United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
	)	
and	)	**Docket No. 20-0981**
	)	**Issued: November 9, 2020**
DEPARTMENT OF HOMELAND SECURITY, NATIONAL PROTECTION & PROGRAMS DIRECTORATE, Casa Grande, AZ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 4, 2020 appellant filed a timely appeal from a March 18, 2020 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 his burden of proof to establish renal failure causally related to the accepted factors of his federal employment.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 21, 2014 appellant, then a 58-year-old chemical security inspector, filed an occupational disease claim (Form CA-2) alleging that he sustained acute renal failure causally related to the accepted factors of his federal employment. He noted that he first became aware of his condition on May 29, 2014 and attributed it to factors of his federal employment on May 30, 2014. Appellant stopped work on May 29, 2014.

In a statement accompanying his claim, appellant described his work as an inspector with the employing establishment starting in 2005. He alleged that exposure to chemicals at work, including recent inspections of agricultural chemical facilities, had resulted in acute renal failure. Appellant advised that he inspected facilities containing potassium nitrate, which was known to cause kidney and blood problems. He asserted that he had performed hundreds of inspections of rail tankers carrying chemicals such as chlorine and anhydrous ammonia from May 2005 to July 2010. In July 2010 appellant began inspecting facilities. He worked with an inspector from 2011 to 2013 who had physical reactions when exposed to nitrate-based chemicals in factories. The number of inspections increased significantly in 2013 and appellant began to experience medical problems that needed urgent care. He was hospitalized on May 30, 2014 for acute renal failure, and that a neurologist had attributed his condition to chemical exposure at work.

On October 11, 2013 appellant received treatment in the emergency department for an ileus or small bowel obstruction. On January 30, 2014 he received treatment for a skin rash.

In a May 30, 2014 consultation, Dr. Theodore Tzeremas, a Board-certified nephrologist, evaluated appellant for an acute kidney injury. He noted that he took ibuprofen nightly for hyperlipidemia and hypertension. Dr. Tzeremas diagnosed an acute kidney injury which he suspected resulted from "severe volume depletion in the setting of nonsteroidal medication use."

In a discharge summary dated June 1, 2014, Dr. Matthew C. Kerzan, a Board-certified internist, discussed appellant's hospitalization for high creatinine levels after lab work revealed acute renal failure. He diagnosed acute renal failure due to either medications, urinary retention, or chemicals. Dr. Kerzan noted that appellant had a history of smoking in the past and had been exposed to chemicals in his work as a chemical inspector.

Appellant, on August 15, 2014, summarized recent chemical facility inspections that he had performed from September 17, 2013 to July 2, 2014.

On September 3, 2014 Dr. Maninder P. Chatha, a Board-certified nephrologist, diagnosed stage two chronic kidney disease with high creatinine levels for three months.

[2] Docket No. 19-0362 (issued June 11, 2019).

Appellant underwent a left renal biopsy on September 11, 2014. Dr. Juan M. Iturregui, a Board-certified pathologist, indicated that the biopsy had revealed tubulointerstitial fibrosis and a focal acute tubular injury. He advised, "The degree of tubulointerstitial fibrosis is out of proportion to the damage to vessels and glomeruli, therefore, these changes could represent the chronic sequela of a previously tubulointerstitial disorder, such as acute tubular necrosis due to a toxic event or a hemodynamic disturbance."

On September 30, 2014 appellant provided a list of additional facilities that he inspected, including ones that had environmental violations.[3] He also submitted a non-exhaustive list of chemicals that were present at the inspected facilities.

On October 13, 2014 Dr. Chatha related that he had initially treated appellant for an acute kidney injury and was currently treating him for chronic kidney disease and hypertension. He found that he should avoid exposure to toxic chemicals, stress, and extensive travel.

In a development letter dated December 12, 2014, OWCP advised appellant that the evidence currently was insufficient to show that he actually had experienced the alleged employment factors or had sustained a diagnosed condition due to an employment activity. It notified him of the type of additional evidence needed, including a detailed factual statement describing the activities that he believed had contributed to his condition and a report from his attending physician addressing the causal relationship between any diagnosed condition and factors of his federal employment. OWCP afforded appellant 30 days to submit the requested evidence.

Appellant, in a January 2, 2015 response to OWCP's development letter, asserted that a renal biopsy indicated that his condition had resulted from either a toxic event, a hemodynamic disturbance, or a combination of the two. He related that he had developed a rash at a facility where a fellow inspector had a reaction to airborne nitrates. The employing establishment did not provide safety equipment. Appellant advised that he had smoked cigarettes for 20 years, stopping in November 2007. He indicated that the Material Safety Data Sheet (MSDS) for ammonium nitrate listed a kidney injury as a possible consequence of prolonged exposure. Appellant related that facility inspections had significantly increased for the past five years and that he had been exposed to pesticides, insecticides and nitrates in enclosed warehouses. R.L., who works for the employing establishment, reviewed his statement and advised that it appeared to be accurate.

In a report dated January 14, 2015, Dr. Chatha noted that appellant had been hospitalized with ileus in December 2013. In January 2014, after conducting inspections of chemical facilities, he sought treatment in the emergency room for a rash and in May 2014 was admitted to the hospital for elevated creatinine levels. Dr. Chatha advised that a biopsy had demonstrated kidney damage due to either acute tubular necrosis or toxic exposure. He diagnosed stage two chronic kidney

[3] Appellant submitted enforcement and compliance histories for various facilities that he had inspected and information regarding complaints and accidents at facilities from Occupational Safety and Health Administration (OSHA). He also submitted chemical release information for facilities. Appellant additionally submitted a list of chemicals likely to be present in rail cars and chemicals of interest to the employing establishment.

disease and noted that appellant had an extensive history of chemical exposure at work and that it was difficult to ascertain which chemical contributed to his condition.

By decision dated February 4, 2015, OWCP denied appellant's occupational disease claim. It found that he had not factually established the occurrence of the alleged chemical exposure. Thus, OWCP concluded that the requirements had not been met to establish an injury as defined by FECA.

On February 25, 2015 appellant, through his then- counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a report dated September 15, 2015, Dr. Jeffrey D. Gaber, a Board-certified internist, evaluated appellant for chronic renal failure. He reviewed medical records, including the pathology report finding chronic tubular interstitial changes and a focal nebular injury due to either toxic exposure or acute tubular necrosis. Dr. Gaber opined that appellant's condition did not result from acute tubular necrosis as it had not completely resolved, but instead was "more consistent with a toxic exposure." He discussed the chemicals found at sites that appellant had inspected, noting that many facilities had violated federal safety regulations for releases of chemicals or an improper safety system. Dr. Gaber diagnosed chronic renal insufficiency as a result of chronic tubular interstitial nephritis and related, "It is clear that [appellant] has been exposed to a number of toxic chemicals during his career with [the employing establishment], many of which are well-known to be nephrotoxic. During his career, he did not have protective respiratory equipment. The pathology report on the kidney biopsy is consistent with a toxic cause of renal insufficiency." He advised that smoking cigarettes did not cause renal failure. Dr. Gaber reviewed OWCP's decision and asserted:

> "To reiterate, [appellant] did not have any preexisting or underlying conditions to cause renal failure and, as stated just before, tobacco use is definitely not one of them. The fact that a single chemical cannot be determined as the offending agent does not, in my opinion, reduce the validity of his claim. In fact, in my opinion, since so many of the chemicals can cause renal insufficiency, that history alone strengthens his claim.
>
> "To summarize, then, it is my opinion to a reasonable degree of medical certainty that there is a strong causal relationship between [appellant's] renal insufficiency and the work[-]related exposures described above."

A telephonic hearing was held on September 17, 2015.

By decision dated December 8, 2015, OWCP's hearing representative affirmed the February 4, 2015 decision. She found that appellant had not established exposure to a particular toxic chemical.

Thereafter, appellant provided statements from coworkers who had accompanied him on inspections.

In a report dated June 24, 2016, Dr. Harry F. Goss, Jr., a Board-certified internist and nephrologist, noted that appellant believed that his exposure to chemicals had caused his renal

condition. He diagnosed renal interstitial fibrosis, secondary tubulointerstitial nephritis, kidney disease, a history of hypertension, history of toxic inhalation exposure, occupational exposure to toxic agents in agriculture, occupational exposure to toxic waste, kappa light chain disease, azotemia, and gout.

In a December 7, 2016 affidavit, appellant described his workplace exposure to chemicals, including ammonium nitrate, potassium nitrate, potassium permanganate, and aluminum phosphide. He described improper release and storage of chemicals at various facilities that he had inspected and asserted that the employing establishment had not provided him with respiratory equipment.

In a supplemental report dated December 7, 2016, Dr. Gaber noted that appellant had provided an affidavit describing significant exposure to ammonia nitrate in ripped and leaking pallets during an inspection at a facility with poor ventilation. In 2014 he had performed inspections on a facility which contained the chemicals potassium nitrate, potassium permanganate, and aluminum phosphide. Dr. Gaber discussed appellant's exposure to other chemicals during the course of his inspection of nine facilities and indicated that he had reviewed the MSDS for the various chemicals and articles relevant to renal failure after exposure to certain chemicals. He related that based on the information from the MSDS and a review of medical literature, appellant's exposure to one or all of the following chemicals, potassium permanganate, potassium nitrate, phosphorus, phosphorus oxychloride, chlorine dioxide, and aluminum phosphide, had resulted in his development of chronic renal failure. Dr. Gaber noted that the chemicals evaporated slowly, off-gassed, and negatively impacted air quality indoors.

On December 6, 2016 the employing establishment denied the request from appellant's counsel for information regarding a description of the storage of the chemicals, protective clothing or respirators he wore, and chemicals leaking or improperly stored, citing security issues. It submitted a November 18, 2015 statement regarding the exposure of another employee to hazardous chemicals.

On December 7, 2016 appellant, through counsel, requested reconsideration.

By decision dated March 9, 2017, OWCP modified its December 8, 2015 decision to find that appellant had established exposure to chemicals in the course of his federal employment. It determined, however, that the medical evidence of record was insufficient to establish that he had sustained a medical condition causally related to the accepted exposure, noting that Dr. Gaber had failed to discuss appellant's history of hypertension.

In a report dated July 1, 2017, Dr. Gaber asserted that appellant's biopsy demonstrated that interstitial nephritis, a condition unrelated to hypertension, had caused his renal insufficiency. He opined that there was no evidence that his controlled hypertension "played any role in the development of the renal insufficiency."

On September 14, 2017 appellant, through counsel, requested reconsideration.

By decision dated June 18, 2018, OWCP denied modification of its March 9, 2017 decision. It found that appellant had not submitted reasoned medical evidence explaining how

exposure to potassium permanganate, potassium nitrate, phosphorus oxychloride, chlorine dioxide, or aluminum phosphide caused chronic renal failure.

Appellant appealed to the Board. By decision dated June 11, 2019, the Board set aside the June 18, 2018 decision. It found that Dr. Gaber's reports were sufficient to require further development of the medical evidence and instructed OWCP to refer appellant for a second opinion examination. The Board further found that, on remand, OWCP should obtain relevant evidence from the employing establishment regarding his chemical exposure and use of PPE.[4]

On December 19, 2019 OWCP prepared an updated SOAF describing appellant's work history and chemical exposure.

OWCP referred the case record to Dr. Chadi Obeid, a Board-certified internist and nephrologist, for a second opinion based on a review of the case record. In a report dated February 7, 2020, Dr. Obeid listed the evidence provided. He diagnosed an acute kidney injury in May 2014 due to prerenal azotemia and ischemic tubular necrosis. Dr. Obeid attributed the kidney injury to hypotension and the use of blood pressure medication. He noted that appellant's kidney function improved after intravenous fluid, but did not go back to normal. Dr. Obeid advised that appellant had objective findings of reduced kidney function and abnormal creatine and a biopsy showing a tubular injury and unspecific interstitial fibrosis. He indicated that he had subjective findings of chemical exposure. Dr. Obeid opined that medical literature was inadequate "to establish a scientific connection between the chemical exposure and the claimant's kidney disease…." He found that appellant's kidney disease likely resulted from an "ischemic acute tubular necrosis injury secondary to hypotension and dehydration…." Dr. Obeid noted that studies supported an increased risk of chronic kidney disease in patients with an acute kidney injury. He concluded that appellant's "chronic kidney disease is likely secondary to ischemic tubular necrosis due to hypotension and kidney disease due to chemical exposure is less likely."

By decision dated March 18, 2020, OWCP denied modification of its March 9, 2017 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation period of FECA,[6] that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to

[4] In response to a congressional inquiry, by letter dated December 16, 2019, OWCP noted that its appointment scheduling service had been unable to locate a specialist that would accept the case. In a letter to appellant's senator dated February 18, 2020, OWCP responded that it had been unable to locate a specialist to evaluate appellant and had thus scheduled an opinion based on a file review.

[5] *Supra* note 1.

[6] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

the employment injury.[7] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[8]

In an occupational disease claim, appellant's burden of proof requires submission of the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[9]

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.[10] The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[11]

Section 8123(a) of FECA provides, in pertinent part: "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."[12] 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.[13] Where a case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[14]

ANALYSIS

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

[7] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[8] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[9] *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

[10] *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388 (2008).

[11] *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008).

[12] 5 U.S.C. § 8123(a).

[13] 20 C.F.R. § 10.321; *C.W.*, Docket No. 18-1536 (issued June 24, 2019).

[14] *V.K.*, Docket No. 18-1005 (issued February 1, 2019).

The Board finds that a conflict in medical opinion exists between Dr. Gaber, appellant's attending physician, and Dr. Obeid, an OWCP referral physician, regarding whether he sustained a renal failure causally related to the accepted factors of his federal employment.

On September 15, 2015 Dr. Gaber advised that he had reviewed the medical records, including the pathology report finding chronic tubular interstitial changes and a focal nebular injury due to either toxic exposure or acute tubular necrosis. He found that appellant's kidney condition was unrelated to acute tubular necrosis due to its failure to resolve. Dr. Gaber attributed the pathology findings to toxic exposure. He discussed appellant's history of exposure to chemicals working as an inspector. Dr. Gaber diagnosed chronic renal insufficiency due to chronic tubular interstitial nephritis and opined that there was a "strong causal relationship" between his renal insufficiency and exposure at work. In a December 7, 2016 supplemental report, he noted that appellant had been exposed to ammonia nitrate, potassium nitrate, potassium permanganate, chlorine dioxide, and aluminum phosphide. Dr. Gaber indicated that he had reviewed the MSDS for the chemicals and medical literature addressing the relationship between renal failure and chemical exposure. He attributed appellant's chronic renal failure to exposure to the chemicals. On July 1, 2017 Dr. Gaber advised that his condition of interstitial nephritis was unrelated to hypertension, asserting that controlled hypertension did not cause renal insufficiency.

In a report dated February 7, 2020, Dr. Obeid found that appellant had sustained an acute kidney injury as a result of prerenal azotemia and ischemic tubular necrosis secondary to hypotension and blood pressure medication, noting that his kidney function improved, but did not resolve with intravenous fluid resuscitation. He found inadequate medical literature showing causation between his kidney disease and chemical exposure. Dr. Obeid noted that a kidney biopsy showed a tubular injury and unspecific interstitial fibrosis. He attributed the tubular injury to hypotension and dehydration and advised that patients with an acute kidney injury had an increased risk of chronic kidney disease. Dr. Obeid found that appellant's chronic kidney disease was likely due to ischemic tubular necrosis resulting from hypotension rather than chemical exposure.

Both Dr. Gaber and Dr. Obeid discussed appellant's history of chemical exposure, reviewed the medical evidence, and provided rationale for their respective findings. The Board, therefore, finds a conflict in medical opinion regarding whether appellant sustained a kidney condition caused or aggravated by factors of his federal employment. As discussed, 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.[15] The Board will therefore remand the case for OWCP to refer appellant to an impartial medical examiner to determine whether the accepted employment exposure caused or contributed to appellant's kidney condition.[16] Following this and any such further development as deemed necessary, OWCP shall issue a *de novo* decision.

[15] 5 U.S.C. § 8123(a); *see also G.K.*, Docket No. 16-1119 (issued March 16, 2018).

[16] *C.C.*, Docket No. 20-0151 (issued July 30, 2020).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: November 9, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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