United States Department of Labor
Employees' Compensation Appeals Board

R.H., claiming as widow of S.H., Appellant	)	
and	)	**Docket No. 23-0120**
	)	**Issued: March 21, 2024**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL, El Paso, TX, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 2, 2022 appellant, through counsel, filed a timely appeal from an August 23, 2022 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.

[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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish that the employee's death on January 10, 2020 was causally related to the accepted employment exposure.

FACTUAL HISTORY

On December 17, 2019 the employee, then a 55-year-old border patrol agent, filed an occupational disease claim (Form CA-2) alleging that he contracted cytomegalovirus (CMV) due to factors of his federal employment. He indicated that he tested positive for CMV IgM anti-bodies and his physician indicated that he could have contracted the disease while performing his duties with children from South America. The employee noted that he first became aware of his condition and realized its relationship to his federal employment on December 17, 2019. He stopped work on November 20, 2019.

In support of his claim, the employee submitted an undated note by Dr. Suresh J. Antony, a Board-certified internist specializing in infectious diseases, who indicated that the employee had been diagnosed with CMV IgM. Dr. Antony further indicated that the disease was carried by children and opined that the employee could have contracted the disease while performing his duties as a border patrol agent. He noted that the employee had daily exposure to children from South America as part of his duties, which led to the possibility of him contracting the disease.

OWCP also received a portion of a December 2, 2019 medical report by an unknown provider, which indicated that the employee had been diagnosed with acute alcoholic hepatitis which required intravenous fluids. During his evaluation for this condition, the employee was found to be positive for CMV and Epstein-Barr virus (EBV) with no systemic signs. The report further noted that he worked as a border patrol agent with prolonged exposure to children at a detention center. Physical examination findings included jaundice, increased fatigue, and pitting edema in the bilateral lower extremities.

In a separate note of even date, Dr. Antony released the employee to return to work on December 18, 2019.

In a December 9, 2019 Certification of Health Care Provider for Employee's Serious Health Condition form, Veronica Padilla, a nurse practitioner, indicated that the employee had been hospitalized from November 20 through 23, 2019, was under the care of Dr. Antony, and the duration of his condition would be approximately six months.

In a December 17, 2019 witness statement, T.A., the employee's coworker, confirmed that he was assigned to the sally port and helped sickly children from Central America. She indicated that the employee was in direct contact with children who were coughing, sneezing, and running fevers on an almost daily basis.

In a December 23, 2019 development letter, OWCP informed the employee of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary. In a separate letter of even date, OWCP requested that the employing establishment address the

accuracy of the employee's allegations and describe his exposure and any precautions taken to minimize effects of exposure. It afforded both parties 30 days to submit the requested information.

OWCP thereafter received a December 17, 2019 witness statement by A.H., a coworker, who indicated that he witnessed the employee working in close contact with many undocumented children from Central America for most of 2019. A.H. noted that the employee was assigned to detainee watch during a surge of immigrants and routinely had contact with undocumented immigrants, including feeding them and lining them up for medical screenings with in-house medical teams.

By decision dated January 27, 2020, OWCP found that the employee had established that he was in direct contact with sick children from Central America on a daily basis and was diagnosed with CMV IgM. However, it denied the employee's occupational disease claim, finding that he had not submitted rationalized medical evidence establishing a causal relationship between his diagnosed conditions and the accepted employment exposure.

On February 4, 2020 appellant advised OWCP that the employee had passed away on January 10, 2020. A death certificate dated January 27, 2020 listed the cause of death as distributive shock and end-stage liver disease. It further listed acute renal failure as a significant condition contributing to his death.

In a development letter dated July 2, 2020, OWCP informed appellant of the evidence required to establish a claim for survivor's benefits and provided her with a claim for compensation by surviving spouse and/or children (Form CA-5).

On July 13, 2020 OWCP received a Form CA-5 completed by appellant on July 9, 2020. Appellant also completed the attending physician's portion of the form, alleging that the employee could not be treated for the CMV and EBV diagnoses, because he was already weak from a preexisting liver condition. She further alleged that CMV and EBV caused the employee's liver to worsen and his body to go into shock, which caused his death. Appellant enclosed a custody agreement dated October 2019 appointing her and the employee as joint managing conservators for their two grandchildren.

In a subsequent development letter dated September 10, 2020, OWCP informed appellant that the evidence submitted was insufficient to establish her claim for survivor's benefits. It advised her of the evidenced needed, including a statement describing the employee's hazardous exposure and activities and acute symptoms for the week prior to his death, and a detailed report from the employee's treating physician addressing the causal relationship between his death and the employment exposure. In a separate letter of even date, OWCP requested that the employing establishment complete an official supervisor's report of employee's death (Form CA-6) and provide a statement describing the employee's hazardous exposure, activities, and symptoms for the week prior to his death. It afforded both parties 30 days to submit the requested evidence.

In a statement dated December 17, 2020, C.M., the employee's coworker, indicated that, during the year 2019, their sector had an influx of undocumented adults and children from all over the world. He noted that many of those individuals were sick from different types of illnesses and contagious diseases, but despite that remained in their custody for extended periods of time. C.M.

indicated that he witnessed the employee work in direct contact with undocumented immigrants in their custody in various locations including processing areas, holding tents, and the sally port.

On December 22, 2020 appellant filed a request for reconsideration of OWCP's January 27, 2020 decision. In support of the request, she submitted a duplicate copy of Dr. Antony's undated note.

By decision dated January 21, 2021, OWCP denied appellant's request for reconsideration of the merits of the employee's claim, pursuant to 5 U.S.C. § 8128(a), finding that her request for reconsideration neither raised substantial legal questions, nor included new or relevant evidence.

On April 13, 2021 appellant filed another Form CA-5. In the attending physician's portion of the form, Dr. Antony indicated that the employee was working with migrant children when he developed CMV and EBV. He diagnosed CMV hepatitis and indicated that the employee's direct cause of death was liver failure secondary to CMV. Dr. Antony further noted that he provided treatment to the employee on November 23, 2019 which he characterized as "management of hepatitis secondary to CMV."

OWCP thereafter received portions of the employee's hospital records for an admission from November 20 through 23, 2019. Dr. Jeremy Paul D. Santiago, an internist, noted that the employee related complaints of feeling unwell, inability to urinate, jaundice, bloating, and severe bilateral lower extremity swelling. He noted that the employee worked as a border patrol agent with exposure to children from migrant communities and was recently treated in the emergency room and found to have a hemoglobin of 15. A computerized tomography scan of the employee's abdomen revealed an enlarged liver with severe steatosis, generalized body wall edema, and a small amount of free fluid in the right lower quadrant and pelvis. An ultrasound of the right upper quadrant revealed echogenic liver compatible with fatty replacement. Upon review of systems, Dr. Santiago noted fatigue, generalized malaise, jaundice, and that the abdomen had become bigger over the last several months with redness and tenderness to the left flank. On physical examination, he noted that the employee's abdomen was obese with evidence of spider nevi and ecchymosis, flank erythema on the left side without tenderness, and lower extremity edema. Dr. Santiago reviewed the employee's laboratory data and diagnosed acute alcoholic hepatitis and elevated CMV and EBV. He opined that the employee's elevated CMV and EBV were "probably due to the exposure to the migrant [children] at the border patrol where he works for the last several months." Dr. Santiago recommended that the employee refrain from treatment of CMV and EBV until he recovered from the liver function tests and parenchymal damage that had occurred secondary to alcohol use.

In a portion of a December 25, 2019 hospital report, Dr. Leticia I. Tiscareno-Grajeda, an internist, noted that the employee had a history of hypertension, obesity status postgastric bypass surgery, chronic anemia, and alcohol abuse, and was admitted recently for severe alcoholic hepatitis. She noted that he presented to the emergency department with progressive weakness, fever, and deepening jaundice and, during his work-up, was found to have elevated EBV and CMV IgM levels. Dr. Tiscareno-Grajeda also noted that the employee was continued on medications to reduce his lower extremity edema and had been doing well, but then became progressively weaker and developed deepening jaundice, mild grade fever, and chills. The report indicated that the employee was admitted to the hospital from December 17 through 25, 2019.

By decision dated June 10, 2021, OWCP denied appellant's survivor's claim, finding that she had not submitted sufficient evidence to establish that the exposure occurred, as alleged. It noted that there was no factual evidence to establish that any of the children the employee worked with were actually diagnosed with CMV or EBV. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On July 6, 2021 appellant requested reconsideration of OWCP's June 10, 2021 decision.

By decision dated July 20, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), finding that her request for reconsideration neither raised substantial legal questions, nor included new or relevant evidence.

On May 25, 2022 appellant, through counsel, again requested reconsideration of OWCP's July 20, 2021 decision. In an accompanying letter, counsel contended that OWCP erred in issuing its June 10, 2021 decision. He argued that: (1) it failed to properly develop the record as it did not obtain a response from the employing establishment as to whether or not the children to which the employee was exposed had been diagnosed with CMV or EBV; (2) in the absence of a response from the employing establishment, it should have accepted the employee's report of injury as established pursuant to 20 C.F.R. § 10.177(b); (3) it failed to attempt to secure evidence in the custody of the employing establishment detention facility medical unit, including statistics and medical records pertaining to migrant children diagnosed with CMV with whom the employee had contact prior to contracting CMV; and (4) it failed to adjudicate the claim under the premise that the employee was engaged in high-risk employment.[3]

By decision dated August 23, 2022, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), finding that her request for reconsideration neither raised substantial legal questions, nor included new or relevant evidence.

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.[4] 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.[5] 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

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.6 (January 2013).

[4] 5 U.S.C. § 8133 (compensation in case of death).

[5] *B.M.*, Docket No. 20-0741 (issued September 30, 2021); *W.C.*, Docket No. 18-0531 (issued November 1, 2018).

issue and can be established only by medical evidence.[6] 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.[7] The Board has held that it is not necessary that there is a significant contribution of employment factors to establish causal relationship.[8] If the employment contributed to the employee's death, then causal relationship is established.[9]

ANALYSIS

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

Initially, the Board finds that, while OWCP indicated in its August 23, 2022 decision that it was performing a nonmerit review, it considered counsel's arguments as set forth in the May 25, 2022 request for reconsideration and discussed their relative probative value. As such, OWCP performed a *de facto* merit review of appellant's May 25, 2022 reconsideration request.[10]

By decision dated January 27, 2020, OWCP found that the employee had established that he was in direct contact with sick children from Central America on a daily basis and was diagnosed with CMV IgM. However, it denied his occupational disease claim, finding that he had not submitted rationalized medical evidence establishing a causal relationship between his diagnosed condition and the accepted employment exposure.

Shortly, thereafter, on February 4, 2020 appellant advised OWCP that the employee had passed away on January 10, 2020 and she submitted a death certificate dated January 27, 2020, which listed the cause of death as distributive shock and end-stage liver disease and acute renal failure. OWCP then proceeded to develop appellant's claim for survivor's benefits, and, by decision dated June 10, 2021, denied her survivor's claim, finding that she had not submitted sufficient evidence to establish that the exposure occurred, as alleged.

The Board finds that, prior to the employee's passing, OWCP had accepted that the employee established exposure under his own occupational disease claim. As appellant, his widow, is now claiming death benefits due to the same exposure, OWCP improperly readjudicated that aspect of the case finding that exposure was not established. Consequently, the Board finds that appellant has met her burden of proof to establish that the employee was in direct contact with sick children from Central America on a daily basis and was diagnosed with CMV IgM.

[6] *See R.G. (K.G.)*, Docket No. 19-1059 (issued July 28, 2020); *L.R. (E.R.)*, 58 ECAB 369 (2007).

[7] *P.G. (J.G.)*, Docket No. 20-0815 (issued December 10, 2020); *Edna M. Davis (Kenneth L. Davis)*, 42 ECAB 728 (1991).

[8] *See R.G. (O.G.)*, Docket No. 17-0916 (issued September 6, 2017); *T.H. (M.H.)*, Docket No. 12-1018 (issued November 2, 2012).

[9] *See P.G.*, *supra* note 7.

[10] *See Gina C. Cardenas (Alejandro P. Cardenas)*, Docket No. 01-200 (issued September 17, 2001).

As OWCP found that appellant had not established fact of injury, it did not evaluate the medical evidence. The case must, therefore, be remanded for consideration of the medical evidence of record.[11] After such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether the employee's death on January 10, 2020 was causally related to the accepted employment exposure.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2022 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: March 21, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[11] *Supra* note 9; *L.D.*, Docket No. 16-0199 (issued March 8, 2016).