

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

S.C., widow of R.C., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
SUPPLY CENTER, Columbus, OH, Employer**

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**Docket No. 17-1637
Issued: November 16, 2017**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 24, 2017 appellant, through counsel, filed a timely appeal from a May 1, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 met her burden of proof to establish that the employee's death was caused or contributed to by his federal employment.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

On appeal counsel asserts that the May 1, 2017 decision is contrary to fact and law.

FACTUAL HISTORY

Appellant, widow of the deceased employee, filed a claim for death benefits (Form CA-5) on July 30, 2014,³ alleging that his death from lung cancer and asbestosis was caused by his work at the employing establishment. The employee, a 62-year-old retired warehouse worker died on July 12, 2012.⁴ An attending physician's report attached to the claim form indicated that the employee had metastatic lung cancer with brain metastases. The signature on the report is illegible. The death certificate was signed by Dr. Walter Ferris, Board-certified in family medicine, hospice care, and palliative medicine. The immediate cause of death was Stage IV adenocarcinoma of the lung. An autopsy was not done.

In an October 9, 2014 letter, OWCP asked that appellant and the employing establishment respond to the claim. This was to include evidence of hazardous exposure and medical evidence containing an opinion regarding the contribution of employment to the employee's death.

A May 2, 2012 x-ray was interpreted by Dr. L.C. Rao, Board-certified in internal medicine and pulmonary disease, and a certified B reader. He advised that, in the presence of a significant occupational exposure history to asbestos dust and latency period, the x-ray was consistent with a diagnosis of bilateral interstitial fibrosis due to asbestosis with additional evidence of malignancy.

In a January 7, 2014 report, Dr. Nasir A. Khan, Board-certified in anatomic and clinical pathology and cytopathology, noted his review of the employee's medical records, including Dr. Rao's report. He noted an occupational history that the employee was exposed to asbestos fibers and asbestos-containing products throughout the course of his employment at the employing establishment from 1976 to 1997 and at Anchor Hocking Company from 1970 to 1976, and that he also had a smoking history of a half-pack daily from 1970 to 1987. Dr. Khan reported a history that the employee was found to have a lung mass and possible brain metastases in May 2012, with a history of prostate cancer two years prior. He reported that a fine needle lymph node aspiration done in the hospital was interpreted as nonsmall cell carcinoma with gene testing positive for amplification. Dr. Khan opined that the employee died due to the direct effects of primary lung cancer with contributing causes of occupational exposure to asbestos fiber inhalation and smoking.

In a November 4, 2014 statement, appellant advised that when the employee worked for the employing establishment, it was always in a warehouse, and that he did maintenance work and cleaning at the post office.

³ A copy of the certificate of marriage, issued by the State of Ohio, indicates that appellant and the employee married on July 7, 1979.

⁴ The record also indicates that the employee worked for the U.S. Postal Service from February 2000 to July 2005.

By letter dated May 7, 2015, OWCP asked the employing establishment to provide the employee's employment record and information regarding his occupational exposure to asbestos, including dates of exposure. It also requested that the employing establishment furnish asbestos sampling data.

The employing establishment forwarded information regarding the employee's employment there and with the U.S. Postal Service. This included both job applications. A Notice of Personnel Action (Standard Form 50) indicated that the employee's service computation date was February 5, 1975 and, effective February 11, 2000, he was terminated from a facility in Youngstown, Ohio, and appointed to the U.S. Postal Service. A U.S. Postal Service Notification of Personnel Action indicated that, effective July 11, 2005 the employee retired. The employing establishment listed the employee's employment as laborer effective September 23, 1976, supply clerk effective June 24, 1979, warehouse worker effective February 15, 1981, warehouse worker (forklift operator) effective March 11, 1984, warehouse worker effective May 20, 1984, materials handler effective July 22, 1990, materials handler (packer) effective April 10, 1994, and materials handler (forklift operator) effective July 20, 1997 to February 11, 2000.

The employing establishment forwarded medical surveillance examination data on the employee from October 1988 to June 1996 that showed no exposure to asbestos. It also forwarded employing establishment asbestos policies dated March 12, 1987, a report of improper handling of asbestos materials dated June 10, 1985, a report of a cracked asbestos tile on the floor in October 1991, and asbestos testing reports dated May 28, 1987 to July 12, 2001. A November 2, 1988 x-ray of the employee's chest showed new or progressive reticular interstitial change which could represent pulmonary fibrosis or an acute viral bronchitis or pneumonitis. A June 11, 1992 x-ray demonstrated no significant interval change with bilateral interstitial opacities seen, most compatible with fibrosis.

By decision dated June 21, 2016, OWCP denied the claim, finding that appellant did not submit sufficient factual and medical evidence to establish that the employee's death was causally related to his federal employment.

Appellant, through counsel, timely requested a hearing with OWCP's Branch of Hearings and Review.

On January 20, 2016 Dr. Rao indicated that his opinion regarding the employee's x-ray had not changed. A May 3, 2012 cytology report of the employee's brain tissue demonstrated metastatic poorly differentiated nonsmall cell carcinoma.

At the hearing, held on February 15, 2017, counsel argued that the employing establishment should supply data regarding the employee's specific places of employment and asbestos testing for those facilities. Appellant testified that in 1997 the facility in Columbus, Ohio, was closing so that the employee transferred to a facility in Youngstown, Ohio, and worked there until he transferred to the U.S. Postal Service in 2000.

In a May 1, 2017 decision, an OWCP hearing representative affirmed the June 21, 2016 decision. She found that the factual component of the claim had not been established and,

furthermore, that the medical evidence did not indicate that the employee's federal employment in any way contributed to his adenocarcinoma diagnosis.

LEGAL PRECEDENT

The United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.⁵

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.⁶ 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 medical opinion evidence of a cause and effect relationship based on a complete factual and medical background. The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale.⁷

ANALYSIS

The employee died on July 12, 2012. The death certificate listed the cause of death as Stage IV adenocarcinoma of the lung. In order to prevail in her claim for death benefits, appellant must demonstrate that factors of her husband's federal employment caused his death.

The employing establishment submitted the employee's employment history and evidence of asbestos testing. In reviewing the testing information, there is no indication if this was done in locations where the employee worked.

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. Although the employing establishment submitted the requested information it did not provide information regarding the employee's specific locations of employment in Columbus and Youngstown, Ohio, and in not identifying specific asbestos testing results for these locations should not be an impediment to a successful prosecution of the claim.⁸ Herein, the type of information being sought includes results of the employee's exposure at specific work sites from September 1976 to February 2000. This type of information is normally within the custody of the employing establishment and not readily available to appellant.⁹ As the employee is

⁵ 5 U.S.C. § 8102(a); *see* 5 U.S.C. § 8133.

⁶ *T.L. (W.L.)*, Docket No. 12-1873 (issued June 12, 2013).

⁷ *L.R. (E.R.)*, 58 ECAB 369 (2007).

⁸ *See T.W.*, Docket No. 12-1882 (issued March 12, 2013).

⁹ *Supra* note 6.

deceased, appellant should not be penalized for the employing establishment's failure to submit this information.¹⁰

Proceedings under FECA are not adversarial in nature, and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. This is particularly true when the evidence is of the character normally obtained from the employing establishment or other government source.¹¹ Once OWCP has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible. It has an obligation to see that justice is done.¹²

The Board finds that 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 asbestos exposures. As OWCP undertook this development, it had an obligation to secure a response that adequately addressed the relevant issues.¹³

The case will be remanded to OWCP to ascertain the employee's specific locations of employment and identify the nature and extent of his exposure to asbestos, if any, from September 1976 to February 2000. Such response should identify specific testing documenting the presence or absence of asbestos in the employee's specific work environment. Following such factual and medical development deemed necessary, OWCP shall issue a *de novo* decision.

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 exposure to asbestos and its relationship, if any, to his demise.

¹⁰ *Id.*

¹¹ *R.B.*, Docket No. 08-1662 (issued December 18, 2008).

¹² *A.A.*, 59 ECAB 726 (2008).

¹³ *See Peter C. Belkind*, 56 ECAB 580 (2005).

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2017 decision of the Office of Workers' Compensation is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: November 16, 2017
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board