

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

J.P., claiming as widower of T.P., Appellant)	
)	
and)	Docket No. 23-0725
)	Issued: April 4, 2024
DEPARTMENT OF VETERANS AFFAIRS,)	
DWIGHT D. EISENHOWER VA MEDICAL)	
CENTER, Leavenworth, KS, Employer)	
)	

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, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 23, 2023 appellant filed a timely appeal from a March 30, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 that the employee's death on January 28, 2021 was causally related to her accepted employment injury.

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.

OWCP accepted the employee's February 21, 2001 occupational disease claim (Form CA-2) for aggravation of asthma as a result of chemical exposure due to factors of her federal employment. On August 11, 2003 OWCP granted the employee a schedule award for 50 percent permanent impairment of her lungs. The award ran for 78 weeks from July 8, 2003 through January 3, 2005.

The employee passed away on January 28, 2021. On April 13, 2021 appellant filed a claim for compensation by a surviving spouse (Form CA-5), noting that the employee had passed away due to respiratory failure.

Appellant submitted a death certificate for the employee dated February 5, 2021, which noted a death date of January 28, 2021. The death certificate listed the causes of death as respiratory failure and COVID-19 pneumonia. It also noted chronic obstructive pulmonary disease (COPD) and diabetes as other significant contributions to the employee's death.

OWCP also received a hospital discharge summary report dated January 30, 2021, which noted diagnoses of acute hypoxic respiratory failure, pneumonia due to COVID-19, history of COPD, emphysema, and atrial fibrillation with rapid ventricular response (RVR).

OWCP referred the case, including a statement of accepted facts (SOAF) to Dr. David I. Krohn, a Board-certified internist, serving as an OWCP district medical adviser (DMA), to provide an opinion regarding whether the employee's death was a result of her work-related condition. In a report dated June 8, 2021, Dr. Krohn noted that the employee's death certificate and hospital discharge summary report did not note the accepted condition of aggravation of asthma as a contributing diagnosis or cause of death. As such, he concluded that the employee's death was not a result of her work-related condition.

On August 25, 2021 OWCP referred the case to Dr. Akshay Sood, a Board-certified internal medicine and pulmonary disease specialist, for a second opinion evaluation regarding whether the employee's accepted condition caused or contributed to her death. In a report dated September 4, 2021, Dr. Sood noted his review of the SOAF, and that the employee's claim was accepted for aggravation of asthma due to chemical exposure. He discussed appellant's employment and medical history. Dr. Sood opined that it was "not at least as likely as not the claimant's accepted work-related exposure to cleaning chemicals ... which resulted in an aggravation of asthma, cause[d] or contribute[d] to the claimant's death on January 28, 2021."

² Docket No. 22-0512 (issued October 24, 2022).

By decision dated November 19, 2021, OWCP denied appellant's survivor benefits claim. It found that the opinion of Dr. Sood represented the weight of the evidence and established that the employee's death was not causally related to the employee's accepted injury.

Appellant appealed to the Board.

By decision dated October 24, 2022, the Board set aside the November 19, 2021 decision and remanded the case for a supplemental opinion regarding whether the employee's accepted condition caused or contributed to her death.

OWCP subsequently referred appellant, along with an updated SOAF and a series of questions, to Dr. Christine M. Cisneros, a Board-certified occupational and preventive medicine specialist, for a second opinion evaluation regarding whether the employee's accepted condition caused or contributed to her death. The updated SOAF noted the employee's accepted condition for aggravation of asthma due to chemical exposure, a detailed history of the employee's employment duties and work exposure, and the diagnostic testing she received.

In a report dated February 13, 2023, Dr. Cisneros noted her review of the SOAF and discussed the employee's medical history. She noted that the employee was exposed to chemicals at work and that her claim was accepted for aggravation of asthma due to chemical exposure. Dr. Cisneros indicated that the employee's past medical history was significant for allergic rhinitis, asthma, COPD, emphysema, and diabetes. She recounted that on January 2, 2021 the employee was admitted to the hospital due to worsening of shortness of breath and was diagnosed with COVID-19 pneumonia. Dr. Cisneros reported that the employee died on January 28, 2021, and noted that the immediate cause of death was respiratory failure because of COVID-19 pneumonia, with COPD and diabetes as other contributing causes. She also noted that the January 30, 2021 hospital discharge summary report, indicated that the employee was treated during her hospitalization for acute hypoxic respiratory failure, pneumonia/acute respiratory distress syndrome due to COVID-19, history of COPD with extensive emphysema, and other medical conditions, but did not mention her work-related asthma. Dr. Cisneros explained that based on the medical evidence of record, there was no evidence that asthma was treated in the employee's clinical course of the COVID-19 pneumonia. She opined, therefore, that the employee's death did not result from the accepted condition of aggravation of asthma due to chemical exposure.

By *de novo* decision dated March 30, 2023, OWCP again denied appellant's survivor benefits claim. It found that the opinion of Dr. Cisneros represented the weight of the evidence, establishing that the employee's death was not causally related to her accepted employment injury.

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.³ 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

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

employment.⁴ 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 causal relationship between the employee's death and an employment injury or factors of his or her federal employment.⁵

Causal relationship is a medical 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

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.¹⁰ OWCP's procedures dictate that when a DMA, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹¹

ANALYSIS

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

OWCP referred appellant, along with a SOAF dated October 25, 2022 and a series of questions, to Dr. Cisneros for a second opinion evaluation regarding whether the employee's accepted condition caused or contributed to her death. In a February 13, 2023 report, Dr. Cisneros noted her review of the SOAF, discussed the employee's medical history, and opined that the employee's death did not result from the accepted condition of aggravation of asthma due to

⁴ *B.M.*, Docket No. 20-0741 (issued September 30, 2021); *W.C.*, Docket No. 18-0531 (issued November 1, 2018).

⁵ *P.G.*, Docket No. 20-0815 (issued December 10, 2020); *M.L.*, Docket No. 19-0020 (issued May 2, 2019); *L.R. (E.R.)*, 58 ECAB 369 (2007).

⁶ *See R.G. (K.G.)*, Docket No. 19-1059 (issued July 28, 2020); *L.R. (E.R.)*, *id.*

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 5.

¹⁰ *C.E.*, Docket No. 19-1923 (issued March 30, 2021); *A.M.*, Docket No. 19-1602 (issued April 24, 2020); *K.V.*, Docket No. 15-0960 (issued March 9, 2016); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *see L.J.*, Docket No. 14-1682 (issued December 11, 2015). *See also* Chapter 2.809 (September 2009).

chemical exposure. OWCP's procedures require that the SOAF include a description of medical treatment and relevant medical history.¹² The Board notes, however, that the October 25, 2022 SOAF did not mention the employee's previous schedule award for 50 percent permanent impairment of the bilateral lungs which is relevant to the issue of whether the employee's accepted aggravation of asthma caused or contributed to her death. The Board has found that when an OWCP referral physician renders a medical opinion based on a SOAF which is incomplete or inaccurate, the probative value of the opinion is seriously diminished or negated altogether.¹³ As Dr. Cisneros' report was based on an inadequate SOAF, her report lacks probative value and cannot represent the weight of the medical evidence.¹⁴

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹⁵ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁶ Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the issue in the case.¹⁷

Accordingly, the Board finds that the case must be remanded to OWCP.¹⁸ On remand, OWCP shall prepare a complete and accurate SOAF, which includes the prior schedule award and request that Dr. Cisneros review the updated SOAF, and provide a supplemental opinion regarding whether the employee's death on January 28, 2021 was causally related to her accepted aggravation of asthma. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹² *Id.*

¹³ *Supra* note 11.

¹⁴ *See M.O., Order Remanding Case*, Docket No. 23-0608 (issued October 25, 2023); *see also M.G.*, Docket No. 22-1394 (issued May 10, 2023).

¹⁵ *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

¹⁶ *P.T.*, Docket No. 21-0138 (issued June 14, 2021); *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁷ *L.N.*, Docket No. 22-0497 (issued September 14, 2023); *G.M.*, Docket No. 19-1931 (issued May 28, 2020); *W.W.*, Docket No. 18-0093 (issued October 9, 2018).

¹⁸ *S.J.*, Docket No. 22-0714 (issued March 31, 2023); *P.W.*, Docket No. 22-0218 (issued November 28, 2022).

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2023 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: April 4, 2024
Washington, DC

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

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

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