

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

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R.G., claiming for the children of K.G., Appellant)	
)	
and)	Docket No. 22-0288
)	Issued: February 9, 2023
U.S. POSTAL SERVICE, MICHIGAN)	
METROPLEX PROCESSING &)	
DISTRIBUTION CENTER, Pontiac, MI,)	
Employer)	
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Appearances:
Alyson Oliver, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On December 14, 2021 appellant, through counsel, filed a timely appeal from a June 22, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of her oral argument request, appellant asserted that oral argument should be granted to review the extensive file and to provide a complex scientific analysis. The Board, in exercising its discretion, denies her request for oral argument because this matter requires an evaluation of the medical evidence presented. As such, the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUES

The issues are: (1) 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; and (2) whether OWCP's hearing representative properly denied appellant's request for the issuance of subpoenas.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

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. 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 immediate cause of death on June 9, 2015 as bronchial asthma.

Counsel for the employing establishment provided a July 26, 2017 letter noting that the employee's family alleged that methane gas at the workplace had 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.

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 concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On May 18, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a May 6, 2018 statement, 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

³ 5 U.S.C. § 8101 *et seq.*

⁴ Docket No. 19-1059 (issued July 28, 2020).

normal. Appellant questioned why the employee's supervisor had not checked on her for two hours. The hearing took place on October 17, 2018.

OWCP subsequently received an emergency room report dated November 19, 2014 from an osteopath, who noted that the employee had experienced shortness of breath at work when she bent down to place a soda underneath a table and was exposed to dust and papers. The employee was diagnosed with acute asthma exacerbation and suspected allergic reaction. The report included the employee's levels for salt, potassium, carbon dioxide, glucose, creatine, alcohol, and blood urea nitrogen.

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.

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 the employee 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.

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. 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 violation of OSHA standards.

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 [the employee's] asthma attack."

On April 16, 2019 appellant filed an appeal with the Board of the December 20, 2018 OWCP decision. By decision dated July 28, 2020, the Board found that she had not established that the employing establishment denied the employee access to her medication at work on June 9, 2015. The Board further found, however, that the case was not in posture for decision regarding whether the employee was exposed to methane at work as OWCP failed to adequately develop this issue. The Board remanded the claim for OWCP to obtain all relevant information

from the employing establishment regarding methane or other chemicals at the employing establishment as well as a statement of the employee's duties.⁵

In a September 9, 2020 development letter, OWCP requested that appellant provide additional medical evidence establishing the employee's cause of death and a toxicology report. In a separate development letter of even date, it requested that the employing establishment provide all environmental/air tests conducted near June 9, 2015 at the employee's worksite including tests conducted by OSHA and independent contractors. OWCP also requested a copy of the employee's job duties. It afforded both parties 30 days to respond.

On September 23, 2020 the employing establishment provided the results of methane testing and air monitoring. The Louis Berger Group Inc. responded to a methane detection system (MDS) alarm at the employing establishment on January 14, 2015 through its subcontractor, Professional Service Industries, Inc. (PSI) and found no detected levels of methane that would present a health and safety concern for the occupants of the building. In a January 15, 2016 letter, PSI noted that there was a fault in the MDS which resulted in triggering of the alarm. It noted that methane had an immediately dangerous to life and health threshold of 50,000 parts per million (ppm) in enclosed or confined spaces as a potential simple asphyxiant. PSI reported that methane had a lower explosive limit level (LEL) of 12,500 ppm and an upper explosive limit (UEL) of 50,000 ppm. It found that the highest tested level of methane at the employing establishment was 5.71 ppm.

On March 18, 2016 Tetra Tech Inc. tested air quality at the employing establishment and found no methane gas or other conditions of concern.

On April 5, 2016 OSHA conducted personal air monitoring at the employing establishment. It provided results summarized in a table which indicated that there were no detectable levels of methane or hydrogen sulfide. The table also included carbon dioxide levels of 474 and 494 ppm while the OSHA standard for acceptable indoor air quality maximum was 1,000 ppm.

By decision dated December 23, 2020, 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.

OWCP continued to receive evidence. In a February 22, 2016 memorandum, the employing establishment Office of Inspector General (OIG) addressed the safety concerns of the MDS at the employing establishment. It noted that there were 5 employee deaths within a 14-month period which had not been correlated with failures of the MDS or any other safety concern. The OIG reported that the employing establishment was built on a former vehicle manufacturing plant that had included a foundry, and that it was considered a brownfield site because its use was affected by environmental contamination. The U.S. Environmental Protection Agency provided specific guidelines and regulations to sustainably reuse brownfield sites. Prior to construction of the employing establishment, environmental studies determined that there was light nonaqueous phase liquid (LNAPL) contamination. As part of its decomposition process, LNAPL is broken down to produce colorless and odorless methane gas. The employing establishment included a gas venting system when constructing the employing establishment to

⁵ *Id.*

prevent the buildup and accumulation of methane gas and a MDS to detect and alert personnel of any methane gas inside the facility. As methane gas is extremely flammable and may form explosive mixtures with the air when it reached LEL of 20 percent LEL, the amber light on the MDS was to be illuminated as a warning at 10 percent LEL. The OIG determined that the MDS had not been functioning properly since March 2015. It reported that there were 10 MDS warnings between March and July 2015 with LEL percentages ranging between 6 and 18 percent. Maintenance personnel had replaced the sensor on the MDS in March and September 2015 and had found that the continuous flashing amber warning light was due to sensor malfunction and not the presence of methane gas. The OIG noted that, if the MDS was operating properly, the blue indicator light, demonstrating sensor malfunction would have been illuminated. Its testing indicated that the amber warning light flashed when the screen showed zero percent LEL. OIG found that the employing establishment did not address repeated recommendations to resolve the claims of methane buildup, by modifying the MDS to include a ventilation of the pipes that release the methane gas into the atmosphere, until January 15, 2016 at which time an industrial hygienist found that methane levels were low and that there were no immediate health or safety concerns. It requested written confirmation from the employing establishment that corrective actions were completed.

In a December 28, 2020 report, Dr. Werner U. Spitz, a Board-certified forensic pathologist and a toxicologist, reviewed the medical and factual evidence of record. He noted that the employee was a known asthmatic and that, therefore, she was especially sensitive to exposure to toxic and nontoxic substances including methane gas. Dr. Spitz reported that, when she was exposed to methane gas, the employee experienced difficulty breathing because her airways had constricted. He noted that the employee had two asthmatic episodes at work, the first on November 19, 2014 when she bent down to place a soda container under a table, stirring up dust, which caused her to become short of breath, and the second on June 9, 2015 when she collapsed in the parking lot. Dr. Spitz noted that there was an MDS at the employing establishment and found that its presence indicated that a problem of methane gas contamination existed in the building. He further noted that the MDS had not functioned properly since March 2015. Dr. Spitz opined that the employee suffered of severe hypersensitivity to methane gas exposure, that this contamination triggered the acute manifestations of asthma and thus that methane gas exposure caused her death. He reported that on November 19, 2014 testing showed the presence of methane gas in her blood.

On January 26, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. She provided additional medical evidence including the employee's arterial blood gas results and other test results from November 19, 2014. Appellant also provided OSHA guidelines for confined and enclosed spaces for shipyard employment.

On February 16, 2021 appellant, through counsel, requested a series of subpoenas for an employee of Tetra Tech Inc., an employee of The Louis Berger, Inc., an employee of PSI, OSHA investigators, the employing establishment's counsel, and Dr. Spitz. The purpose of the subpoenas was to determine the date of the air and methane testing and to obtain expert opinions.

By decision dated March 9, 2021, OWCP's hearing representative denied appellant's request for the issuance of subpoenas under 20 C.F.R. § 10.619, finding that the testimony could be obtained through written reports, affidavits, or statements. The oral hearing took place on April 28, 2021.

Appellant, through counsel, resubmitted the evidence of record and included a table labeled Appendix B which listed the OSHA permissible exposure limits for methane as none, the immediately dangerous to life or health (IDLH) value as 5,000 ppm or 10 percent LEL, the LEL as 5.00 percent or 50,000 ppm, and the UEL as 15.00 percent or 150,000 ppm.

By decision dated June 22, 2021, an OWCP hearing representative affirmed the December 23, 2020 decision finding that the evidence of record did not establish that the employee was in fact exposed to methane gas at work on June 9, 2015. He also denied appellant's request for the issuance of subpoenas.

LEGAL PRECEDENT -- ISSUE 1

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.⁶ 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.⁷ 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.⁸

ANALYSIS -- ISSUE 1

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence submitted prior to OWCP's December 20, 2018 decision, because the Board considered that evidence in its July 28, 2020 decision, finding that it was insufficient to establish her claim. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.⁹

Appellant alleged that the employee's asthma and resulting death was due to exposure to methane while in the performance of duty. On prior appeal, the Board directed OWCP to obtain all relevant information from the employing establishment regarding methane or other chemicals at the employing establishment.

⁶ 5 U.S.C. § 8133 (compensation in case of death).

⁷ See *W.C.*, Docket No. 18-0531 (issued November 1, 2018); *Sharon Yonak (Nicholas Yonak)*, 49 ECAB 250 (1997).

⁸ See *B.M. (H.M.)*, Docket No. 20-0741 (issued September 30, 2021); *L.R. (E.R.)*, 58 ECAB 369 (2007).

⁹ See *K.V.*, Docket No. 21-0008 (issued November 15, 2021); *B.R.*, Docket No. 17-0294 (issued May 11, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

Along with other evidence of MDS error, the employing establishment submitted a February 22, 2016 OIG memorandum, finding that the employing establishment MDS had not been functioning properly since March 2015. It noted that there were 10 MDS warnings between March and July 2015 with methane LEL percentages ranging between 6 and 18 percent. The employee was at work and developed asthma on June 9, 2015 during the period that the MDS was not functioning and within the dates of the 10 MDS warnings. The evidence from the employing establishment does not include the specific dates of the 10 MDS warnings and the corresponding methane LEL percentages for those dates. The Board is unable to ascertain whether the date of the employee's death corresponds to that of an MDS warning and, if so, what level of methane she was exposed to on June 9, 2015.

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 responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁰ 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.¹¹

As OWCP failed to obtain all relevant information from the employing establishment regarding the details of the presence of methane at the employing establishment, the Board will remand the case for it to further develop the factual evidence in this case. On remand, it shall obtain all relevant information from the employing establishment regarding the specific dates of methane alarms between March and July 2015, the levels of methane found on those dates, and whether and how these alarm and methane levels correspond to June 9, 2015, the date of the employee's death. Following this and any other necessary development, it shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 2

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.¹² The hearing representative of OWCP's Branch of Hearings and Review has discretion to approve or deny a subpoena request.¹³ Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are clearly contrary to logic and probable deductions from established facts.¹⁴

¹⁰ See *J.C.*, Docket No.20-0943 (issued April 4, 2022); *R.G.*, Docket No. 19-1059 (issued July 28, 2020); *D.M.*, Docket No. 19-0362 (issued June 11, 2019).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of the Factual Evidence*, Chapter 2.800.7.b(4) (June 2011); *J.C.*, *id.*

¹² See 20 C.F.R. § 10.619; *R.H.*, Docket No. 19-1503 (issued February 2, 2022); *P.F.*, Docket No. 19-0547 (issued December 20, 2019); *E.C.*, Docket No. 18-1808 (issued May 16, 2019).

¹³ *Id.*

¹⁴ *B.M.*, Docket No. 17-1157 (issued May 22, 2018); *Gerald A. Carr*, 55 ECAB 225 (2004).

ANALYSIS -- ISSUE 2

The Board finds that OWCP's hearing representative properly denied appellant's request for the issuance of subpoenas.

Appellant requested that OWCP's hearing representative issue subpoenas to an employee of Tetra Tech, Inc., an employee of The Louis Berger, Inc., an employee of PSI, OSHA investigators, the employing establishment's counsel, and Dr. Spitz. The purpose of the subpoenas was to determine the date of the air and methane testing and to obtain expert opinions. The hearing representative denied appellant's request, noting that the testimony of these persons could be obtained through written reports, affidavits, or statements. Appellant has insufficiently explained why a subpoena was the best method to obtain this evidence or shown that there was no other method to obtain the information. The Board finds that OWCP's hearing representative's denial of appellant's request for subpoenas was reasonable and did not constitute an abuse of discretion.¹⁵

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 this case is not in posture for decision with regard the employee's exposure to methane at the employing establishment. The Board further finds that OWCP's hearing representative did not abuse his discretion in denying appellant's requests for the issuance of subpoenas.

¹⁵ See *P.F.*, *supra* note 12; *E.C.*, *supra* note 12; *L.M.*, Docket No. 17-0159 (issued September 27, 2017).

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 9, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board