

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

L.S., widow of G.S., Appellant)	
)	
and)	Docket No. 14-1046
)	Issued: September 23, 2014
DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Gainsville, FL, Employer)	
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Appearances: *Case Submitted on the Record*
Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 1, 2014 appellant, through counsel, timely appealed the November 26, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed the denial of survivors' 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 the claim.

ISSUES

The issues are: (1) whether appellant established that the decedent employee's January 25, 2011 death was employment related; and (2) whether OWCP abused its discretion by denying appellant's request for subpoenas.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

The decedent employee, a former special agent, died on January 25, 2011 at the age of 59. He worked for the employing establishment approximately 22 years prior to his December 31, 2008 retirement. Appellant filed an occupational disease claim (Form CA-2) on October 9, 2012, alleging that her deceased husband developed chronic lymphocytic leukemia (CLL) and tonsillar lymphoma as a result of his federal occupational exposure.² She submitted an August 24, 2004 report from Dr. Mathew Miceli, a Board-certified oncologist, who diagnosed CLL. Dr. Miceli stated that it was his understanding that, as a DEA agent, the employee was involved with investigating methamphetamine (meth) labs. During takedown of these labs, he was exposed to organic solvents; probably such common ones as toluylene and benzene. Because of the employee's underlying bone marrow disorder, Dr. Miceli advised against further exposure to meth labs or solvents. He explained that the risk of further bone marrow injury was too high. Further, Dr. Miceli stated that the solvents "might" have contributed to the employee's CLL.

On October 23, 2012 OWCP advised appellant to file a survivor's claim (Form CA-5). It requested a factual statement regarding the decedent's employment exposure, as well as nonoccupational exposure to chemicals and carcinogens. OWCP also advised appellant of the need for additional medical evidence in support of the claim.

On October 31, 2012 appellant filed a claim for compensation by widow, (Form CA-5). She attributed her husband's January 25, 2011 death to meth exposure.

In a November 29, 2012 statement, the employing establishment advised that the decedent was a former DEA special agent, who served approximately 22 years prior to his retirement in December 2008. During his tenure, he participated in raiding and processing clandestine drug laboratories where illegal drugs were manufactured. The employing establishment indicated that all DEA special agents who entered clandestine drug laboratories were provided with appropriate personal protective equipment, as well as training in the proper use of such equipment. The equipment included secondary breathing apparatus, protective coveralls, gloves and foot protection. The employing establishment stated that, despite proper use of the protective gear, it was possible for an individual to be exposed to the myriad of chemicals used in the production of drugs in a clandestine laboratory.

OWCP also received a position description for Criminal Investigator, which major duties included "seizures, raids, arrests and dismantlement of clandestine laboratories." The position description listed that the employee was "[s]ubject to exposure to contagious diseases and to injury or death from harmful substances, all types of weapons and vehicular accidents."

In an undated statement, appellant noted that the employee worked in or around meth labs from 1999 through 2004. She explained that initially agents had no protective gear, but around 2002 they went from nothing to full hazmat gear. The employee tore down and cleaned-up labs and transported all seized chemicals back to work in either the trunk or rear floor board of his vehicle. Afterwards, he would air out the vehicle in the driveway and then showered.

² The Form CA-2 indicated the decedent last worked on August 31, 2008.

Appellant noted that her husband's clothes required immediate washing. She described the smell as nauseating. Appellant claimed that he had been exposed to various chemicals, including methanol, ether, benzene, methylene chloride, trichloroethane, toluylene, muriatic acid, sodium hydroxide, table salt, ammonia, anhydrous ammonia, red phosphorus and iodine. She stated that there was no family history of cancer dating back three generations. When appellant asked their physician if the meth or chemicals related to meth caused her husband's cancer, the physician indicated that some of the chemicals were linked and could cause cancer.

On February 15, 2013 OWCP asked the employing establishment for information regarding the decedent employee's occupational exposure. It requested a list of chemicals he was exposed to and information regarding the frequency and extent of his participation in meth lab raids. Additionally, OWCP requested a copy of the decedent's employment record and any medical records in its possession. Appellant was copied on the February 15, 2013 correspondence and OWCP specifically asked her to submit the decedent's death certificate and any other relevant medical evidence, as initially requested on October 23, 2012.

On March 5, 2013 the employing establishment advised OWCP that the decedent's records were archived in St. Louis, MO. Consequently, additional time was needed in order to comply with OWCP's February 15, 2013 request.

On March 14, 2013 OWCP granted the employing establishment a 30-day extension. During the allotted timeframe, no additional information was received from either appellant or the employing establishment.

In an April 24, 2013 decision, OWCP denied appellant's survivor's claim. It found that the evidence failed to substantiate the claimed occupational exposure and that there was insufficient medical evidence providing a diagnosis in connection with the decedent's employment exposure. Consequently, OWCP found that appellant failed to establish fact of injury.

Appellant's counsel requested an oral hearing, which was held on September 23, 2013. In advance of the hearing, he requested subpoenas to obtain documentation from the employing establishment regarding chemical exposure and the use of the protective equipment. Counsel also sought DEA investigative reports for all meth labs and indoor marijuana growing labs the decedent raided, including information regarding the type of toxic substances and levels he encountered in each raid. He also sought a list of all DEA agents evaluated for CLL and a list of those who died due to chemical exposure or cancer during the past 10 years. The hearing representative denied the subpoena request on September 10, 2013.

By decision dated November 26, 2013, the hearing representative affirmed OWCP's denial of survivors' benefits. The hearing representative denied appellant's hearing request on the grounds that it was too general in nature and the information requested was of a type that could be obtained in writing.

LEGAL PRECEDENT -- ISSUE 1

FECA provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.³ 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.⁴ This burden includes the necessity of furnishing rationalized medical opinion evidence demonstrating a causal relationship.⁵ The physician's opinion must be based on a complete factual and medical background, must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale explaining the relationship between the employee's death and his previous employment.⁶

ANALYSIS -- ISSUE 1

The Board finds that the employing establishment's November 29, 2012 statement corroborates that the employee was a DEA agent for 22 years. During his tenure, the employee participated in raids of laboratories where illegal drugs were manufactured. While he was provided protective equipment, the employing establishment acknowledge that it was possible for employees to be exposed to a myriad of chemicals used in the production of drugs. Specific employing establishment records pertaining to the employees' participation in the subject raids was not obtained or submitted to OWCP prior to the denial of this claim. However even if OWCP's case development regarding the decedent employee's occupational exposure was incomplete, this does not relieve appellant of her burden to establish that the employee's death was causally related to his employment.

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 an employment injury or to factors of his employment.⁷ She must submit a medical report from a physician who provides an accurate history of the employment injury, that correctly addresses the cause of death and that explains, with sound medical reasoning, how one led to the other. Such rationalized medical opinion evidence is absolutely necessary for appellant to establish the element of causal relationship. Without it, she has not established a *prima facie* case.⁸

The Board finds that appellant did not submit sufficient medical evidence regarding her husband's cause of death. The record does not include a death certificate verifying January 25, 2011 as the date of death. The only medical evidence of record predates the employee's death by more than six years. On August 24, 2004 Dr. Miceli surmised that the employee's exposure to

³ 5 U.S.C. §§ 8102(a) and 8133.

⁴ *L.R.*, 58 ECAB 369, 375 (2007).

⁵ *Id.*

⁶ *Id.*

⁷ *See Lorraine E. Lambert (Arthur R. Lambert)*, 33 ECAB 1111 (1982).

⁸ *R.L. (P.L.)*, Docket No. 08-2313 (February 18, 2009).

organic solvents “might” have contributed to his CLL. Appellant testified at the September 23, 2011 hearing that her husband’s CLL had not progressed beyond the initial stage one diagnosis, but that he subsequently developed a throat condition. Absent a death certificate it is unclear whether the employee died due to his throat condition. There is no medical report from a physician addressing how the employee’s CLL diagnosed in 2004 contributed to his death in 2011.

Ultimately, the burden of proof rests with appellant to establish the essential elements of her claim.⁹ Despite OWCP’s repeated requests that she submit evidence to support her survivors’ claim, the medical report of record is insufficient to establish the employee’s cause of death as related to the implicated occupational exposure. Consequently, appellant failed to satisfy her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

The employing establishment is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession or which it may acquire through investigation or other means. Such evidence may be submitted at any time pursuant to 20 C.F.R. § 10.118(a). A claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, 20 C.F.R. § 10.619. The Board’s function on appeal is to determine whether the hearing representative abused her discretion in granting or denying the subpoena request.¹⁰ In requesting a subpoena, the claimant must explain why the testimony or evidence is directly relevant to the issues at hand and also explain why a subpoena is the best method or opportunity to obtain such evidence because there are no other means by which the documents or testimony could have been obtained, see 20 C.F.R. § 10.619(a)(2).

ANALYSIS -- ISSUE 2

On appeal, counsel challenged the hearing representative’s denial of his subpoena request. Counsel argued that OWCP failed to properly develop the claim with respect to the decedent employee’s occupational exposure and the availability of protective equipment. He indicated that the requested information was necessary to lay a proper foundation for expert medical testimony regarding causal relationship.

The Board finds that the hearing representative properly denied appellant’s subpoena requests. She did not establish why a subpoena was the best method to obtain the evidence in question and why there was no other means by which the testimony could be obtained. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.¹¹ The Board finds that the hearing representative did not abuse his discretion in denying appellant’s request for subpoenas.

⁹ *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁰ *Mary Poller*, 55 ECAB 483, 489-90 (2004).

¹¹ *See Claudio Vazquez*, 52 ECAB 496 (2001).

CONCLUSION

Appellant has not established that the decedent employee's January 25, 2011 death was employment related. She has also not established that OWCP abused its discretion by denying her request for subpoena.

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 2014
Washington, DC

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

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

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