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

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| **R.G., claiming for the children of K.G., Appellant** | ) | |
| **and** | ) | |
| **U.S. POSTAL SERVICE, MICHIGAN METROPLEX PROCESSING & DISTRIBUTION CENTER, Pontiac, MI, Employer** | ) | **Docket No. 19-1059**<br>**Issued: July 28, 2020** |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On April 16, 2019 appellant filed a timely appeal from a December 20, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 has met her burden of proof to establish that the employee's death on June 9, 2015 occurred in the performance of duty, as alleged.

[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

On May 30, 2017 appellant filed a claim for compensation by widow, widower, and/or children (Form CA-5) on behalf of the minor children of the deceased employee.[2] She alleged that the employee's death on June 9, 2015 was caused by the employing establishment refusing to allow her access to her asthma medication in the workplace.

In support of her claim, appellant submitted a June 9, 2015 hospital record of death, which indicated that the employee died of respiratory failure at 5:40 a.m. on that date. A June 10, 2015 autopsy report by Dr. Bernardino B. Pacris, a county deputy medical examiner, determined that the employee had died of bronchial asthma. The results of a June 17, 2015 toxicology report were normal. The county death certificate dated June 18, 2015 listed the deceased employee's immediate cause of death on June 9, 2015 as bronchial asthma.

In a development letter dated June 21, 2017, OWCP requested that appellant submit additional factual and medical evidence in support of her claim, including statements from witnesses verifying that the employee could not use her asthma medication at work. In a separate letter of even date, it requested that the employing establishment provide a statement explaining the policy/policies that precluded the employee from having her medication at work. OWCP also requested witness statements, including a statement from the employee's supervisor, addressing the circumstances of her death and include whether appellant was called to the work sight. Finally, it requested that the employing establishment provide a written statement noting all times that the employee had requested use of her medicine and when those requests were denied. OWCP afforded both parties 30 days to submit the requested evidence.

Counsel for the employing establishment responded in a July 26, 2017 letter that the employing establishment "has no policies that precluded the decedent from having her medication at work," that no one at the employing establishment had ever prevented the employee from having or using her inhaler at work, and that her supervisor was aware of the employee's usage of her medication at work and "affirmatively approved of her going to use the medication." Counsel noted that that the employee's family alleged that methane gas at the workplace had also contributed to the employee's death. She advised, however, that the Occupational Safety and Health Administration (OSHA) had indicated that there were no levels of methane gas or other hazardous air pollutants that represent a health and safety concern at that facility.

In a signed declaration dated July 17, 2017, R.J., a manager, related that at 5:10 a.m. on June 9, 2015 she received a call notifying her of an emergency in the employee parking lot. When she arrived at the lot, she saw emergency medical services (EMS), performing cardiopulmonary resuscitation on the employee. R.J. was informed that a maintenance employee had found the

[2] The record reflects that the employee, appellant's daughter, worked for the employing establishment as a postal support employee clerk and was 38 years old when she died on June 9, 2015. Appellant noted on the claim form that the employee had two minor children, P.G. and D.W. She submitted documentation establishing that she was the legal guardian of P.G, who was 13 years old at the time of his mother's death. D.W. was 17 years old at the time of his mother's death. OWCP's procedures provide that the relationship of the survivor to the deceased is determined as of the date the death occurred. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Death Claims*, Chapter 2.700.5c(1) (August 1994). A child is defined as an individual under 18 years old, incapable of self-support, or a full-time student under age 23. 5 U.S.C. § 8101(9).

employee lying on the ground next to her vehicle at 4:55 a.m. that day. The employee was taken to the hospital, and R.J. called appellant to inform her of what occurred. Appellant responded that she was unaware her daughter had gone to work and that she told her daughter to make sure she took her breathing medication. R.J. advised that the employing establishment did not have policies that precluded the employee from having or using her medication at work. She indicated that the employee's supervisor that day, R.T., had informed R.J. that he had seen the employee's inhaler and allowed her to leave the workroom floor to obtain or use her medication. R.J. also indicated that the OSHA had investigated the employee's death and had not issued a citation.

R.T., the employee's supervisor, provided a July 25, 2017 statement relating that when the employee approached him along with a coworker for training she had her inhaler in her possession, and that the coworker told him that the employee needed to get fresh air and use her epinephrine auto-injector (EpiPen). He noted that he approved the employee's request. When the employee did not return he looked for her, but did not find her. R.J. informed him to go to the employee parking lot, which is where he saw EMS attending to the employee. R.T. advised that the employing establishment did not have any policies that would have prevented the employee from using her medication at work.

In an undated statement, S.J., a coworker, related that on June 9, 2015 she was working with the employee. At around 3:20 a.m. to 3:30 a.m. the employee had used her inhaler, and at 3:40 a.m. the employee informed her that she needed some air and also needed to use her EpiPen. S.J. walked with her to let her supervisor know that she was going to use her EpiPen because she was having an asthma attack. The employee appeared calm, so S.J. was not worried. The supervisor returned to the machine area between 4:05 a.m. to 4:15 a.m. and asked if the employee had returned. S.J. responded that she had not.

By decision dated April 30, 2018, OWCP denied appellant's claim for compensation based on the factual component of fact of injury, finding that the evidence of record was insufficient to establish that the claimed events occurred as alleged. It determined that there was no factual basis to support that the employing establishment had prevented the employee from using her asthma medication at work. OWCP concluded, therefore, that the requirements had not been met to establish that the employee sustained an injury as defined by FECA.

By letter dated and postmarked May 18, 2018, appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. Attached to the accompanying appeal request form was the first page of a May 6, 2018 statement, wherein appellant related that the employee's coworkers had informed her that her daughter's death was due to methane poisoning. She advised that the employee had experienced an asthma attack on her first day of work in November 2014 and had to be taken to the hospital. The hospital prescribed an inhaler and EpiPen. Appellant asserted that news reports attributed the employee's death to methane. She called OSHA, but by the time they investigated six months later the levels were normal. Appellant questioned why the employee's supervisor had not checked on her for two hours.

During the telephonic hearing, held on October 17, 2018, appellant testified that when the employee first began working at the employing establishment on November 19, 2014, she received a call that the employee was in the hospital. At the hospital she was told that the employee had

experienced an asthma attack. The employee had become dizzy at work and unable to breath, and that the employing establishment had called 911. Her supervisor advised that the employing establishment would place the employee at a new work site in the building. The employee had asthma as a child and young adult, but had not had asthma for the past 10 years until she started working inside the employing establishment. Once she was moved to another location within the building she felt better and left her medication in her truck. The employee told appellant that she could only have a clear plastic bag at her office and that she could not bring her the items needed for her asthma inside, and when the police gave appellant the plastic bag after her death it only had her keys, personal items, cellphone and badge in it. Appellant clarified that she did not know if that was the official policy or what the other employees had told the employee. When she arrived at the hospital on June 9, 2015, a doctor told her that the employee had passed away due to an asthma attack.

Appellant further testified that the employee's coworker informed her that on the day of her death the employee was placed in the same location where she had originally gotten sick on November 19, 2014 in order to sort mail. The coworker advised that the supervisor did not know that she was not supposed to work there. The employee told him that she could not breathe twice and he said she could go to her truck and get her medication. Appellant maintained that S.J. was lying when she said that the employee had used her inhaler, as it was inside of her truck. She asserted that the employee had previously complained about the air at her job making her weak and dizzy and worried that it would kill her.

OWCP subsequently received an emergency room report dated November 19, 2014 from an osteopath, who noted that appellant had experienced shortness of breath at work when bent down to place a soda underneath a table when she was exposed to dust and papers.[3]

A log of work-related injuries and illnesses for the employee's work location dated 2013 and 2014 indicated that no deaths had occurred on the premises during those years.

A June 9, 2015 EMS report noted that the employee was on the ground by her vehicle with the driver's door open. She was assessed at 5:08 a.m., and it was discovered that lung sounds were absent. There was an albuterol inhaler and two used EpiPens on the driver's seat of the car and one unused EpiPen on the floor of the driver's side. The employee's supervisor indicated that the employee had complained of trouble breathing and stated that she needed to go out to her car and use her inhaler. EMS's primary clinical impression was that the employee had suffered cardiac arrest.

In an emergency room report dated June 9, 2015, an osteopath indicated that the employee had been found unresponsive.[4] Past medical diagnoses and prescribed medication included asthma and albuterol. A central line was placed in the employee and epinephrine was administered. There was no cardiac activity.

[3] The name of the osteopath is not legible.

[4] The osteopath's name is illegible.

A June 9, 2015 emergency incident report from the employing establishment indicated that the employee had asked her supervisor to leave for a few minutes to use her inhaler and showed the supervisor her inhaler. Another employee had informed the supervisor that the employee had not returned, so he looked for her in the break areas and the lunch room and then received a call that she had been found nonresponsive in the employee parking lot. The incident was recorded as nonwork related.

In a June 15, 2015 accident report form, the employing establishment indicated that on June 9, 2015 the employee had suffered a nonwork-related asthma attack which caused her death. The report advised that it had conducted an onsite investigation and found no hazardous situations or defective equipment. The employing establishment indicated that on June 9, 2015 she had complained of breathing irregularities and requested to leave the floor to retrieve her inhaler. Before the incident, the employee had been performing the normal duties of a mail processing clerk.

A June 23, 2015 OSHA fatality/catastrophe report noted that on June 9, 2015 the employee had allegedly complained to her supervisor that she was feeling ill and asked to get her medication.[5] The supervisor allegedly refused to allow her to get her medication until her shift ended, and when she was leaving her workplace to get her medication she collapsed in the parking lot due to an asthma attack and was found two hours later.

In an inspection narrative, a certified safety and health official (CSHO) with OSHA advised that on June 21, 2015 appellant had telephoned OSHA and reported the employee's death in the employee parking lot of the employing establishment.[6] She alleged that on June 9, 2015 the employee had asked to get her inhaler as the dust was bothering her, but her request was denied twice. The CSHO conducted an onsite inspection on June 23, 2015, reviewed medical documentation, and interviewed employee and supervisors on June 9, 2015. The CSHO found that the investigation supported that the employing establishment did not deny the employee use of her inhaler or prevent her from going to her vehicle for her EpiPen and thus there was no OSHA standard violation.

In a June 30, 2017 statement, D.W., the employee's son, related that she had advised that her job was making her sick and that she could not bring her inhaler inside the building. Even after they moved her she could not breathe adequately.

In a November 13, 2018 letter, the employing establishment noted that appellant had related that the employee had left her medication in her car because she felt fine and that the employee may have believed that she could not bring her medication into work based on statements from her colleagues.

[5] A June 23, 2015 letter from OSHA to the employing establishment requested information related to the inspection of the employee's death. In an inspection report dated July 16, 2015, an OSHA inspector related that the entry, opening conference, walk around, and exit occurred on June 23, 2015, and the first closing conference occurred on July 7, 2015.

[6] The name of the CSHO has been redacted.

In an undated statement, K.B., a friend of the employee, related that she had told her that her first asthma attack at work had been caused by methane, and how she feared the chemical could kill her because the employing establishment prohibited personal essentials such as inhalers and EpiPens inside the facility.

On December 14, 2018 OWCP received the second page of appellant's May 6, 2018 statement. Appellant related that five coworkers at the employee's work location had died in five years. A news team investigated and found that "the plant was built on a gas site and since the time of existing 11 people have passed away all with the same upper respiratory problem." Appellant related that there were reports showing the methane levels at the time of the employee's death.

By decision dated December 20, 2018, OWCP's hearing representative affirmed the October 17, 2018 decision, finding that the evidence of record was insufficient to establish that the employee was denied use of her asthma medication at work "or exposed to an event, hazardous gas or other substance that initiated her asthma attack."

## ***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.[7] 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.[8] 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 or her federal employment. As part of this burden, appellant must submit a rationalized medical opinion, based upon a complete and accurate factual and medical background, showing a causal relationship between the employee's death and an employment injury or factors of his or her federal employment. Causal relationship is a medical issue and can be established only by medical evidence.[9]

## ***ANALYSIS***

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

Appellant alleged that the employee's fatal asthma attack was caused by exposure to methane at her place of employment and by a workplace policy denying employees the right to have their medication with them at work. The Board has held that to establish that an injury

[7] 5 U.S.C. § 8133 (compensation in case of death).

[8] *See W.C.*, Docket No. 18-0531 (issued November 1, 2018); *Sharon Yonak (Nicholas Yonak)*, 49 ECAB 250 (1997).

[9] *See L.R. (E.R.)*, 58 ECAB 369 (2007).

occurred in the performance of duty the employee must establish that an occupational exposure occurred as alleged.[10]

The Board finds that appellant has not established that the employing establishment denied the employee access to her medication at work on June 9, 2015. In support of her allegation, she submitted statements from the employee's family and friends indicating that she told them that she could not bring medication inside her work location. However, the employing establishment refuted appellant's contentions. In a July 17, 2017 statement, R.J., a manager, advised that there were no policies to prevent the employee from having or using her medication at work. R.T., the employee's supervisor, also related that there were no policies precluding the use of medication at work. OSHA investigated appellant's complaints that the employee's supervisor had prevented her from obtaining her medication. The OSHA inspection concluded that the employing establishment never denied the employee use of her medication, nor did anyone prevent her from going to her vehicle to use her medication, and therefore no OSHA standards had been violated. Appellant has not factually established that the employing established refused to allow the employee to bring her medication in the building or denied her request to obtain her medication from the employee parking lot and thus has not established the occurrence of that claimed work factor.[11]

The Board finds, however, that the case is not in posture for decision regarding whether the employee was exposed to methane at work as OWCP failed to adequately develop the issue.

In a statement dated May 6, 2018, appellant advised that one of the employee's coworkers had told her that the employee had died due to methane gas poisoning. She indicated that she had seen news reports regarding the employee's death that also attributed it to methane. Appellant asserted that five employees had died over the course of five years at that work location. She alleged that the location had been built on a gas site and that 11 people had died since of the location opened of upper respiratory issues. Appellant maintained that reports existed documenting methane levels at the time of the employee's death.

Counsel for the employing establishment, in a letter to OWCP on July 26, 2017, indicated that OSHA had found no levels of methane gas or any other hazardous air pollutants that constituted a health or safety concern. Although counsel indicated in her correspondence that she enclosed copies of test results from OSHA and two independent contractors, no such report are found in the record. OWCP did not attempt to obtain any evidence from the employing establishment regarding appellant's allegation that the employee has an asthma attack due to exposure to methane gas at work. OWCP's procedures provide that the employing establishment is the best source for data regarding exposure to substances at the workplace.[12]

Proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation benefits, OWCP shares

[10] *A.O.*, Docket No. 18-0558 (issued October 10, 2018).

[11] *Id*.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of the Factual Evidence*, Chapter 2.800.7b(4) (June 2011).

responsibility in the development of the evidence. It has the obligation to see that justice is done.[13] In particular, OWCP has the responsibility to develop the evidence when such evidence is of the character normally obtained from the employing establishment or other government source.[14] On remand, it shall obtain all relevant information from the employing establishment regarding methane or other chemicals at the employing establishment as well as a statement of her employment duties.[15] Following this and any other necessary development, it shall issue a *de novo* decision.

## ***CONCLUSION***

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

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 20, 2018 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 28, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

[13] *X.V.*, Docket No. 18-1360 (issued April 12, 2019); *K.B.*, Docket No. 18-1548 (issued March 11, 2019).

[14] *See D.M.*, Docket No. 19-0362 (issued June 11, 2019); *G.R.*, Docket No. 18-1490 (issued April 4, 2019).

[15] *D.M.*, *id*.