

File Number:
HR11-D-H

RECEIVED AUG 14 2012

U.S. DEPARTMENT OF LABOR

AUG - 8 2012

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

Date of Injury:
Employee:

Dear Sir/Madam:

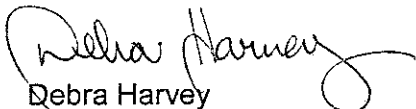
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A preliminary review has been completed, and it has been determined that the case is not in posture for a hearing at this time. The decision of the District Office has been vacated and returned to the district office for further action as explained in the attached Remand Order.

Your case file has been returned to the New York City District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 2 NYC
LONDON, KY 40742-8300

Sincerely,



Debra Harvey
Hearing Representative

PAUL H FELSER
FELSER LAW FIRM
PO BOX 10267
SAVANNAH, GA 31412

If you have a disability (a substantially limiting physical or mental impairment), please contact our office/claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations and modifications.

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

*In the matter of the claim for compensation under Title 5, U.S. Code 8101 et seq. of
, widow of , Employed by the United States
Case No:*

Merit consideration was completed in Washington, D.C. Based on this review, the decision of the District Office dated May 2, 2012, is hereby set aside for the reasons set forth below.

The issue is whether the death arose out of federal employment.

The deceased was employed by the , predecessor agency to the , as in for the period beginning in through . On , he was diagnosed with cholangiocarcinoma (cancer of the bile duct). He died on , with the cause of death being cholangiocarcinoma. The widow filed a claim under the Energy Employees' Occupational Illness Compensation Program Act (EEOICPA) and was awarded a lump sum payment under Part "B" of that Act that found he was a member of the Special Cohort Group (SCG) and that he was diagnosed with a specified cancer. The widow also filed a claim under Part "E" of that Act but that claim was denied. The Office found that Part "E" of the EEOICPA pertains to government contractors and not federal employees who may file claims under the Federal Employees' Compensation Act (FECA).

The instant claim was filed on with the widow alleging the claimant's death from bile duct cancer was due to radiation exposure in his federal workplace.

Initial evidence received included marriage and death certificates. Also received was a , list of diagnosis information from Dr. showing the initial diagnosis of bile duct carcinoma was made on . Illegible medical notes were received as well as a , statement from , Office Manager, Ms. stated the claimant was seen in consultation at on but these medical records are non-existent due to the passage of time. A copy of the decision from the FAB was also received.

¹ The July 20, 2011, decision of the Hearing Representative of the Final Adjudication Branch (FAB) of the Department of Labor's Energy Employees Occupational Illness Program Act found the deceased was employed by the Brookhaven National Laboratory from 1956 to 1970.

By letter of February 29, 2012, the District Office requested additional evidence to support the claim. The Office specifically requested the following:

- 1) A statement as to when the widow became aware that Mr. death was related to his federal employment at ;
- 2) A description of the "specific hazardous exposure that resulted in the death of the employee" as well as witness statements if available;
- 3) A comprehensive medical report from the treating physician that provided the physician's opinion on the cause of death with reasoning for the opinion, and
- 4) Copies of all medical and laboratory reports and test results pertaining to the diagnosis and treatment of the cancer.

It is noted that the District Office did not request any documentation or exposure information from the Employing Agency.

On March 20, 2012, Attorney Paul Felser requested additional time to provide the requested information. Much of the previously submitted information was resubmitted. In addition, statements from the family were received. A general information sheet concerning the EEOICPA program was received along with a list of qualifying cancers for the Special Exposure Cohort. The transcript from the FAB hearing of May 17, 2011, was received. Finally, a letter dated , from the addressed to Employees and Retirees was received. This letter was to inform the addresses of the EEOICPA program and advised them that this program "provides compensation and medical benefits to current and former employees who have developed cancer or other illnesses as a result of work at a DOE facility, including BNL. Certain survivors' benefits are also available to next-of-kin if the affected worker has died." This letter advised that there were "gaps" in certain BNL pre-1980 records that "might make it difficult for DOL to accurately estimate the total radiation dose a BNL worker with cancer had received, and so might result in the incorrect rejection of a valid cancer claim." This letter explained the Special Exposure Cohort that covered employees who had worked in the BNL for at least 250 days prior to and who developed one of the cancers listed on the letter. Bile duct cancer was one of those listed.

On May 2, 2012, the District Office denied the FECA claim finding the "weight of the evidence of record fails to establish that the decedent's cancer and subsequent death was diagnosed in connection with factors of his employment." The widow disagreed with this decision and through Mr. Felser has requested a hearing before an OWCP Hearing Representative.

I have carefully reviewed the record and find the case is not in posture for a hearing.

Although both programs fall under the Department of Labor, the FECA and the EEOICPA programs have separate criteria for eligibility. Eligibility under one program does not automatically entitle a claimant or survivor to benefits of the other. The

Employees' Compensation Appeals Board has held that claims under the FECA are not bound by decisions arising under different laws.²

An employee seeking benefits under the FECA has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act; that the claim was filed within the applicable time limitation of the Act; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition, for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.³

The elements listed above are examined separately with timely filing being the first to be established.

Section 8122 of the FECA provides that an original claim for compensation for disability or death must be filed within three years after the injury or death unless the immediate superior had actual knowledge of the injury within 30 days.⁴ In a case of latent disability⁵, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware, or by exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment.⁶

The Board has further ruled in the case of *Maxine Leonard (Ardee Leonard)*, 39 ECAB ____ (1988), that the statutory period for filing a survivor's claim on the death of a spouse begins to run "when the surviving beneficiary is, or should have been, aware of the causal relationship between the employee's death and factors of his federal employment."

² *Mary E. Hite*, 42 ECAB ____ (Docket No. 91-0306, issued May 8, 1991).

³ *Rebecca LeMaster*, 50 ECAB ____ (Docket No. 97-797, issued February 22, 1999).

⁴ The Office's *Procedure Manual*, Chapter 2-0801-3 (c)(3)(c) states, "If an agency, in connection, with a recognized environmental hazard, has an employee testing program and a test shows the employee to have positive findings this should be accepted as constituting actual knowledge."

⁵ "Latent disability generally refers to an injury or disability of insidious onset, such as occupational disease or condition produced by systemic infections, continued or repeated stress or strain, exposure to toxic chemicals, fumes, or poisons, or other continued or repeated exposure to conditions of the work environment which produce a cumulative or increasingly deleterious effect upon the employee, of which the employee may not be immediately aware." *Paul S. Devlin*, 39 ECAB ____ (1988).

⁶ *Devlin*, supra note 4.

Finally, the Board has found that an employee's assertion that he was not aware that he could file a claim is unacceptable as sufficient cause or reason for failure to file a timely claim.⁷

In its letter to the widow of February 29, 2012, the Office asked when the widow became aware the death was related to his federal employment at BNL. The widow did not respond to this question. The Office, however, in its decision dated May 2, 2012, found the March 26, 2010, letter from the BNL "explaining benefits under the EEOICPA and special exposure cohorts would indicate awareness upon the part of the employing agency of exposure as a result of your husband's employment." I do not find that this document establishes timely filing of the claim. This letter is of a general nature and not specific to the claimant. It was issued 16 years after the claimant's death and does not establish any sort of monitoring program or awareness on the part of the agency of the claimant's exposure to a hazard during the time he was employed or up until his death. However, it cannot be assumed that there was not such knowledge on the part of the agency. The Office failed to write the employing agency to ask if there was any sort of employee testing program in effect during the claimant's employment and if the agency was aware of a hazard during this time. (The exact dates of the claimant's employment are also unknown). Upon return of the case file, the Office should write the Employing Agency and ask for the exact dates of employment and whether the agency had knowledge of a workplace hazard during this period. At that point, the Office should determine if the claim was, in fact, timely filed. This action is necessary to ensure thorough examination of the claim and that due process is given to the widow.

If it is determined that the claim is timely filed, fact of an injury should then be examined. It has been established that the claimant was a civil employee.

The *FECA Procedure Manual*, Chapter 2-803-2, states, fact of injury "consists of two components, which must be considered together: (1) whether the claimant actually experienced the accident, untoward event, or employment factor which is alleged to have occurred. This is a factual determination. (2) Whether a medical condition has been diagnosed in connection with this event. To make this determination, medical evidence is required."

When a claimant alleges an injury in the performance of duty, the claimant must submit sufficient evidence to establish that [s]he experienced a specific event, incident, or exposure occurring at the time, place, and in the manner alleged. The claimant must also establish that such event, incident, or exposure caused an "injury" as defined in the Act and its regulations.⁸ In this case, the claimant was employed as the Chief of

⁷ Albert K. Tsutsui, 44 ECAB ____ (Docket No 92-2002, issued September 27, 1993).

⁸ *Melissa A. Carter*, 45 ECAB ____ (Docket No 93-958, issued May 6, 1994).

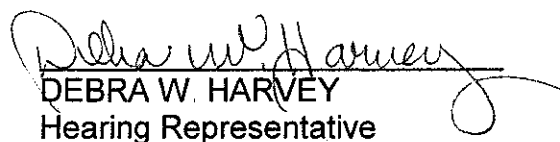
Administration in Finance. The widow has alleged he developed cancer due to exposure to radiation in the workplace. Under the FECA program, it must be established that there was, in fact, exposure to radiation. There is no data in the instant file that establishes this at present. (The general letter sent to the lab employees does not establish this claimant was actually exposed to radiation, or if so, the amount and frequency of such exposure.) The Employing Agency should be written and asked for exposure data to include the work that was performed, the location(s) where exposure occurred, the period of exposure, number of hours per day and days per week exposed, and the type and frequency of safety precautions used. Again, this information is necessary to provide due process to the widow. The Office should then make a finding of fact once this information has been received.

The widow and/or attorney may wish to provide a copy of the EEOICPA file as this file may contain pertinent supporting documentation for consideration. If the factual component of fact of an injury has been satisfied, there is medical evidence in the file that contains a diagnosis of bile duct cancer.

The questions then to be determined would be whether the disease arose out of the performance of duty and whether the diagnosed bile duct cancer was causally related to radiation exposure in the workplace during the period the claimant was employed. In deciding whether an injury is covered by the FECA, the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed and the resultant injury.⁹ Causal relationship must be established by rationalized medical opinion evidence.¹⁰

The Office denied the claim finding the evidence did not establish the diagnosed cancer was related to employment duties. However, the Office failed to contact the Employing Agency, nor did it request a copy of the information (from the widow) contained in the EEOICPA file which may contain information pertinent to the instant claim. Therefore, the Office's decision must be SET ASIDE and REMANDED for further development as stated above.

DATED: AUG - 8 2012
WASHINGTON, D.C.


DEBRA W. HARVEY
Hearing Representative
For
Director, Office of Workers'
Compensation Programs

⁹ *Wilfredo Carrillo*, 50 ECAB ____ (Docket No. 97-25, issued October 2, 1998).

¹⁰ *James H Bolts*, 50 ECAB ____ (Docket No. 97-464, issued March 1, 1999).