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

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| **G.B., claiming as widow of, M.B., Appellant** | ) | |
| **and** | ) | **Docket No. 22-0446** |
| | ) | **Issued: November 22, 2024** |
| **DEPARTMENT OF NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA, Employer** | ) | |

*Appearances:*
*Steven E. Brown, 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
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

### ***JURISDICTION***

On January 31, 2022 appellant, through counsel, filed a timely appeal from an August 2, 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] Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from August 2, 2021 was January 29, 2022. As this fell on a Saturday, appellant had until the close of the next business day, Monday, January 31, 2022, to file the appeal. 20 C.F.R. § 501.3(f)(2). The appeal was received on Monday, January 31, 2022, rendering it timely.

Federal Employees' Compensation Act[3] (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 her burden of proof to establish that the employee's death on November 30, 2016 was causally related to the accepted employment exposure.

## ***FACTUAL HISTORY***

On August 1, 2019 appellant filed a claim for compensation by widow (Form CA-5) alleging that her husband, the employee, died on November 30, 2016 of stomach cancer due to factors of his federal employment.[4] She submitted a declaration dated June 4, 2019 and noted that the employee worked at Mare Island Naval Shipyard from October 13, 1987 through April 2, 1990 as a boilermaker and used asbestos-containing pipe and block insulation and cement. Appellant indicated that the employee was exposed to asbestos at several other jobs before and after his work at Mare Island Naval Shipyard working as a boilermaker, laborer, shipfitter supply clerk, and mechanic from 1963 through 2002. The employee was diagnosed with gastric adenocarcinoma on September 30, 2016, which appellant asserted was related to his federal employment.

Appellant submitted a death certificate from the State of California, Alameda County Healthcare Services, that listed the employee's cause of death as stomach cancer and the date of death as November 30, 2016. It noted the employee was a foreman in the maritime industry.

On August 21, 2017 Dr. Jose R. Torrealba, a Board-certified pathologist, reviewed autopsy and pathology slides as well as the employee's medical records. The autopsy report revealed widely-metastatic, poorly-differentiated adenocarcinoma, consistent with the employee's known history of gastric primary adenocarcinoma, and pleural and diaphragmatically-hyalinized plaques characteristic of asbestos exposure, interstitial fibrosis, asbestosis, and cardiomegaly.[5] Dr. Torrealba concluded that the post-mortem examination revealed widely metastatic poorly differentiated carcinoma consistent with primary gastric cancer and evidence of asbestos exposure by the presence of hyalinized pleural and diaphragmatic plaques and lung interstitial fibrosis. He noted the employee had a history of smoking on and off from 1988 to 1990 and that he usually smoked approximately five cigarettes per day, or one-quarter pack per day. Dr. Torrealba noted a

[3] 5 U.S.C. § 8101 *et seq*.

[4] The attending physician's portion of the Form CA-5 was not in the case record.

[5] The employee worked as a trainee and supply clerk for the Department of the Army from 1961 through 1963 and noted insulated piping running throughout his sleep quarters; from 1968 through 1987 he was intermittently employed as a shipfitter and his job duties included installing foundation plates and bulkheads throughout ships, installing gaskets and valves and working in close proximity to pipefitters, laggers, machinist, and boilermakers who worked with asbestos containing pipe, block insulation and asbestos containing insulating cement; from 1968 through 1992 he intermittently worked as a boilermaker and his job duties included maintenance and repair to economizers, superheaters, burners, heat exchangers, boilers, cutting asbestos containing sheets of gasket material, removing asbestos containing gaskets from boiler doors, and cutting and installing packing material around boiler windows. During this time period, the employee was exposed to asbestos fibers, asbestos tape, mud, asbestos cloth, asbestos pipe covering, asbestos cement, insulation pads, paper, gaskets, sheets, wallboard and bricks.

"3 pack/year history" and that the employee held multiple jobs with multiple exposures to asbestos. He opined that given long-standing asbestos exposure, it was more likely than not, to a reasonable degree of medical certainty, that the cumulative aggregate latent dose of exposure to asbestos caused the calcified pleural plaques in both pleural surfaces and diaphragm and the evidence of lung fibrosis related to asbestosis in the lung parenchyma.

Appellant submitted a September 25, 2017 report from Dr. Richard Cohen, a specialist in family and occupational medicine, who noted the employee began his asbestos exposure as a ship-fitter in 1968 where he worked alongside pipefitters, insulators, machinists, riggers and boilermakers as they manipulated asbestos containing pipe and block insulation and cement. From 1968 through 1992 the employee worked as a boilermaker and ship-fitter in shipyards and aboard ships performing maintenance and repair of equipment, removed and installed asbestos containing gaskets and packing, and worked alongside insulators who removed and installed asbestos containing pipe and block insulation, and also worked near laborers who swept and cleaned up asbestos containing debris. He reported periodically wearing a paper mask. The employee's medical history was also significant for his mother's diagnosis of gastric cancer. In his personal life, he removed and replaced asbestos containing brakes on his personal vehicle and removed flooring and insulation, and mixed and sanded asbestos containing drywall compound. Dr. Cohen opined to a reasonable degree of medical certainty that the metastatic gastric cancer was directly caused by cumulative asbestos exposure comprised of the employee's work with and around asbestos containing pipe and block insulation, gaskets, packing, refractories, insulating cement, blankets, brakes, and drywall joint compound. He further opined that the exposure to asbestos was a proximate cause of gastric cancer with additional contributing causes of family history and brief smoking history.

In an August 14, 2019 development letter, OWCP advised appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. By separate letter of even date, OWCP also requested additional information from the employing establishment. It afforded both parties 30 days to respond.

OWCP received additional medical evidence dated between 2009 and the employee's death on November 30, 2016. An October 20, 2011 B-reading from Dr. Daniel Powers, a Board-certified radiologist and National Institute for Occupational Safety and Health (NIOSH) certified B-reader, revealed no definite prone evidence for asbestosis, but limited right lung posterior lung base findings with the appearance of early asbestosis and bilateral calcified pleural plaque formation characteristic of asbestos exposure. A CT angiogram of the chest dated August 30, 2016 revealed a three-millimeter glass nodule in the posterior left upper lobe adjacent to the fissure at the level of the lingular bronchus, small calcified pleural plaque left anterolateral hemithorax, and bilateral pleural plaques related to the hemidiaphragms incompletely interrogated, and a combination consistent with previous asbestos exposure. On September 30, 2016 the employee underwent an esophagogastroduodenoscopy with biopsy and was diagnosed with gastric mass, either carcinoma or lymphoma. The surgical pathology report confirmed gastric adenocarcinoma.

In an August 28, 2019 response to OWCP's development letter, the employing establishment indicated that from June 1969 through August 1987 the employee worked as a shipfitter at Todd Shipyard, San Francisco, California; from February 1971 through September 1971 he worked as a shipfitter at Bethlehem Steel, San Francisco, California; and from

October 1987 through April 1990 the employee worked as a shipfitter at Mare Island Naval Shipyard. It noted that on April 21, 1988 the employee signed an "on call working agreement" and resigned on April 2, 1990. The employing establishment did not have records to confirm how many hours the employee worked from April 1988 through April 1990. The employee did not participate in asbestos monitoring. Also submitted were employing establishment medical records from 1987 through 1990 and an application for federal employment.

On November 1, 2019 OWCP referred the case, including a recent statement of accepted facts (SOAF), to Dr. David I. Krohn, a Board-certified occupational medicine specialist serving as an OWCP district medical adviser (DMA). It requested that Dr. Krohn review the opinions of Drs. Torrealba and Cohen and provide an opinion regarding whether the employee's death was employment related.

In a November 29, 2019 report, Dr. Krohn discussed the employee's employment and medical histories. He noted that the employee was treated by Dr. Akshiv Malhotra, a Board-certified oncologist, who on November 22, 2018 referenced the employee's long-standing asbestos exposure and opined that the cumulative aggregate latent dose of exposure to asbestos caused the calcified pleural plaques in both pleural surfaces and diaphragm and the evidence of lung fibrosis related to asbestosis in the lung parenchyma. Dr. Malhotra, however, did not address the causal relationship between the employee's asbestos exposure and the development of gastric cancer. Dr. Krohn reviewed Dr. Torrealba's August 21, 2017 report and indicated that the physician identified the presence of lung disease caused by asbestos, but provided no statement regarding causal relationship between the asbestos exposure he had identified and the presence of gastric adenocarcinoma that was widely metastasized and the cause of death of the employee. He further referenced the report from Dr. Cohen dated September 25, 2017 who opined that the employee's gastric cancer was caused by cumulative asbestos exposure comprised of his work with and around asbestos and the cumulative exposure was a direct cause of his gastric cancer. Dr. Krohn opined that, given the discrepancies in the reports of Dr. Torrealba and Dr. Cohen and medical literature supporting only a mild-to-moderate association between asbestos exposure and the development of adenocarcinoma of the stomach, OWCP should seek a supplemental report from Dr. Malhotra addressing the possible causal relationship between the work-related asbestos exposure and his development of gastric cancer.

On December 18, 2019 OWCP requested that Dr. Malhotra review the November 29, 2019 report from the DMA and address whether there was a causal relationship between the employee's asbestos exposure and the development of gastric cancer. No response was received.

By decision dated January 27, 2020, OWCP accepted that the employee was exposed to asbestos while he worked at the employing establishment from October 13, 1987 through April 2, 1990, as alleged, but denied appellant's claim for survivor benefits, finding that the weight of the medical opinion evidence rested with Dr. Krohn.

On May 1, 2020 appellant, through counsel, requested reconsideration. In support of her request, she submitted a January 30, 2020 report from Ronald E. Gordon, Ph.D., a research professor. Dr. Gordon reviewed the employee's pathology material and medical records. He opined within a reasonable degree of scientific certainty that the employee had mixed asbestos exposure, which was documented by his fiber burden of amphibole asbestos fibers, amosite,

tremolite, and anthophyllite. Dr. Gordon noted that based on the finding of the amphiboles asbestos fibers and the history of exposure to substantial amounts of chrysotile-type asbestos, the asbestos alone substantiates and attributes the asbestos as a causative and contributing factor for the employee's pleural disease, diaphragm plaques, asbestosis, and stomach carcinoma.

By decision dated July 30, 2020, OWCP denied modification of the January 27, 2020 decision.

On August 31, 2020 appellant, through counsel, requested reconsideration and submitted additional evidence. On June 10, 2020 Dr. Cohen referred to the employee's asbestos exposure from 1968 through 1992 as previously set forth in his September 25, 2017 report. He advised that scientific authorities agreed that asbestos in the form of chrysotile, amosite, crocidolite, and tremolite caused asbestosis, mesothelioma, gastric cancer, and other cancers. Dr. Cohen opined to a reasonable degree of medical certainty that the employee had gastric cancer, which was fatal. He further opined that the gastric cancer was caused by the cumulative asbestos exposure comprised of his work with and around asbestos-containing pipe and block insulation, gaskets, packing, refractories, insulating cement, blankets, brakes, drywall joint compound, and related dust and debris. Dr. Cohen concluded that the employee's cumulative asbestos exposure was a direct cause of his gastric cancer with additional contributing causes including family history and brief smoking history.

On July 12, 2020 Dr. Daniel J. Bressler, a Board-certified internist, reviewed the case record and the employee's occupational exposure to asbestos. He diagnosed gastric non-cardia adenocarcinoma with metastases and asbestosis. Dr. Bressler noted that the employee was diagnosed with gastric non-cardia adenocarcinoma by biopsy on September 30, 2016. He noted a computerized tomography scan of the chest dated August 30, 2016 revealed evidence of fibrotic changes and pleural plaques indicating significant asbestos exposure and asbestosis. Dr. Bressler noted that between 1961 and 2002 the employee had prolonged exposure to asbestos containing gaskets, debris, dust, and particulate matter both as a part of his direct job duties and while working in proximity to other workers involved with asbestos containing material. He opined that the employee's gastric non-cardia adenocarcinoma and asbestosis were clearly linked to his extensive occupational exposure to asbestos. The employee's death was caused by gastric non-cardia adenocarcinoma. Dr. Bressler noted that the medical literature supports the association between prolonged exposure to asbestos and increased risk of gastric non-cardia adenocarcinoma. He indicated that the employee smoked lightly and over 30 years prior to his diagnoses of lung disease and gastric non-cardia adenocarcinoma. Dr. Bressler opined that based on the carcinogenic effects and the pulmonary effects of tobacco smoke exposure neither his gastric non-cardia adenocarcinoma nor his asbestosis were in any way affected by his distant tobacco exposure.

By decision dated August 2, 2021, OWCP denied modification of the July 30, 2020 decision.[6]

[6] This decision superseded a July 20, 2021 decision which also 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.[7] An award of compensation in a survivor 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.[8] 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.[9] 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.[10] The Board has held that it is not necessary that there is a significant contribution of employment factors to establish causal relationship.[11] If the employment contributed to the employee's death, then causal relationship is established.[12]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While it is appellant's burden of proof to establish the claim, OWCP shares responsibility in the development of the evidence.[13] It has the obligation to see that justice is done.[14]

## ***ANALYSIS***

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

The employee died on November 30, 2016. The death certificate provided the cause of death as stomach cancer. Following initial development, OWCP denied appellant's survivor benefits claim. Appellant subsequently requested reconsideration and submitted additional evidence.

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[7] 5 U.S.C. § 8133.

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

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

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

[11] *See P.G.* (*J.G.*), *id.*; *T.H. (M.H.)*, Docket No. 12-1018 (issued November 2, 2012).

[12] *Id*.

[13] *C.W.*, Docket No. 19-0231 (issued July 15, 2019); *D.G.*, Docket No. 15-0702 (issued August 27, 2015); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[14] *Id*.

In a June 10, 2020 report, Dr. Cohen opined to a reasonable degree of medical certainty that the employee had gastric cancer, which was fatal and was caused by the cumulative asbestos exposure comprised of his work with and around asbestos-containing pipe and block insulation, gaskets, packing, refractories, insulating cement, blankets, brakes, drywall joint compound, and related dust and debris. He referenced scientific studies supporting that asbestos in the form of chrysotile, amosite, crocidolite, and tremolite cause asbestosis, mesothelioma, gastric cancer, and other cancers. Dr. Cohen attributed the employee's death at least in part, to his occupational exposure to asbestos. His opinion is also supported by Dr. Bressler, who opined in a July 12, 2020 report that the employee's gastric non-cardia adenocarcinoma and asbestosis were clearly linked to his extensive occupational exposure to asbestos between 1961 and 2002, including exposure to asbestos containing gaskets, debris, dust, and particulate matter both as a part of his direct job duties and while working in proximity to other trades. Dr. Cohen noted that the medical literature supports the association between prolonged exposure to asbestos and increased risk of gastric non-cardia adenocarcinoma. The Board finds that, although Dr. Cohen's and Dr. Bressler's opinions were not sufficiently rationalized to meet appellant's burden of proof to establish her claim, their opinions are sufficient to require further development of the case by OWCP.[15]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[16] The case must therefore be remanded for further development.

On remand OWCP shall provide a SOAF and the medical evidence of record to a physician in the appropriate field of medicine. The chosen physician shall provide a rationalized opinion as to whether the employee's death is causally related to the accepted occupational exposure to asbestos. If the physician opines that the employee's death is not causally related, he or she must explain with rationale how or why their findings differ from that of Drs. Cohen and Bressler. 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.

[15] *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *see also John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

[16] *C.W., supra* note 13; *D.G., supra* note 13; *Donald R. Gervasi, supra* note 13; *William J. Cantrell, supra* note 13; *John J. Carlone, id*.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 2, 2021 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: November 22, 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