

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

M.H., claiming as widow of M.H., Appellant)	
)	
and)	Docket No. 23-0286
)	Issued: May 10, 2023
GENERAL SERVICES ADMINISTRATION,)	
Baltimore, MD, Employer)	
)	
)	

Appearances:
Analese B. Dunn, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On December 19, 2022 appellant, through counsel, filed a timely appeal from a July 5, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 his April 4, 1977 employment injury.

FACTUAL HISTORY

OWCP accepted that on April 4, 1977 the employee, then a 39-year-old elevator mechanic foreman, sustained chondromalacia of the left knee, dislocation of the right acromioclavicular joint, back sprain, and sciatica lifting reels of elevator cable while in the performance of duty. It assigned OWCP File No. xxxxxx151. OWCP further accepted that the employee injured his back, left knee, and right wrist on August 27, 1976 when he fell down 15 steps. It assigned OWCP File No. xxxxxx618. OWCP combined OWCP File No. xxxxxx618 with the current claim, OWCP File No. xxxxxx151, with the latter serving as the master file. It paid the employee wage-loss compensation for total disability after his April 4, 1977 employment injury until his death on May 22, 2017.

In a report dated April 28, 2020, Dr. Jeffrey D. Gaber, a Board-certified internist, reviewed the evidence of record and discussed the employee's history of severe back pain radiating into the left lower extremity after a fall down steps at work on August 27, 1976. He noted that the employee had also experienced increased back pain on April 4, 1977 after stacking elevator cable. Dr. Gaber asserted that the employee had chronic sciatica and spinal stenosis from his back injury that affected his left leg. He related, "[The employee] also had two strokes, at least one related to atrial fibrillation, and also required a pacemaker. From this, he apparently was disabled and placed in a nursing home, where he was wheelchair bound. I also note that [the employee] had Parkinsonism, but this seemed to be fairly well-controlled." Dr. Gaber indicated that the employee's primary care physician on December 7, 2017 had found that the employee's stenosis caused neurological deficits and weakness in his legs bilaterally which contributed to his bedbound state and his death. He opined that the employee's back injury on August 27, 1976 contributed to his immobility and decline in health leading to his death, "as noted by [the employee's] primary care physician, and as listed on the death certificate."

On May 13, 2020 appellant filed a claim for compensation by a surviving spouse and/or children (Form CA-5).

A June 26, 2017 death certificate provided that the employee died on May 22, 2017 and that the cause of death was Parkinson's syndrome with as cerebrovascular disease and spinal stenosis as other significant conditions contributing to death, but not resulting in the underlying cause.

On August 28, 2020 Dr. David I. Krohn, a Board-certified internist serving as a district medical adviser (DMA), recounted the employee's history of injury. He opined that the medical record contradicted Dr. Gaber's findings regarding the cause of death. Dr. Krohn asserted that the employee's inability to transfer or ambulate were caused by his Parkinson's disease rather than spinal stenosis. He referenced a 2016 finding from a physician who indicated that the employee's immobility resulted from a frontal lobe effect of Parkinson's disease. Dr. Krohn noted that reports from the employee's physical therapy for Parkinson's disease attributed the employee's limitations

to cognitive deficits related to his Parkinson's disease. He opined that immobility as a cause of death was not generally accepted in the medical community. Dr. Krohn advised that Parkinson's disease was terminal and caused dementia and neuromuscular abnormalities. He related, "In my considered opinion, the neurological deficits, the difficulty with ambulation and transfers and the [employee] taking to his bed were not the cause of his death, but rather the manifestation of his terminal Parkinson's disease that eventually was the cause of death."

On September 13, 2021 OWCP referred the case record and a statement of accepted facts (SOAF) to Dr. Paul A. Jain, a Board-certified internist, for a second opinion evaluation.

In a report dated August 12, 2021, Dr. Jain recounted his review of the case record and SOAF. He noted that the employee had become wheelchair bound in August 2017 after a second cerebral vascular accident. Dr. Jain related that the employee's August 27, 1976 back injury "played a substantial role in causing [the employee's] decline in health which subsequently led to his death." He found that the employee had low back pain that required a lumbar laminectomy decompression in October 2012 and that the employee subsequently had developed "significant immobility first becoming wheelchair bound, then bedbound." Dr. Jain noted that the employee's two strokes and Parkinson's disease contributed to his immobility, pain and disability and were also "significant contributing factors to [the employee's] death."

On November 12, 2021 Dr. Krohn related that the employee had initially experienced back pain on August 27, 1976 when he fell down steps at work, and that case had been combined with the current case. The employee underwent a decompression laminectomy and facetectomy at L4-5 bilaterally and sustained two strokes, one in August 2016 and one in January 2017, following which he was confined to a wheelchair and put in a nursing facility. He was diagnosed with Parkinson's disease in 2013. Dr. Krohn disagreed that the employee was bedbound because of back pain, citing medical evidence of record. He asserted that Dr. Jain had not commented on his finding that the employee's death resulted from Parkinson's disease rather than residuals of his employment injury. Dr. Krohn opined that Dr. Jain's report had not changed his opinion that the cause of death was the employee's terminal Parkinson's disease.

By decision dated December 9, 2021, OWCP denied appellant's survivor's claim. It found that the opinion of Dr. Krohn represented the weight of the evidence and established that the employee's death was not causally related to his accepted employment injuries.

On December 22, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on April 19, 2022. Counsel contended that OWCP should have obtained a supplemental report from Dr. Jain instead of sending the case to the DMA for review. She noted that the death certificate provided spinal stenosis as a cause of death. Counsel maintained that it appeared that OWCP engaged in physician shopping.

In a statement dated May 17, 2022, appellant's counsel asserted that Dr. Krohn selectively quoted from the medical evidence of record, and questioned why OWCP had failed to obtain a supplemental report from Dr. Jain. Counsel noted that OWCP's procedures provided that second

opinion reports should not be sent to a DMA except in schedule award cases or for guidance on a specific medical issue. She asserted that the medical evidence supported appellant's claim.³

By decision dated July 5, 2022, OWCP's hearing representative affirmed OWCP's December 9, 2021 decision.

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, 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.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 be 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 the case is not in posture for decision.

³ Appellant submitted a December 4, 2015 report from Dr. James E. McDonnell, who specializes in family medicine. Dr. McDonnell related that the employee was totally disabled due to his orthopedic problems. In a hospital report dated December 21, 2016, Dr. David Gaughan, a Board-certified psychiatrist, noted that the employee was on inpatient status after a cerebrovascular accident complicated by dementia and Parkinson's disease.

⁴ 5 U.S.C. § 8133.

⁵ *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).

⁶ *J.P. (E.P.)*, Docket No. 18-1739 (issued May 3, 2019); see *L.R. (E.R.)*, 58 ECAB 369 (2007).

⁷ *J.P. (E.P.) id.*; *W.C.(R.C.)*, *supra* note 5; *Edna M. Davis (Kenneth L. Davis)*, 42 ECAB 728 (1991).

⁸ *M.L. (S.L.)*, *supra* note 5; see *T.H.(M.H.)*, Docket No. 12-1018 (issued November 2, 2012).

⁹ *L.W. (K.W)*, Docket No. 19-0569 (issued August 16, 2019).

A June 26, 2017 death certificate indicated that the employee died on May 22, 2017 as a result of Parkinson's syndrome with other significant conditions listed as cerebrovascular disease and spinal stenosis.

Dr. Krohn, a DMA, reviewed the evidence on August 28, 2020 and found that the employee had died of terminal Parkinson's disease unrelated to his employment injury. He attributed the employee's inability to walk or get out of bed to his Parkinson's disease and resulting neuromuscular and cognitive difficulties.

In a report dated August 12, 2021, Dr. Jain, a second opinion physician, provided his review of the case record and SOAF. He noted that the employee was confined to a wheelchair in August 2017 after his second cerebral vascular accident. Dr. Jain found that the employee's low back pain was treated in October 2012 with a lumbar laminectomy decompression and that, subsequent to the surgery, he had developed significant immobility, becoming initially limited to a wheelchair and then to a bed. He opined that the August 27, 1976 back injury contributed substantially to the employee's deterioration in health that led to his death. Dr. Jain advised that the employee's strokes and Parkinson's disease also contributed to his immobility and death.

On November 12, 2021 Dr. Krohn related that his opinion that the employee's death was due to Parkinson's disease rather than residuals of his employment injury remained unchanged. He disagreed with Dr. Jain's finding that the employee was confined to his bed due to back pain based on his review of the medical evidence.

OWCP denied appellant's survivor's claim, finding that the opinion of Dr. Jain was insufficiently reasoned to constitute the weight of the evidence. The Board notes, however, that Dr. Jain's report, while not fully rationalized, is generally supportive of the employee's claim.¹⁰ OWCP's procedures provide that, if the second opinion physician submits an opinion which is "equivocal, lacks rationale, or fails to address the specified medical issues, the CE [claim's examiner] should seek clarification or further rationale from that physician."¹¹ Its procedures further specify that OWCP should request "a supplemental report to clarify specifically-noted discrepancies or inadequacies in the initial second opinion report."¹² If the second opinion physician does not respond or if the response is not sufficient, OWCP should schedule with another physician.¹³

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.¹⁴ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the

¹⁰ *V.P.*, Docket No. 22-0706 (issued November 3, 2022).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluation Medical Evidence*, Chapter 2.810.9j (June 2015).

¹² *Id.*

¹³ *Id.*

¹⁴ *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).

obligation to see that justice is done.¹⁵ Accordingly, once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁶ It referred the case record to Dr. Jain and thus had the obligation to secure, if necessary, clarification of the physician's report.¹⁷

The Board, therefore, finds that the case must be remanded for OWCP to request clarification from Dr. Jain, or from a new second opinion physician if Dr. Jain is unavailable or unresponsive, regarding whether the employee's death was causally related to his accepted employment injury. Following this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁵ *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).

¹⁶ *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

¹⁷ *See A.P.*, Docket No. 17-0813 (issued January 3, 2018); *R.J.*, Docket No. 16-1525 (issued January 9, 2017); *Alva L. Brothers, Jr.*, 32 ECAB 812 (1981).

ORDER

IT IS HEREBY ORDERED THAT the July 5, 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: May 10, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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