United States Department of Labor
Employees' Compensation Appeals Board

J.P., claiming as widow of E.P., Appellant	)	
and	)	
DEPARTMENT OF ENERGY, BONNEVILLE POWER ADMINISTRATION, Portland, OR, Employer	)	**Docket No. 18-1739** **Issued: May 3, 2019**

Appearances:
Alan J. Shapiro, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 18, 2018 appellant, through counsel, filed a timely appeal from a July 12, 2018 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 was causally related to a January 30, 1988 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on January 30, 1998 the employee sustained injury while working on a transformer at work. The employee's traumatic injury claim (Form CA-1) was initially approved for cervical strain and cervical disc displacement at C6 through T1 and he later underwent OWCP-approved anterior cervical discectomy with interbody arthrodesis at C6 through T1. He suffered a myocardial infarction in August 2000 and the accepted conditions were later expanded to include aggravation of preexisting coronary atherosclerosis (myocardial infarction) due to taking anti-inflammatory medication (including Naproxen) for the accepted cervical condition.

The employee died on January 11, 2013. On January 25, 2013 appellant (the employee's widow) submitted a claim for survivor benefits (Form CA-5) alleging that the employee's death on January 11, 2013 was due, at least in part, to work-related heart failure and that; therefore, she was entitled to survivor's benefits.

In an undated report, Dr. Kevin M. Haughton, an attending Board-certified family practitioner, provided an opinion that a work-related medical condition contributed to the employee's death on January 11, 2013. He indicated that, although the primary cause of death was unknown given there was no autopsy, the cause of death was presumed to be from coronary artery disease. Dr. Haughton opined that the employee suffered a myocardial infarction in 2000 from chronic nonsteroidal anti-inflammatory drugs taken for his chronic pain and asserted that the coronary artery disease resulted in congestive heart failure. He indicated that the severity of the employee's hypotension was thought to be secondary to chronic, long-term opioid medication use and noted, "In my opinion, [the employee's] death was due to multiple chronic health diseases that developed after he sustained his work injury, and the subsequent treatment of the resulting chronic pain…."

On a January 14, 2013 death certificate, Dr. Paul Knouff, an attending Board-certified family practitioner, indicated that the employee's cause of death on January 11, 2013 was "unknown." He indicated that in a portion of the certificate entitled, "other conditions contributing to death" the condition of "coronary artery disease" was one of the contributing causes to death.

In a February 5, 2013 report, Dr. William Stewart, a Board-certified cardiologist serving as an OWCP medical adviser, found that there was no objective evidence that the employee's death was due to coronary artery disease or the use of nonsteroidal anti-inflammatory drugs (NSAIDS) or narcotic analgesics. He indicated that, prior to the employee's death on January 11, 2013, he

[3] Docket No. 14-0403 (issued March 27, 2015).

had developed pneumonia that was life threatening and that on January 9, 2013 he was again shown to have bilateral pneumonia. Dr. Stewart posited that there was no objective evidence that the coronary artery disease contributed to the employee's death based on an attending cardiologist's direct visualization of the coronary arteries in November 2011 and his finding that the condition was stable and nonlife threatening. He asserted that the most rational conclusion was that the employee's death was due to chronic obstructive pulmonary disease and bilateral pneumonia as he had an episode of pneumonia and respiratory failure two months prior and had just started treatment for an apparently new episode of bilateral pneumonia two days before his death. Dr. Stewart felt that there was no evidence that the employee's death was related to the use of NSAIDS or the use of narcotic analgesics.

By decision dated February 25, 2013, OWCP denied appellant's claim for survivor's benefits, finding that she had not submitted medical evidence sufficient to establish that a work-related condition caused or contributed to the employee's death on January 11, 2013. By decision dated September 19, 2013, a representative of OWCP's Branch of Hearings and Review affirmed the February 25, 2013 decision.

Appellant appealed to the Board and, by decision dated March 27, 2015,[4] the Board set aside the September 19, 2013 decision and remanded the case to OWCP for further development. The Board found that there was a conflict in the medical opinion evidence between Dr. Haughton and Dr. Knouff, attending physicians, and Dr. Stewart, an OWCP medical adviser, regarding whether a work-related condition contributed to the employee's death on January 11, 2013. The Board further determined that, on remand, the case record must be referred to an impartial medical specialist to resolve the outstanding conflict in the medical opinion evidence. The Board directed OWCP to issue an appropriate decision regarding appellant's claim for survivor's benefits after carrying out this development.

On remand OWCP referred the case record to Dr. Robert Thompson, a Board-certified cardiologist, for review in his role as an impartial medical specialist and an opinion regarding whether a work-related condition contributed to the employee's death on January 11, 2013. In a January 4, 2016 report, Dr. Thompson discussed the employee's factual and medical history. He indicated that he did not have "access to the particulars of [the employee's] actual dying, so I cannot comment on whether or not he did die of heart disease, but I will assume that he did." Dr. Thompson noted that the employee's use of NSAIDS was a contributing factor, but not a substantial contributing factor that would meet the criteria of more probably than not causing his cardiac condition.

By decision dated January 26, 2016, OWCP denied appellant's claim for survivors' benefits. It determined that the weight of the medical opinion evidence on the matter rested with the opinion of Dr. Thompson.

On February 3, 2016 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on October 19, 2016, counsel argued that Dr. Thompson's opinion regarding the cause of the employee's death was not well rationalized. By decision dated January 5, 2017, OWCP's hearing

[4] *Id*.

representative set aside the January 26, 2016 decision and remanded the case to OWCP in order to obtain a supplemental report from Dr. Thompson.

On remand OWCP requested, through a January 11, 2017 letter, that Dr. Thompson provide a supplemental report regarding the cause of the employee's death. However, Dr. Thompson did not respond to its request for such an opinion.

Due to Dr. Thompson's nonresponse, OWCP referred the case record in June 2017 to Dr. David Wu, a Board-certified cardiologist, for review in his role as an impartial medical specialist and an opinion regarding whether a work-related condition contributed to the employee's death on January 11, 2013.

In an October 12, 2017 report, Dr. Wu provided a summary of the employee's factual and medical history per his review of the documents in the case record. He indicated that the employee had suffered a non-ST elevation myocardial infarction (NSTEMI) in 2000 and that he underwent coronary artery stenting for proven coronary disease in 2000.[5] Dr. Wu noted that obvious factors contributing to the employee's NSTEMI in 2000 were hypertension, cigarette smoking, and hyperlipidemia, and he indicated that over-the-counter NSAIDS had been identified as a contributing factor to the employee's coronary artery disease. He advised that he could not find any clinical evidence to support that coronary artery disease caused or contributed to the employee's death on January 11, 2013. Dr. Wu noted that Dr. Craig Wehrli, a Board-certified cardiologist, treated the employee for over a decade and indicated that Dr. Wehrli concluded that his coronary artery disease had been clinically stable. He indicated that, as late as December 2011, Dr. Wehrli treated the employee and determined that no further cardiac intervention was needed. Dr. Wu advised that the employee's cardiac catheterization results in 2011 were unchanged from the previous catheterization findings which were obtained in 2002 after the employee suffered his initial NSTEMI in 2000. He indicated that, prior to the employee's death on January 11, 2013, there was no indication of active problems related to coronary artery disease. Dr. Wu noted that the reports of Diana Schofield, an attending nurse practitioner, described the employee's medical condition in the days and months before his death, but there was no mention of any cardiac symptoms nor concerns for active cardiac problems.

Dr. Wu further indicated that, while there was a complete lack of evidence of active cardiac problems, there was ample evidence of active pulmonary disease. The employee had a long-standing history of chronic obstructive pulmonary disease (COPD) and impaired pulmonary function with recurrent exacerbations. Dr. Wu noted that, in October 2011, he developed pneumonia complicating his underlying COPD and was ill enough to require hospital admission. He noted that, in October 2012, less than three months prior to his death, the employee contracted pneumonia and became hypotensive and he opined that one plausible scenario was that the pneumonia spread and caused sepsis or even septic shock leading to hypotension which became life threatening. Dr. Wu indicated that on January 9, 2013 the employee developed yet another episode of pneumonia involving both lungs after suffering from bronchitis. The bilateral pneumonia was confirmed by chest x-ray testing and antibiotics treatment was initiated, but the

[5] It is noted that ST refers to the ST segment, which is part of the electrocardiogram (EKG) heart tracing used to diagnose a heart attack.

employee died two days later. Dr. Wu opined that, since there was no autopsy or other medical records available at the time of the employee's death, the precise cause of death could not be definitively determined. He noted, however, that based on the aforementioned clinical events and underlying disease processes, "the weight of the medical evidence points to the conclusion that the cause of death is most likely severe pneumonia complicating the underlying COPD and not due to cardiac events."

Dr. Wu then considered whether the employee's coronary artery disease had caused congestive heart failure around the time of his death on January 11, 2013. He noted that, between 2000 and the employee's death in 2013, there were only two episodes of reduction in left ventricular systolic function (occurring in 2000 after his NSTEMI and 2010 after suffering pneumonia) and he indicated that the employee recovered after each of these two events which only caused temporary reduction in left ventricular systolic function. Dr. Wu noted that the employee had otherwise maintained normal left ventricular systolic function and he concluded that the employee's coronary artery disease had not caused congestive heart failure around the time of his death. He noted that the employee had ample reason to develop coronary artery disease without the use of NSAIDS and indicated that one could not prove or disprove the argument that long-term use of NSAIDS aggravated the employee's coronary artery disease because the medical science was not conclusive in this area. Under the heading "Conclusions," Dr. Wu indicated that the employee's cause of death was likely pneumonia complicating lung disease, and that the use of NSAIDS might or might not have played a role in his initial NSTEMI, but its exact effect could not be determined due to insufficient clinical research data. He noted that, after the NSTEMI in 2000, the employee's coronary artery disease remained stable over the years and did not cause congestive heart failure. Dr. Wu also advised, "[NSAIDS] had no role in causing or contributing to his death in 2013."

By decision dated October 27, 2017, OWCP denied appellant's claim for survivor's benefits. It determined that the special weight of the medical opinion evidence regarding the cause of the employee's death rested with the opinion of Dr. Wu, the impartial medical specialist.

Appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on May 10, 2018, counsel argued that Dr. Wu's opinion regarding the cause of the employee's death was not well rationalized.

By decision dated July 12, 2018, OWCP's hearing representative affirmed OWCP's October 27, 2017 decision. He found that the special weight of the medical opinion evidence regarding the cause of the employee's death continued to rest with the opinion of Dr. Wu.

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.[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

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

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, she 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]

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.[9] The Board has held that it is not necessary that there is a significant contribution of employment factors to establish causal relationship.[10] If the employment contributed to the employee's death, then causal relationship is established.[11]

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.[12] For a conflict to arise the opposing physicians' viewpoints must be of virtually equal weight and rationale.[13] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.[14]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that the employee's death was causally related to a January 30, 1988 employment injury.

The Board finds that OWCP properly referred the case record to Dr. Wu for review in his role as an impartial medical specialist in order to resolve the conflict in the medical opinion evidence, pursuant to 5 U.S.C. § 8123(a), and the special weight of the medical opinion evidence is represented by his thorough, well-rationalized opinion.

In his October 12, 2017 report, Dr. Wu provided a detailed summary of the employee's factual and medical history per his review of the documents in the case record and he advised that he could not find any clinical evidence supporting that coronary artery disease caused or

[7] *W.C.*, Docket No. 18-0531 (issued November 1, 2018).

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

[9] *Edna M. Davis (Kenneth L. Davis)*, 42 ECAB 728 (1991).

[10] *See T.H. (M.H.)*, Docket No. 12-1018 (issued November 2, 2012).

[11] *Id.*

[12] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[13] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[14] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

contributed to the employee's death on January 11, 2013. He discussed medical records, which showed that, in the years prior to the employee's death, there was no indication of active problems related to coronary artery disease.[15] Dr. Wu further indicated that, while there was a complete lack of evidence of active cardiac problems, there was ample evidence of active pulmonary disease. He noted that the employee had a long-standing history of COPD and impaired pulmonary function with recurrent exacerbations. Dr. Wu discussed the employee's history of pneumonia and hypotensive state which complicated his underlying COPD around the time of his death, and he opined that "the weight of the medical evidence points to the conclusion that the cause of death is most likely severe pneumonia complicating the underlying COPD and not due to cardiac events." Under the heading "Conclusions," he indicated that the employee's cause of death was likely pneumonia complicating lung disease, and noted that the exact effect of the employee's use of NSAIDS could not be determined due to insufficient clinical research data. Dr. Wu indicated that, after the NSTEMI in 2000, the employee's coronary artery disease remained stable over the years and did not cause congestive heart failure. He further advised, "[NSAIDS] had no role in causing or contributing to his death in 2013."

The Board has reviewed the opinion of Dr. Wu and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Wu provided a thorough factual and medical history and accurately summarized the relevant medical evidence.[16] He provided medical rationale for his opinion by explaining that the employee's death on January 11, 2013 was likely caused by pneumonia which complicated his underlying lung disease. Dr. Wu explained why work-related coronary artery disease or some other form of work-related cardiac disease did not contribute to the employee's death.[17] As such, his opinion is entitled to the special weight of the medical evidence as the impartial medical examiner.

Because appellant has not shown that work-related condition contributed to the employee's death on January 11, 2013, she has not met her burden of proof to establish entitlement to survivor's benefits.[18]

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.

[15] Dr. Wu indicated that the employee generally maintained normal left ventricular systolic function and he concluded that the employee's coronary artery disease had not caused congestive heart failure around the time of his death.

[16] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

[17] The Board notes that Dr. Wu acknowledged, as accepted by OWCP, that the employee's use of NSAIDS contributed to his heart attack in 2000. Dr. Wu further indicated that the nature of the current research data did not allow him to provide an opinion on the exact extent of the effect NSAIDS had on the employee's cardiac condition. However, as noted, he provided an unequivocal opinion that the employee's work-related cardiac condition did not contribute to his death.

[18] *See supra* note 8.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that the employee's death was causally related to a January 30, 1988 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 3, 2019
Washington, DC

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

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

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