



## **FACTUAL HISTORY**

Appellant, widow of the deceased employee, filed a claim for death benefits on October 20, 2012.<sup>2</sup> The claim form indicated that the employee had died on July 17, 2012, and that the cause of death was prostate cancer. He had retired under Civil Service Retirement System and had applied for benefits with the Department of Veterans Affairs (VA). An attached attending physician's report, signed by appellant, provided a history that the employee spent two tours of duty as a civilian employee in Vietnam where he was exposed to Agent Orange and had been treated for advanced prostate cancer for 20 years. Additional diagnoses included lung and bone cancer. The form included a statement that "there has been [a] direct link between Agent Orange and prostate cancer." A physician named Dr. Nicholas Vogelzang, Board-certified in internal medicine and oncology, was identified. In an undated letter appellant related that the employee had been employed at the employing establishment in Utah. She stated that he served in Vietnam in 1970 and had received the Vietnamese Air Service Medal.

In a December 2, 2013 letter, OWCP requested that the employing establishment provide information from a knowledgeable supervisor regarding the employee's claimed Agent Orange exposure. This was to include a precise description of his work assignment and frequency and duration of any exposure. In a separate letter, appellant was asked to provide documentation of the employee's work history and a comprehensive medical report from his physician that explained how the Agent Orange exposure or other employment incidents contributed to his prostate cancer.

The employee's death certificate, signed by Dr. Warren Wheeler,<sup>3</sup> noted the immediate cause of death was carcinoma of the prostate. No additional causes were listed.

Appellant furnished information regarding awards given to the employee. This indicated that in July 1970 he was awarded the Vietnamese Air Service Medal for assistance in instructing, scheduling, and controlling the installation of specific guns and rocket launchers on three squadrons of helicopters at Bien Hoa, Nha Trang, and Da Nang, Vietnam.<sup>4</sup>

By decision dated January 23, 2014, OWCP denied the claim because appellant had failed to provide evidence to support or establish that the employee was exposed to Agent Orange during his federal employment or that the employee's prostate cancer and subsequent death were causally related to his employment noting that, as she apparently had completed and signed the attending physician's report, it did not constitute medical evidence.

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<sup>2</sup> The record indicates that appellant, through counsel, had previously contacted OWCP regarding filing a claim. Correspondence dated August 22, 2013 noted that counsel wrote OWCP trying to obtain a claim number. A facsimile transmittal from a District Director to counsel on October 31, 2013 acknowledges his request. On November 7, 2013 OWCP requested information from appellant regarding the employee. Appellant was asked to provide the name and address of the employing establishment where he was employed prior to retirement. OWCP also requested that appellant provide an attorney authorization.

<sup>3</sup> Dr. Wheeler's credentials could not be ascertained.

<sup>4</sup> Appellant also forwarded the employee's military service record. This indicated that he served active duty in the Coast Guard from February 23, 1946 until he was honorably discharged on February 24, 1948.

Appellant, through counsel, timely requested a hearing, which was held on August 15, 2014. At the hearing appellant testified that she had not completed the claim form.<sup>5</sup> Counsel noted that the employee had received the Vietnamese Air Service Medal and maintained that under VA rules, if you had “boots on the ground” in Vietnam, a presumption existed regarding Agent Orange exposure. He requested that the record be left open to submit a report from Dr. Vogelzang. Nothing further was submitted.

In a November 3, 2014 decision, an OWCP hearing representative affirmed the January 23, 2014 decision. He noted that no evidence had been received to establish exposure by the employee to Agent Orange.

### **LEGAL PRECEDENT**

An 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 or her employment.<sup>6</sup>

On February 6, 1991 Congress enacted Pub. L. No. 102-4, Stat. 11, which provided a statutory presumption of service connection for diseases sustained by veterans associated with exposure to certain herbicide agents.<sup>7</sup> Pursuant to this legislation, regulations were promulgated with listed diseases for which the presumption of service connection would apply. The legislation was made applicable to veterans in military service only and not to civilian employees who also served in Vietnam. Therefore, under FECA, a claimant who is not a veteran in military service bears the burden of proof in establishing his or her claim for compensation due to alleged exposure to Agent Orange.<sup>8</sup>

OWCP procedures provide that upon receipt of a new death claim, OWCP should ask the employing establishment to assist in compiling and to submit evidence required.<sup>9</sup> The procedures further provide that OWCP should also ask the employing establishment to submit evidence regarding causal relationship.<sup>10</sup> The claimant should be asked to furnish evidence including a death certificate and, if appropriate, a marriage certificate.<sup>11</sup>

### **ANALYSIS**

The Board finds that this case is not in posture for decision. Appellant, widow of the employee, filed a claim for death benefits on October 20, 2012. She asserted that the employee’s

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<sup>5</sup> Appellant did not indicate who had completed the form.

<sup>6</sup> *L.R. (E.R.)*, 58 ECAB 369 (2007).

<sup>7</sup> Agent Orange Act of 1991, Pub.L.No. 102-4 § 2, 105 Stat. 11 (1991) codified in part at 38 U.S.C. § 316 (2000).

<sup>8</sup> *D.I.*, 59 ECAB 158 (2007).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Death Claims*, Chapter 2.700.4(c) (August 1994).

<sup>10</sup> *Id.* at Chapter 2.700.5(f) (November 1996).

<sup>11</sup> *Id.*

exposure to Agent Orange while deployed as a civilian to Vietnam in the 1970s caused his prostate cancer which resulted in his death.

As noted above, OWCP procedures provide that, after a death claim is filed, it should obtain information from the employing establishment. The procedures instruct OWCP to assist in compiling and submitting evidence, including evidence regarding causal relationship.<sup>12</sup> On December 2, 2013 OWCP requested that the employing establishment provide information regarding the employee's employment, including time in Vietnam and exposure to Agent Orange, the employing establishment did not respond.

Although it is a claimant's burden to establish his or her claim, OWCP is not a disinterested arbiter but, rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.<sup>13</sup> Once it has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible. OWCP has an obligation to see that justice is done.<sup>14</sup>

For these reasons, the Board finds that the case must be remanded for further development. OWCP shall request that the employing establishment submit any and all personnel and medical records pertaining to appellant's claim in its possession.<sup>15</sup> After conducting such further development, it shall issue a *de novo* decision.

### **CONCLUSION**

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

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<sup>12</sup> *Id.* at Chapters 2.700.4(c) and 2.700.5(f).

<sup>13</sup> *See N.S.*, 59 ECAB 422 (2008).

<sup>14</sup> *A.A.*, 59 ECAB 726 (2008).

<sup>15</sup> *See T.M.*, Docket No. 14-1631 (issued December 2, 2014).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 3, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: April 24, 2015  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board