

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

M.L., Executor of the Estate of E.L., Appellant	)	
	)	
and	)	<b>Docket No. 23-1193</b>
	)	<b>Issued: June 28, 2024</b>
U.S. POSTAL SERVICE, MOSS POINT	)	
BRANCH POST OFFICE, Moss Point, MS,	)	
Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On September 26, 2023 appellant filed a timely appeal from an April 27, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether appellant has met his burden of proof to establish that the employee's death was causally related to her accepted employment injury.

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> 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 February 24, 2000 the employee, then a 36-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she developed a cervical condition due to factors of her federal employment including lifting heavy trays of mail. She noted that she first became aware of her condition and realized its relation to factors of her federal employment on May 4, 1998. OWCP assigned the claim OWCP File No. xxxxxx845 and accepted it for aggravation of cervical strain. On July 5, 2002 the employee had surgery to implant a Genesis Pulse Generator. On March 9, 2006 the spinal neurostimulator was removed. On July 24, 2006 OWCP expanded the acceptance of the claim to include chronic tension headaches, cervicogenic in nature; postlaminectomy syndrome, arising from anterior cervical discectomy surgery to C5-6 with anterior arthrodesis on July 10, 2000; cervical torticollis; cervical dystonia to the right; and depression.<sup>4</sup> The employee stopped work in 2000 and did not return. The record reflects that OWCP paid her wage-loss compensation on the periodic rolls as of June 16, 2002.

On May 31, 2013 the employee was admitted to her local hospital emergency room with complaints of chest pain. She underwent cardiac catheterization on June 2, 2013 and was discharged on June 3, 2013. The catheterization report related no angiographic evidence of coronary artery disease. The employee passed away on June 4, 2013.

On May 18, 2015 appellant, the employee's widower, filed a claim for compensation by surviving spouse and/or children (Form CA-5). The employee's death certificate identified hemorrhagic lungs as the immediate cause of death. Contributing causes included respiratory impairment and recent intake of drugs. The death was identified as accidental due to "intake of prescribed medication."

In a provisional autopsy report dated June 5, 2013, Dr. Paul McGarry<sup>5</sup> noted diagnoses including recent intake of drugs; multiple venipunctures of right forearm and antecubital fossa; hemorrhagic atelectatic lungs with aspirated gastric contents; dilated heart hypoxic myocardium, congested cyanotic brain and viscera; small bloody pleural effusions; and autolytic changes in the brain.

By letter to OWCP dated April 25, 2014, the coroner, Vicki L. Broadus, a registered nurse and coroner, related that the employee's cause of death was the intake of her prescription medication which was required for pain management related to a job-related injury. She noted

---

<sup>3</sup> Docket No. 20-0605 (issued January 27, 2021).

<sup>4</sup> On May 2, 2000 the employee filed a separate Form CA-2 for cervical conditions causally related to factors of her federal employment including twisting motions. OWCP that claim under OWCP File No. xxxxxx847 and accepted it for herniated cervical disc. On September 28, 2004 it expanded the acceptance of that claim to include postlaminectomy syndrome cervical region, and mechanical complications of implant nervous system device and graft. OWCP has administratively combined the employee's claims, with OWCP File No. xxxxxx845 serving as the master file.

<sup>5</sup> Dr. McGarry's medical specialty is not found in the case record.

that the employee had been hospitalized up to 12 hours prior to her death, and that her medication count was correct at the death scene. Ms. Broadus concluded that the employee's long-term narcotic use was the underlying cause of the employee's hemorrhagic lungs and respiratory impairment.

In an April 29, 2015 letter, Dr. Terry Millette, a Board-certified neurologist, noted her medical history and also related that she had been released from a hospital the evening before her death. Dr. Millette indicated that the employee had taken medications approved for her employment injury.

On June 17, 2015 Dr. Eric Puestow, a Board-certified internist serving as an OWCP district medical adviser (DMA), reviewed the case record. He noted that the employee had been treated with prescription narcotic medication for years, had passed all drug screen studies and had no history of drug-seeking behavior. Dr. Puestow also noted that a pathologist had opined that she died of cardiopulmonary failure consequential to ingestion of prescribed narcotic medication. However, he explained that the employee had been on narcotics for years with no severe consequences. Death would not have occurred if the employee had taken her medications as prescribed. It was much more likely that she died of an overdose of prescribed narcotics after leaving the hospital. Dr. Puestow therefore concluded that there was no causal relationship between the employee's death and her work-related conditions.

OWCP referred the medical record and a statement of accepted facts (SOAF) for further review by a second opinion physician. On August 3, 2015 Dr. Alan Heldman, a Board-certified internist, specializing in cardiovascular disease and interventional cardiology, noted the employee's history of injury and extensive medical treatment. He reviewed the employee's medical records dating back to 2000. Dr. Heldman related that the medical records suggested a broad list of possible causes of death including: seizure with aspiration of gastric contents, as the employee had a history of seizure disorder; cardiac arrhythmia as the employee had electrocardiographic (EKG) findings of left bundle branch block; and delayed adverse drug reaction to a treatment or diagnostic agent administered during hospitalization. He concluded that he had not found evidence that narcotics or other medication used for chronic pain was the cause of the employee's unexpected sudden death.

By decision dated August 11, 2015, OWCP denied appellant's claim for survivor benefits. The weight of the medical evidence was attributed to the opinions of Dr. Puestow, the DMA, and Dr. Heldman, the second opinion physician, who found that the evidence of record was insufficient to establish that the employee's death was causally related to her accepted employment injuries.

On July 28, 2016 appellant requested reconsideration. He also submitted additional evidence.

In a report dated July 15, 2016, Dr. John McCloskey, a neurosurgeon, related that he had performed the employee's anterior cervical fusion two years after her employment injury. He thereafter explained that sudden death was known to occur as a result of chronic opioid usage when on a stable long-term dose. Dr. McCloskey also noted that the employee's EKG tests had shown a stable left branch block since 2009 and that she had been taking medication for her chronic pain, which was known to cause heart problems including heart block. He further noted that he believed that her seizure disorder was work related. Dr. McCloskey concluded that the employee's

employment injury and subsequent severe chronic pain resulted in her death, caused by her long-term use of opioids.

In a report dated July 20, 2016, Dr. Jaswinder Singh Kandola, a Board-certified cardiologist, related that he had reviewed medical records relating to the employee's cardiac condition as of 2006. He related that all EKG studies made available to him showed normal findings. Dr. Kandola opined that the employee did not die from chronic heart disease.

Dr. Millette reported that additional information was now available, which indicated that the amount of drugs in the employee's system at autopsy were within the prescribed range. He also noted that serious, life-threatening fatal respiratory depression had been reported with the use of modified-release opioids, even when used as recommended.

OWCP determined that a conflict in medical opinion existed as to whether the employee's death was causally related to her employment injuries and/or treatment/sequelae. The case record, along with a SOAF was sent to Dr. Robert E. Percy, a Board-certified internist serving as an impartial medical examiner (IME), to resolve the conflict in medical opinion.

In a January 18, 2017 report, Dr. Percy opined that the employee's death was not caused, aggravated, precipitated, or accelerated by the employment injury or sequelae of her treatment. He opined that her death was likely related to a seizure, noting that the autopsy report indicated vomit in and around her nares and mouth, which suggested aspiration. Dr. Percy indicated that this could be due to seizure, noting that the SOAF noted a seizure disorder, and the medical records supported that appellant's medications of Tegretol (Carbamazepine) and Keppra (Levetiracetam) were for seizures. He opined that there was no connection to a seizure diagnosis and the employment injuries. Dr. Percy also advised that while an overdose of opioid medications, intentional or unintentional may result in a life-threatening hypoventilation event, there was no evidence to support that occurred. He also reviewed the cardiac records from the employee's last hospitalization for chest pain prior to her death. Dr. Percy discussed how she might have suffered a cardiac arrhythmic event, which may stimulate a seizure or aspiration.

By decision dated May 3, 2017, OWCP denied modification of its August 11, 2015 decision. It accorded the special weight of the medical evidence to the opinion of Dr. Percy, the IME.

On April 23, 2018 appellant requested reconsideration.

In a July 24, 2016 report, Dr. Thomas L. Yearwood, a Board-certified anesthesiologist, opined that the employee's requirement for long-term opioid analgesics and their untoward side-effects was "completely related" to her death. He opined that her autopsy and the findings of the coroner were completely in line with opioid-induced central sleep apnea as the cause of her death. Dr. Yearwood explained that the other potential diagnoses "paled by comparison" to the overwhelming evidence of central sleep apnea with concomitant aspiration of gastric contents compounding pulmonary function due to loss of airway control as a result of central nervous system depression.

By decision dated July 12, 2018, OWCP denied modification of its May 3, 2017 decision.

On July 2, 2019 appellant requested reconsideration. He contended that the employee's death was accidental due to long-term use of opioid pain medications as a result of her employment injuries, as supported by the medical evidence. Alternatively, appellant contended that, if in fact Dr. Percy, the IME, was correct and that her death was due to a seizure, then it was still an employment-related death as her anti-seizure medications were approved by OWCP and prescribed to her for many years. In support of reconsideration, he submitted a listing of the employee's medications for the period June 1 to July 1, 2013, which included two anti-seizure medications.

In an April 11, 2019 statement, the Jackson County Sheriff, concurred that the employee's death was related to her long-term narcotic use in order to control pain due to her employment-related injuries. He indicated that the medication count was correct at the death scene. The Jackson County Sheriff opined that the drug use was the underlying cause of the hemorrhagic lungs and respiratory impairment.

By decision dated August 2, 2019, OWCP denied appellant's request for reconsideration of the merits of the claim, pursuant to 5 U.S.C. § 8128(a).

Appellant appealed the August 2, 2019 nonmerit decision to the Board.

By decision dated January 27, 2021, the Board set aside OWCP's August 2, 2019 nonmerit decision and remanded the case for OWCP to conduct a merit review.<sup>6</sup>

By merit decision dated April 19, 2021, OWCP denied modification of its July 12, 2018 decision.

On March 1, 2022 appellant requested reconsideration and submitted additional evidence.

In a February 1, 2022 report, Dr. William D. McClendon, a Board-certified internist, opined that it was obvious that the long-term use of narcotic medication for pain management, along with prescribed drug interaction issues were the most likely cause of the employee's death. He related that the only other possible cause of the employee's death would be a seizure. Dr. McClendon explained that a side effect of oxycodone was seizures, and therefore the employee's death would be generally related to her employment injury. He also noted that seizures could be caused by three other medications approved by OWCP, which were therefore related to the job-related injury. Dr. McClendon noted that the employee did not have a history of seizures prior to her work-related injury. Informational sheets on the possible side effects of oxycodone were also provided.

By decision dated March 3, 2022, OWCP denied modification of the April 19, 2021 decision.

On February 27, 2023 appellant again requested reconsideration. He submitted additional evidence, including an informational packet regarding drug interactions from the Mayo Clinic, informational sheets regarding how herniated discs cause seizures, and cites to legal cases for the

---

<sup>6</sup> *Supra* note 3.

proposition that entitlement to dependent's benefits only required that an occupational disease or injury contributed to the cause of the death.

In an undated attending physician's report, Dr. Millette reiterated his opinion that the cause of the employee's death was attributed to long-term narcotic use to control pain due to the accepted conditions in her claim.

In a February 20, 2023 report, Dr. Matthew F. Kuluz, a Board-certified pediatrician, noted that the employee passed away 14 years prior after a work-related neck injury and many years of neck pain, despite medications and treatment for pain by multiple specialists. He opined that the employee's work injury and subsequent severe chronic pain resulted in her untimely early death at the age of 48 years.

By decision dated April 27, 2023, OWCP denied modification.

### **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.<sup>7</sup> An award of compensation in a survivor benefits 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.<sup>8</sup> 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, he or she must submit a rationalized medical opinion, based upon a complete and accurate factual and medical background, establishing 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.<sup>9</sup>

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.<sup>10</sup> The Board has held that it is not necessary that there be a significant contribution of employment factors to establish causal relationship.<sup>11</sup> If the employment contributed to the employee's death, then causal relationship is established.<sup>12</sup>

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary

---

<sup>7</sup> 5 U.S.C. § 8133.

<sup>8</sup> *M.P. (E.P.)*, Docket No. 22-0832 (issued November 18, 2022); *M.L. (S.L.)*, Docket No. 19-0020 (issued May 2, 2019); *W.C. (R.C.)*, Docket No. 18-0531 (issued November 1, 2018); see *Sharon Yonak (Nicholas Yonak)*, 49 ECAB 250 (1997).

<sup>9</sup> *J.P. (E.P.)*, Docket No. 18-1739 (issued May 3, 2019); see *L.R. (E.R.)*, 58 ECAB 369 (2007).

<sup>10</sup> *J.P. (E.P.) id.*; *W.C.(R.C.)*, *supra* note 8; *Edna M. Davis (Kenneth L. Davis)*, 42 ECAB 728 (1991).

<sup>11</sup> *M.L. (S.L.)*, *supra* note 8; see *T.H.(M.H.)*, Docket No. 12-1018 (issued November 2, 2012).

<sup>12</sup> *L.W. (K.W.)*, Docket No. 19-0569 (issued August 16, 2019).

shall appoint a third physician who shall make an examination.<sup>13</sup> The implementing regulation states that, 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. 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.<sup>14</sup> In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual and medical background, must be given special weight.<sup>15</sup>

### ANALYSIS

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

In his January 18, 2017 report, Dr. Percy, the IME, opined that the employee's death was likely related to a seizure or a cardiac arrhythmic event, which may have stimulated a seizure or aspiration, but that there was no connection between a seizure diagnosis and the employee's employment injuries. The Board notes that to be entitled to special weight, Dr. Percy's opinion must contain clear, persuasive rationale on the critical issue in the claim.<sup>16</sup> However, Dr. Percy did not provide a definitive opinion on whether the employee's federal employment caused or contributed to her death.<sup>17</sup> The Board has held that medical opinions which are equivocal or speculative are of diminished probative value.<sup>18</sup>

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.<sup>19</sup> While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>20</sup> Once OWCP undertakes development of the record, it must procure medical evidence that will resolve the relevant issues in the case.<sup>21</sup> In a situation where

---

<sup>13</sup> 5 U.S.C. § 8123(a).

<sup>14</sup> 20 C.F.R. § 10.321.

<sup>15</sup> *M.M.*, Docket No. 22-0037 (issued October 12, 2022); *C.E.*, Docket No. 19-1923 (issued March 30, 2021); *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.C.*, 58 ECAB 238 (2006); *David W. Pickett*, 54 ECAB 272 (2002).

<sup>16</sup> *O.S.*, Docket No. 23-0364 (issued October 19, 2023); *A.R.*, Docket No. 17-1358 (issued February 1, 2018).

<sup>17</sup> *See R.T.*, Docket No. 20-0081 (issued June 24, 2020); *C.T.*, Docket No. 19-0508 (issued September 5, 2019); *F.D.*, Docket No. 18-1596 (issued June 18, 2019).

<sup>18</sup> *T.M.*, Docket No. 19-1414 (issued February 12, 2020); *S.R.*, Docket No. 16-0657 (issued July 13, 2016); *Minnie Cook*, Docket No. 99-1848 (issued December 20, 2000).

<sup>19</sup> *See D.T.*, Docket No. 20-0234 (issued January 8, 2021); *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); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

<sup>20</sup> *C.L.*, Docket No. 20-1631 (issued December 8, 2021); *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>21</sup> *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

OWCP secures an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification and/or elaboration, it has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.<sup>22</sup>

The case must therefore be remanded to OWCP for a rationalized opinion from Dr. Percy regarding whether the employee's accepted medical conditions, any of her prolonged use of related prescribed medications, and/or treatment/sequelae thereof caused or contributed to her death. If Dr. Percy is unavailable or unwilling to provide such an opinion, OWCP shall refer the case record and a detailed SOAF to a new IME for the purpose of obtaining a rationalized medical opinion on the issue.<sup>23</sup> Following this and any 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.

---

<sup>22</sup> *M.W.*, Docket No. 21-1260 (issued September 9, 2022); *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988).

<sup>23</sup> *T.C.*, Docket No. 20-1170 (issued January 29, 2021); *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Harold Travis*, 30 ECAB 1071 (1979).



**ORDER**

**IT IS HEREBY ORDERED THAT** the April 27, 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: June 28, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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