United States Department of Labor
Employees' Compensation Appeals Board

M.S., widow of J.S., Appellant	)	
and	)	**Docket No. 19-0806**
	)	**Issued: December 9, 2019**
DEPARTMENT OF THE ARMY, WOMACK ARMY MEDICAL CENTER, Fort Bragg, NC, Employer	)	

Appearances:
Martin Kaplan, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 5, 2019 appellant, through counsel, filed a timely appeal from a January 11, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[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.*

[3] The Board notes that following the January 11, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has established that the employee's death on August 26, 2017 was causally related to the accepted condition of permanent aggravation and acceleration of retinitis pigmentosa (RP).

FACTUAL HISTORY

On July 8, 1993 the employee, then a 51-year-old physician, filed an occupational disease claim (Form CA-2) alleging that an increased workload beginning in August 1990 caused RP which was diagnosed in November 1991. He stopped work on March 1, 1993.

The employee began treatment with Dr. J. Michael Geiger, a Board-certified ophthalmologist, in 1991. He submitted periodic reports describing the employee's vision loss due to RP.

After initial development of the claim, on November 1, 1995, OWCP accepted permanent aggravation and acceleration of RP. On December 28, 1995 it granted the employee a schedule award for 50 percent loss of vision in both eyes. The period of the award ran from March 9, 1993 to April 1, 1996. Following the expiration of the schedule award, OWCP paid the employee wage-loss compensation on the periodic rolls.

In correspondence dated September 25, 2017, appellant informed OWCP that the employee died on August 26, 2017. She inquired about benefits as a surviving spouse and contended that his death was due to "[h]is condition of progressive blindness caused by work-related aggravation [which] progressed his late stage disoriented condition, an almost Alzheimer[-] like condition, which ultimately lead to his death at a young age." Appellant attached a copy of the employee's death certificate, which indicated that he had died on August 26, 2017. The immediate cause of death was listed as failure to thrive occurring for weeks, with an underlying cause of Alzheimer's disease occurring for years. The death certificate was signed by Dr. Vijaya Polavaram, Board-certified in internal medicine.

By letter dated October 3, 2017, OWCP informed the employee's estate that a widow and/or children would only be entitled to benefits if an injured workers' death was a result of the work injury. It enclosed a claim for compensation by widow, widower, and/or children (Form CA-5) for completion.

Appellant submitted a completed Form CA-5 dated November 1, 2017. An attached attending physician's report, signed by Dr. Polavaram on October 31, 2017 indicated that contributing causes of the employee's death were debility, anorexia, decubitus ulcer, generalized weakness, dementia, anemia, frailty, hypertension, diabetes mellitus, hypothyroidism, and neuropathy. She opined that the employee's death was causally related to his blindness by aggravation and acceleration, and that it contributed to his Alzheimer's and failure to thrive. Dr. Polavaram indicated that the employee's blindness influenced his ability to cope with dementia, because due to his blindness, he had to rely on auditory signals. She opined that dementia often altered perception of auditory signals which made it harder to process simple tasks, and that the employee's lack of vision led to increased difficulties with communication, in learning, in understanding new tasks, and in the ability to participate in therapeutic practices which would have allowed him to adapt and cope with dementia and to slow its progress. Dr. Polavaram

also noted that his blindness also led to mechanical feeding difficulties and unusual feeding habits. She maintained that, if the employee had not been blind, he would have been able to manage his conditions more effectively, but that it ultimately led to his failure to thrive and, had he not been blind, he would likely still be alive.

OWCP asked its district medical adviser (DMA), Dr. Amanda C. Trimpey, Board-certified in preventive medicine, to comment on appellant's claim. In a November 21, 2017 report, she noted her review of the record, including a statement of accepted facts (SOAF). Dr. Trimpey indicated that it was plausible and in line with generally accepted medical knowledge, that blindness could and would worsen one's function and lead to accelerated demise in a dementia patient. The DMA also related that RP was an inherited condition not caused by injury.

Appellant forwarded progress notes for home visits from Dr. Polavaram dated April 28 to August 3, 2017. In each report, Dr. Polavaram noted that the employee had been bedbound for the past year, had dementia, appeared to be weak, and was cared for by family and home health aides. She diagnosed insulin-dependent diabetes, hypertension, hypothyroidism, hyperlipidemia, decubitus ulcer, spinal stenosis, major depression, and failure to thrive. Dr. Polavaram noted that following spinal surgery about 10 years previously, the employee began to decline and was bedbound due to back pain and inability to walk with some contractures of the lower extremities associated with lower motor neuron weakness, and that he indicated that he had no appetite. She reported that the employee was legally blind due to macular degeneration. On August 3, 2017 Dr. Polavaram indicated that the employee was in a terminal condition and was referred for hospice care as requested by the family, noting that he had not been eating for a period of two weeks.

In a January 5, 2018 report, Dr. Geiger noted that he had treated the employee for over two decades and observed the deterioration of his vision from normal sight to total blindness. He opined that the employee's blindness contributed greatly to his rapid decline and failure to thrive after developing Alzheimer's dementia.

Hospice records dated August 9 to 26, 2017 described the employee's palliative care. A note dated August 26, 2017 indicated that the employee died at home. Medical diagnoses listed included late-onset Alzheimer's disease, dementia, and diabetes mellitus.

OWCP again forwarded the record, including Dr. Geiger's report, to Dr. Trimpey, its DMA, for review. It noted that the accepted condition was permanent aggravation and acceleration of RP, bilateral. In a February 1, 2018 report, Dr. Trimpey noted that the employee had a multitude of medical conditions which, when combined, all contributed to the general cause of death, failure to thrive. She reviewed the medical evidence including Dr. Polavaram's October 31, 2017 statement and Dr. Geiger's January 5, 2018 report. Dr. Trimpey noted the accepted condition, but wrote that it was well-documented that RP was a hereditary condition. She indicated that the employee's spinal surgery seemed to have worsened his physical state, and concluded that the combination of his many medical conditions of diabetes, atherosclerosis, Alzheimer's disease, depression, spinal stenosis, neuropathy, hypertension, hyperlipidemia, thyroid disorder, generalized weakness, anemia, macular degeneration, pressure ulcers, bowel and bladder incontinence, poor food and fluid intake/anorexia, hypertensive heart disease, and blindness may have aggravated and or worsened his dementia symptoms and, in combination, contributed to his failure to thrive, which led to his death.

In April 2018 OWCP referred the medical record to Dr. Kevin Yuhan, a Board-certified ophthalmologist, for a second opinion. In an April 19, 2018 report, Dr. Yuhan described the accepted conditions and death certificate findings. He opined that, although there was evidence that suggested that blindness (or a loss of a sense), could aggravate and accelerate dementia, there were no studies that clearly demonstrated that stress or environmental circumstances could aggravate or accelerate visual impairment due to RP, noting that a review of the literature yielded no studies or articles that suggested that environmental circumstances could accelerate or worsen RP. Dr. Yuhan concluded that, therefore, there was no evidence that suggested that the employee's work environment and stressful circumstances accelerated his RP, or his dementia which led to his death.

By decision dated April 30, 2018, OWCP denied appellant's claim. It found the medical evidence of record was insufficient to establish appellant's claim.

On May 23, 2018 appellant, through counsel, requested a hearing before OWCP's Branch of Hearings and Review. On July 17, 2018 counsel withdrew the hearing request.[4]

In a July 1, 2018 report, Dr. Jennifer T. Perry, a Board-certified ophthalmologist, reviewed the employee's medical records. She noted that OWCP accepted permanent aggravation and acceleration of bilateral RP which eventually led to permanent blindness with no light perception. Dr. Perry opined that the employee's accepted RP condition was causally related to his cause of death, Alzheimer's disease and failure to thrive, indicating that it was generally accepted medical knowledge that visual impairment had an adverse effect on persons with dementia. She reported that patients with dementia and visual impairment, let alone no light perception vision, faced tremendous challenges such as inability to perform activities of daily living, increased confusion, inhibition of diurnal cycle inhibiting rest, increased fall risk, and accelerated cognitive decline, noting that the employee suffered all these due to his visual impairment. Dr. Perry maintained that, because of his RP, his blindness would have had a devastating and detrimental effect on his cognition. She continued that she had reviewed the reports of Dr. Trimpey and Dr. Yuhan, and both noted that evidence suggested that blindness could aggravate and accelerate dementia. Dr. Perry concluded that the employee's accepted condition contributed to, aggravated, and accelerated his Alzheimer's disease which eventually caused his death.

On September 4, 2018 counsel requested reconsideration. He claimed that, as Dr. Yuhan opined that RP should not have been accepted, his opinion was contrary to the SOAF and was of limited probative value and could not be the basis for denying survivor's benefits. Counsel concluded that all the physicians of record agreed that blindness could accelerate dementia.

OWCP determined that a conflict in medical opinion had been created between appellant's treating physicians and Dr. Yuhan.

[4] At that time appellant was represented by Daniel F. Read, Esq. On July 16, 2018 Mr. Read withdrew his representation. Martin L. Kaplan, Esq. began representation on July 17, 2018.

In correspondence dated October 19, 2018, counsel, citing Board cases *C.D.*[5] and *Carolyn Spiewak*,[6] maintained that the claim was not in posture for a referee examination because Dr. Yuhan's opinion was fatally flawed as he had opined that the employee's preexisting condition should not have been accepted. He asked that if OWCP proceeded to refer the record for a referee examination, that he be provided with a bypass log to demonstrate that rotation procedures were being followed and to send a copy of the SOAF and questions sent to the referee physician.[7]

By letter dated November 5, 2018, OWCP informed appellant and counsel that a medical records review had been arranged with an impartial medical examiner (IME) Dr. Christopher P. Fleming, a Board-certified ophthalmologist, for a medical evaluation to resolve the conflict of medical opinion.

Counsel forwarded an October 31, 2018 report in which Dr. Seenu M. Hariprasad, a Board-certified ophthalmologist, noted his review of the employee's medical records dating back to June 1993. With regard to the employee's death, Dr. Hariprasad opined that the employee's accepted condition of aggravation and acceleration of bilateral RP was causally related to his death. He wrote that patients who had a visual impairment faced tremendous challenges when coping and dealing with dementia, noting that visual impairment had a detrimental impact on overall cognitive function and substantially impaired the ability to cope and adapt with dementia. This could cause increased difficulty in communicating, feeding, mobility, adapting to new environments or concepts, participating in cognitive therapy, etc. Dr. Hariprasad indicated that the medical literature supported that visual impairment had a substantial adverse impact on those suffering from dementia, noting that he had been involved in some studies. He reported that the employee's residual blindness from his accepted condition substantially contributed, aggravated, and accelerated his dementia. Dr. Hariprasad also concluded that, based on his educational training, practical experience, extensive research, familiarity with the relevant medical literature, and a thorough review of the materials provided, it was his professional medical opinion to a high degree of medical certainly that the employee's previously accepted permanent aggravation and acceleration of bilateral RP was casually related to his death.

In a December 12, 2018 report, Dr. Fleming opined that, based on his extensive review of the medical records, objective evidence, and the SOAF, the employee's cause of death was not due to an accepted work-related condition of permanent aggravation and acceleration of bilateral RP. He wrote that the employee suffered from many medical issues, all of which contributed to his failure to thrive, the stated cause of death on his death certificate. Dr. Fleming opined that the employee's accepted permanent aggravation of RP did not result in a worsening of the underlying conditions resulting in his death. He concluded that he did not see any direct correlation between the employee's death and his accepted condition.

[5] Docket No. 08-1266 (issued January 28, 2009).

[6] 40 ECAB 552 (1989).

[7] The record contains a number of telephone memoranda in which OWCP contacted physicians' offices requesting a review of medical records. The record before the Board does not contain an OWCP form ME023 or a bypass log.

By decision dated January 11, 2019, OWCP denied modification of the April 30, 2018 decision. It found that the special weight of the medical evidence rested with the opinion of Dr. Fleming, the IME.

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 duty.[8] 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 the employment.[9] Appellant has the burden of proof to establish by the weight of the reliable, probative, and substantial medical evidence that the employee's death was causally related to an employment injury or to factors of his federal employment.[10] As part of this burden, he or she must submit a rationalized medical opinion, based upon a complete and accurate factual and medical background, establishing causal relationship between the employee's death and an employment injury or factors of his federal employment.[11] Causal relationship is a medical issue that can only be established by medical evidence.[12]

The mere showing that an employee was receiving compensation for total disability at the time of his or her death does not establish that the employee's death was causally related to the previous employment.[13] The Board has held that it is not necessary that there be a significant contribution of employment factors to establish causal relationship.[14] If the employment contributed to the employee's death, then causal relationship is established.[15]

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[16] For a conflict to arise the opposing physicians' viewpoints must be of virtually equal weight and rationale.[17] Where OWCP has referred the case to an IME to resolve a conflict in the medical

[8] 5 U.S.C. § 8133.

[9] *M.L. (S.L.)*, Docket No. 19-0020 (issued May 2, 2019).

[10] *L.W. (K.W.)*, Docket No. 19-0569 (issued August 16, 2019).

[11] *Id*.

[12] *See J.P. (E.P.)*, Docket No. 18-1739 (issued May 3, 2019).

[13] *L.W. (K.W.), supra* note 10.

[14] *Id*.

[15] *M.L. (S.L.), supra* note 9.

[16] 5 U.S.C. § 8123(a).

[17] *J.P. (E.P.), supra* note 12.

evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.[18]

ANALYSIS

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

On November 1, 2017 appellant filed a Form CA-5 requesting survivor benefits, alleging that the employee's death on August 26, 2017 was causally related to the accepted condition of permanent aggravation and acceleration of bilateral RP.

OWCP referred the case record, together with a SOAF, to Dr. Yuhan for a second opinion. The SOAF noted the employee's accepted condition as permanent aggravation and acceleration of bilateral RP. In his April 19, 2018 report, however, Dr. Yuhan opined that there was no evidence to suggest that the employee's work environment and stressful circumstances accelerated his RP which led to his dementia and subsequently his death. Because he did not rely on the SOAF, his opinion is, therefore, flawed and of insufficient probative value. OWCP's procedures provide that when a second opinion specialist or referee physician does not use the SOAF provided as framework in forming his or her opinion, the probative value of the opinion is seriously diminished, or negated altogether.[19] As such, Dr. Yuhan's opinion is insufficient to establish a conflict in the medical evidence with the employee's treating physicians. As there was no conflict in the medical evidence, pursuant to 5 U.S.C. § 8123(a), the referral to Dr. Fleming was for a second-opinion examination.[20]

In his December 12, 2018 report, Dr. Fleming opined that the employee's central vision loss was likely caused by macular degeneration and diabetes, but he also noted that the condition of permanent aggravation and acceleration of bilateral RP was an accepted condition. Regarding the employee's death, he indicated that any of his serious medical issues including diabetes, hypertension, heart disease, atherosclerosis, and hyperlipidemia could have contributed to his failure to thrive and death, and that he did not think the employee's accepted permanent aggravation of RP resulted in worsening of the underlying conditions which had resulted in his death.

In an October 31, 2018 report, Dr. Hariprasad, reviewed the record on behalf of appellant's counsel, and opined that the employee's accepted condition of aggravation and acceleration of bilateral RP was causally related to his death. He explained that patients who had a visual impairment faced tremendous challenges when coping and dealing with dementia, noting that visual impairment had a detrimental impact on overall cognitive function and substantially impaired the ability to cope and adapt. Dr. Hariprasad concluded that, based on his educational training, practical experience, extensive research, familiarity with the relevant medical literature, and a thorough review of the materials provided, it was his professional medical opinion, to a high

[18] *Id*.

[19] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.7 (October 1990); *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *C.D.*, Docket No. 08-1266 (issued January 28, 2009).

[20] *S.M.*, Docket No. 19-0397 (issued August 7, 2019).

degree of medical certainty, that the employee's previously accepted permanent aggravation and acceleration of bilateral RP was causally related to his death.

The Board finds that there is now a conflict in medical opinion between Dr. Fleming and Dr. Hariprasad regarding whether the employee's accepted condition of permanent aggravation and acceleration of bilateral RP caused or contributed to his death.[21]

Because there remains an unresolved conflict in medical opinion regarding whether there is a causal relationship between the employee's accepted condition and his death, the case shall be remanded to OWCP for referral to an IME pursuant to section 8123(a) of FECA[22] and section 3.500.5(a) of its procedures.[23] After this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[21] *Id.*

[22] 5 U.S.C. § 8123(a).

[23] Federal (FECA) Procedure Manual, *supra* note 19 at Part 3--Medical, *Medical Examinations*, Chapter 3.500.5(a) (May 2013).

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 9, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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