

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

F.D., claiming as widow of S.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Spring Valley, CA, Employer**

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**Docket No. 16-0149
Issued: August 19, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 2, 2015 appellant filed a timely appeal of a May 11, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether appellant established that the employee's death was causally related to factors of his federal employment.

¹ Appellant filed a timely request for oral argument. By order dated April 13, 2016, the Board exercised its discretion and denied her request as it determined that her arguments could adequately be addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 16-0149 (issued April 13, 2016).

² 5 U.S.C. § 8101 *et seq.*

On appeal, appellant argues that the impartial medical specialist selected by OWCP was not qualified in the appropriate specialties of oncology and psychiatry.

FACTUAL HISTORY

On July 12, 1997 the employee, then a 46-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging an emotional condition due to factors of his federal employment. OWCP accepted the claim on August 13, 2001 for adjustment disorder with mixed anxiety and depressed mood. It authorized compensation from July 12 until October 23, 1997, the date the conditions were found to have resolved.

This case has previously been before the Board on appeal.³ The employee died on April 12, 2001 and appellant, the employee's widow, filed a claim for survivor benefits (Form CA-5) on September 3, 2003 alleging that the employee's death was causally related to his accepted employment injury.

In the most recent Board decision in this case, dated August 26, 2013, the Board set aside an August 23, 2012 decision and remanded for further development.⁴ The Board found that the reports by Dr. Shamoan Ahmad, a Board-certified internist with a subspecialty in oncology, were insufficient to resolve the conflict in the medical opinion evidence as they failed to provide an adequate explanation for the conclusions on the questions pertaining to aggravation and causal relationship. The Board instructed OWCP to refer the employee's case record to another impartial specialist to resolve the remaining conflict in the medical opinion evidence. The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.

On January 23, 2014 OWCP referred the employee's case record to Dr. Vandana Agarwal, a Board-certified internist with subspecialty certifications in medical oncology and

³ In the first appeal, the Board found in a January 24, 2000 decision that the employee had established a compensable factor as his postal route required more than eight hours to prepare and complete. The Board remanded the case to OWCP for further development. Docket No. 99-1439 (issued January 24, 2000). In the second appeal, the Board set aside a nonmerit decision dated June 2, 2006. Docket No. 06-1937 (issued March 9, 2007). OWCP had improperly denied appellant's request for a merit review as she had submitted relevant new factual evidence. On March 26, 2008 the Board set aside the April 20, 2007 OWCP decision denying appellant's claim. Docket No. 06-1937 (issued March 9, 2007). As the case was not in posture for decision on the question of whether appellant had established compensable factors of harassment and retaliation. In a September 24, 2009 decision, the Board remanded the case for further development of the medical evidence as the Board found the evidence sufficient to establish that the employee was subjected to retaliation in his federal employment. OWCP was instructed to further develop the evidence and then rule upon the issue of whether the employee's death was caused or aggravated by his employment. Docket No. 08-2109 (September 24, 2009). On February 22, 2011 the Board set aside a May 13, 2010 OWCP decision and remanded for further development. The Board found that there was an unresolved conflict in the medical opinion evidence between Dr. Khalid Rehman, a second opinion Board-certified internist with subspecialties in hematology and oncology, who found the colon cancer was not caused by the employee's employment and Dr. Paul Rosch, appellant's Board-certified internist, who opined that colon cancer could be caused or aggravated by depression and stress requiring further development of the evidence on the issue of whether the employee's colon cancer was caused or hastened by the accepted emotional condition. Docket No. 10-1719 (issued February 22, 2011).

⁴ Docket No. 13-235 (issued August 26, 2003).

hematology, to resolve the conflict in the medical opinion evidence. The statement of accepted facts (SOAF) provided to Dr. Agarwal noted that the accepted condition of adjustment disorder with mixed anxiety and depressed mood, resolved as of October 23, 1997. It further noted that OWCP had accepted as compensable factors of employment that the employee's carrier route required more than eight hours per day to complete and that the employee had been subjected to retaliation and harassment at the employing establishment. Dr. Agarwal was asked to determine whether the employee's colon cancer had been caused or aggravated by the accepted work factors.

In an April 30, 2014 report, Dr. Agarwal reviewed the employee's medical records and provided his agreement with previous opinions that the employee's work environment did not cause his colon cancer. He noted that all the medical records and records OWCP provided were reviewed. Based on his review of medical literature Dr. Agarwal opined that anxiety and stress did not cause or exacerbate colon cancer. Thus, he concluded that the employee's colon cancer had not been precipitated or aggravated by his emotional distress and depression.

On September 4, 2014 OWCP requested that Dr. Agarwal provide clarification of his medical opinion and requested that he provide responses to the questions posed.

In an October 15, 2014 supplemental report, Dr. Agarwal opined that overwork, retaliation, and harassment did not cause, accelerate, or aggravate the employee's colon, or metastatic colon cancer. He noted the lack of any data in the medical literature supporting a causal relationship between stress and emotional well-being and metastatic colon cancer by aggravation, acceleration, or causation. Dr. Agarwal also noted that metastatic cancer was a treatable, but incurable disease with a short life expectancy of approximately two years. He also noted that the condition was unrelated to either a depressed mood or anxiety.

By decision dated May 11, 2015, OWCP denied appellant's claim for survivor benefits. It found that the opinion of Dr. Agarwal, the impartial medical specialist, established that the employee's colon cancer and death were unrelated to the accepted emotional condition or compensable work factors.

LEGAL PRECEDENT

FECA⁵ 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.⁶ However, an award of compensation in a survivor's claim 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 employment. A claimant 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.⁷ This burden includes the necessity of furnishing rationalized

⁵ *Supra* note 2.

⁶ 5 U.S.C. § 8102(a).

⁷ *D.H. (G.H.)*, 58 ECAB 636 (2007); *Viola Stanko (Charles Stanko)*, 56 ECAB 636 (2005).

medical opinion evidence, based on a complete factual and medical background, showing causal relationship.⁸

Section 8123(a) of FECA⁹ 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.¹⁰ 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.¹¹ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹²

ANALYSIS

As noted above, the Board, in an August 26, 2013 decision, found that the opinion of Dr. Ahmad, who had been selected as the impartial medical referee, was insufficient to resolve the conflict in the medical opinion evidence as he failed to provide adequate rationale supporting his conclusions. On remand, OWCP properly referred the employee's case record for review by another impartial medical referee, Dr. Agarwal.

The Board finds that the reports of Dr. Agarwal are sufficient to resolve the conflict in the medical opinion. In his April 30, 2014 report, Dr. Agarwal reviewed the employee's medical records, along with a statement of accepted facts, and opined that there was no causal relationship between the employee's accepted emotional condition and aggravation of his colon cancer. He referenced the lack of medical literature supporting any relationship between cancer, stress, and emotional well-being and concurred with prior medical opinions negating any causal relationship. In a supplemental October 15, 2014 report, Dr. Agarwal responded to the questions posed by OWCP and further clarified his finding that the employee's colon cancer was not aggravated or caused by the employee's emotional condition. He explained that metastatic colon cancer was a treatable, but an incurable disease with an approximate life span of two years and unrelated to depressed mood or anxiety. Dr. Agarwal provided an unequivocal and sufficiently rationalized opinion, based on the evidence of record and review of medical literature, when concluding that the employee's colon cancer had not been caused or aggravated by the accepted emotional condition.

As explained above, an opinion of a referee physician is entitled to special weight if it is based on a complete background and is supported by medical rationale. The April 15, 2014

⁸ *L.R. (E.R.)*, 58 ECAB 369 (2007); *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

⁹ 5 U.S.C. § 8123(a).

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

¹¹ 20 C.F.R. § 10.321.

¹² *R.H.*, 59 ECAB 382 (2008); *Elaine Sneed*, 56 ECAB 373 (2005).

report and October 15, 2014 supplemental report from Dr. Agarwal provide a rationalized medical opinion based on a complete background. The Board finds that Dr. Agarwal is entitled to the special weight accorded an impartial medical examiner and his opinion represents the weight of the evidence.

On appeal, appellant argues that Dr. Agarwal is not an appropriate specialist as he has no psychiatric or psychological experience. In the prior appeal, she made the same argument regarding Dr. Ahmad. Contrary to appellant's contention, Dr. Agarwal is an appropriate specialist as he had Board certifications in medical oncology and hematology. As the issue presented concerned whether the employee's colon cancer was caused or aggravated by the accepted employment factors, the Board finds that Dr. Agarwal was an appropriate specialist.

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 has not established that the employee's death was causally related to factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 11, 2015 is affirmed.

Issued: August 19, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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