholesterolemia. Dr. Happel noted that in the United States coronary artery disease is one of the most common causes of death. A review of objective testing revealed that the employee had a prior myocardial infarction and underwent stent replacement and percutaneous coronary angiography. According to Dr. Happel the employee's coronary artery disease, hypercholesterolemia and congestive heart failure were unrelated to his asbestosis and that asbestosis was not a recognized factor for congestive heart failure. He attributed the employee's death to refractory congestive heart failure which led to cardiac arrest. The underlying cause of the employee's congestive heart failure was coronary artery disease.

By decision dated January 10, 2014, 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.⁴

² Docket No. 13-768 (issued August 7, 2013).

³ 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 obstructive pulmonary disease and asbestosis and its relationship to his federal employment. The employee 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. She attributed his death to congestive heart failure/asbestosis due to his work exposure to asbestosis and submitted a copy of the death certificate.

⁴ 5 U.S.C. § 8133.

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.⁵

Section 8123(a) of FECA provides in pertinent part: "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."⁶ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.⁷

ANALYSIS

The Board previously found a conflict in medical opinion existed between the reports of Dr. Arian, for appellant, and an OWCP medical adviser on the issue of whether the employee's work-related asbestosis contributed to his death and remanded the case for referral of the case file to an impartial medical specialist and to issue a *de novo* decision. On remand, OWCP referred appellant to Dr. Happel for an impartial medical evaluation.

The Board finds that Dr. Happel, based on an extensive review of the medical evidence and statement of accepted facts, concluded that the employee's accepted work-related asbestosis did not cause or contribute to his death. Rather, he concluded that the employee died due to end stage congestive heart failure as a result of his coronary artery disease, which was unrelated to the accepted work-related asbestosis. Dr. Happel noted that the employee exhibited multiple risk factors for coronary artery disease, which included hypertension, smoking and hypercholesterolemia, and coronary artery disease is one of the most common causes of death in the United States. He opined that asbestosis was not a recognized factor for congestive heart failure. Dr. Happel attributed the employee's death to refractory congestive heart failure which led to cardiac arrest with an underlying cause of coronary artery disease. As asbestosis is not recognized as a factor in causing biventricular congestive heart failure, he opined that the employee's asbestosis was not a direct cause or contributing factor in his death.

The Board finds that Dr. Happel provided a well-rationalized, impartial medical opinion based on a complete factual background, an extensive and thorough review of the accepted facts and the medical record. Dr. Happel's opinion that the employee's death on January 23, 2011 was not causally related or aggravated by his accepted work-related asbestosis is entitled to

⁵ *L.R. (E.R.)*, 58 ECAB 369 (2007); *Viola Stanko (Charles Stanko)*, 56 ECAB 436 (2005).

⁶ 5 U.S.C. § 8123(a); *see also R.H.*, 59 ECAB 382 (2008); *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁷ *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

special weight and represents the special weight of the evidence.⁸ The Board will affirm OWCP's January 10, 2014 decision denying compensation for death benefits.

On appeal, counsel asserted that the employee had severe asbestosis and chronic obstructive pulmonary disease, the asbestosis caused severe respiratory impairment and that the asbestosis was a contributing factor in the employee's death. For the reasons set forth above, the Board finds that OWCP properly relied on Dr. Happel's opinion in concluding that the employee's death was unrelated to his work-related asbestosis. Appellant has not submitted any medical evidence which would create a conflict with Dr. Happel's opinion.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that the employee's death on January 23, 2011 was causally related to the accepted work-related asbestosis.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 10, 2014 is affirmed.

Issued: September 25, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

⁸ *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *Gloria J. Godfrey*, 52 ECAB 486 (2001).