

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
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Date of Injury: 8/21/1987
Employee: JAMES HARRIS

ELLEN HARRIS
230 CREDDLES MILL ROAD
FT. GAINES, GA 39851

Dear Ms. Harris:

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 Hearing was held on March 31, 2006. As a result of your Hearing, it has been determined that the decision issued by the District Office should be set aside, and the case remanded to the District Office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Future correspondence should be addressed to: U.S. Department of Labor, Office of Workers' Compensation Programs:

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6
LONDON, KY 40742-8300

Sincerely,


David Leach
HEARING REPRESENTATIVE

DEPARTMENT OF THE NAVY
MARINE CORPS LOGISTICS BASE
WORKERS COMPENSATION G100
814 RADFORD BLVD
ALBANY, GA 31704

PAUL FELSER, ESQ
7 EAST CONGRESS ST, SUITE 400
PO BOX 10267
SAVANNAH, GA 31412

U.S. DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation, survivor's benefits, under Title 5, U.S.C. Code 8101 et seq. of Ellen Harris, widow to James Harris; Employed by the Department of the Navy in Albany, GA; Case no. 060422904.

Hearing was held on March 31, 2006 in Atlanta, GA. Based on this Hearing, the decision of the District Office dated May 26, 2005 is hereby set aside for the reasons set forth below:

The issue for determination is whether the claimant is entitled to survivor's benefits under the provisions of the Federal Employees Compensation Act.

Ellen Harris is the widow of James Harris, a Federal employee, born November 18, 1942, and employed by the Department of the Navy in Albany, Georgia as an Optical Repair Technician. He sustained a traumatic injury to his lower back in the performance of duty on August 21, 1987 when he was on top of a tank turret, lost his balance, and jumped to the ground. The claim was accepted for a low back sprain. Later, the claim was expanded to include consequential major depression as an accepted, work-related condition. The record shows the claimant stopped work on the date of injury. He received continuation of pay and wage-loss compensation for time missed from work due to his injury, and was eventually placed on the OWCP "periodic roll" by which he received regular compensation payments based upon temporary total disability.

The claimant was still in receipt of wage-loss compensation benefits on September 27, 2003, when he died as the result of an apparent suicide. The claimant's widow, Ellen Harris, filed a Form CA-5 on March 4, 2004, for OWCP survivor benefits claiming that Mr. Harris' death was due to the effects of his accepted work injury. Ms. Harris submitted a statement describing the claimant's anguish over chronic pain from his work-related back injury, which she felt had caused the claimant to commit suicide.

A medical report from Dr. Melvin Oakley identified the cause of the claimant's death as a drug overdose, suicide. Dr. Oakley indicated that it was his opinion that the claimant's physical condition had declined, causing his depression to worsen, which ultimately resulted in suicide. An April 16, 2004 report from Dr. Duncan Marsh, the claimant's treating orthopedic specialist was also submitted in support of the claim. Dr. Marsh advised the claimant suffered from

chronic pain in the lower back, which required extensive medication. Dr. Marsh did not provide an opinion on whether the claimant's death was related to his work injury.

A copy of the police report pertaining to the claimant's suicide advised that the claimant was found deceased in a motel room on September 27, 2003, with numerous empty pill bottles beside him, along with a note containing his wife's name and phone number. When the officer called the claimant's wife, she described an argument between herself and Mr. Harris on September 26, 2003, after which the claimant left the house. The autopsy report listed the claimant's cause of death as suicide.

A June 14, 2004 report from Dr. Marsh indicated the claimant's suicide was due to chronic pain from his work-related back injury. He did not feel the claimant's argument with his wife was related to the suicide, noting that she was tremendously supportive of the claimant. As evidence of this, he noted that she always accompanied the claimant on office visits, and seemed to be caring and devoted. A June 22, 2004 report from Dr. Oakley advised he had treated the claimant since 1994, and the claimant suffered depression due to his chronic pain, which caused him to commit suicide.

A Statement of Accepted Facts was prepared and the case file record forwarded to the District Medical Advisor for an opinion on whether the claimant's death was related to his work injury. In an opinion dated July 21, 2004, he opined that the claimant's suicide was unrelated to the work injury. He felt that other severe domestic stressors were the cause, and that the chain of causation from the work injury to the suicide was broken.

Based on the opinion of the District Medical Advisor, the District Office denied the claim for survivor's benefits in a decision dated July 23, 2004. Ms. Harris disagreed with this decision, and requested an appeal in the form of an Oral Hearing before the Branch of Hearings and Review. After a preliminary review of the file, the Branch of Hearings and Review found that the case was not in posture for a decision on that issue, and remanded the case for evaluation by a Board-certified psychiatrist for an opinion on whether or not the claimant's death was related to his accepted August 21, 1987 work injury.

The District Office complied with this directive and sent the file, along with the Statement of Accepted Facts, for a review by Amit Vijapura, MD, a Board-certified Psychiatrist. In a brief report dated May 13, 2005, Dr. Vijapura indicated that he had reviewed the Statement of Accepted Facts and medical documents provided to him. Based on this, he opined as follows:

Upon reviewing all of the medical records, the patient has suffered significant chronic pain and disability, which started after his injury of 08/21/1987. He has received ongoing medical treatment, surgical treatment, injections, physical therapy, and pain medication. He was also diagnosed to have Major Depression, which was established as a work related condition. He has not received any psychiatric treatment. He has not received treatment under a psychiatrist since 1995. It was also noted that his physical capacity to function in basic day to day life had returned and videotaping of October of 1993 noted that he was able to do multiple activities around his house, which were physical in nature. Prior to his death, there is no descriptive record regarding his severe depression, suicidal ideation, or psychiatric inpatient treatment. One day prior to his suicide attempt, he had an argument with his wife. His physician, Dr. Marsh, noted that his wife was supportive and always accompanied him during his visits.

This patient has suffered Major Depression, but during the few months prior to his suicide attempt, there is no evidence of worsening in his depressive symptoms. There is no evidence of suicidal ideation. Thus, it is my medical opinion that his suicide attempt is not causally related to his work injury of 08/21/1987. It is not related to his Major Depression. This suicide attempt could very well be related to an impulsive angry episode, secondary to his argument with his wife, which resulted in an accidental overdose and death.

On May 26, 2005, the District Office issued a *de novo* decision which indicated that the medical evidence of record did not support that the claimant's death was related to his accepted work injury. This was based on the premise that Dr. Vijapura's report represented the weight of medical evidence of record.

Ms. Harris requested another appeal in the form of a Hearing before the Branch of Hearings and Review. As such, a Hearing was scheduled and held on March 31, 2006. Ms. Harris attended the Hearing, along with her attorney, Mr. Paul Felser. The employer did not send a representative to observe.

At the Hearing, Attorney Felser argued that the Statement of Accepted Facts was misleading, and that the opinions of Dr. Vijapura and Dr. Puestow (the District Medical Advisor) were of diminished probative value. Attorney Felser argued that these physicians based their opinions on the premise that the claimant had not seen a psychiatrist since 1995; however, Mr. Harris had only discontinued his psychiatric treatment because he experienced continual problems receiving authorization for his visits from the Department of Labor and ultimately gave up. But he was still being treated for this condition through extensive use of pain medication, and anti-depressant medication, as was noted by both Drs. Marsh and Oakley. In fact, the claimant's

medications included Valium, Oxycontin, Tylox, and Prozac, which Attorney Felser indicated had been linked to suicide in other cases. He provided an extensive list of varied medications that Mr. Harris was taking, that were paid for by the Department of Labor, which Attorney Felser felt clearly illustrated the continuing severity of the chronic pain he continued to suffer from related to his job injury, as well his ongoing struggle with depression, up until his death. He also argued that the accepted condition of "low back strain" was a misrepresentation of the true nature of his work-related spinal condition, and that his condition was much more severe, as evidenced by his long standing disability and chronic pain.

Regarding the repeated mention of the investigative videotape of the claimant in October 1993, Attorney Felser argued that the video was taken ten years prior to Mr. Harris' death, and therefore the tape could not be considered relevant evidence in determining the nature and extent of the work-related condition and chronic pain almost ten years later. He argued that it is medically supported that conditions such as Mr. Harris' degenerate with the aging process, and that to conclude that Mr. Harris was not depressed or that he did not continue to suffer from his accepted, work-related injuries because he was allegedly able to do simple chores around his house ten years prior to his suicide, is a great leap in rational medical reasoning. Attorney Felser argued that the medical opinions of the District Medical Advisor and Dr. Vijapura were based on an incomplete, distorted history of injury, were not well-reasoned, and did not represent the weight of medical evidence of record. He recommended that additional medical development of the case was warranted, at the very least.

At the Hearing, Mrs. Harris' testified that the Statement of Accepted Facts was inaccurate. She stated that Mr. Harris was anguished by chronic pain, which he could not control. He could not sleep, and was irritable. His face would turn purple because of his pain, and he would lash out. She denied domestic problems or family issues. She felt all of their difficulties stemmed from his injury, depression and pain, from his work injury, which he could not control. She pleaded with him to get treatment. She stated the argument they had prior to the date of Mr. Harris' death was over concern for his well-being, because she was trying to get him to seek treatment, but Mr. Harris was not acting rationally.

At the conclusion of the Hearing, Attorney Felser requested that the record be held open so that he would have an opportunity to submit additional materials in support of the appeal. His request was granted, and the record held open. Copies of the transcript were sent to the employer and the claimant's attorney, and their comments were invited.

After the Hearing, a "Post-Hearing Brief" was submitted to the record by Attorney Felser, dated May 31, 2006, with a summary of the information and arguments presented at the Hearing. Also submitted to the record at that time were medical reports previously not of record, along with several other documents that were previously in the file, but had been referenced in the brief.

A December 15, 2005 report from Duncan Marsh, MD, noted that the claimant's chronic back pain became progressively worse over the years and the claimant was on pain medication and received steroid injections up until the time of his death. This report indicated that the claimant became increasingly debilitated and impaired because of this, and had difficulty controlling his pain. His pain and side effects of medication affected his activities of daily living.

A July 8, 2005 report was received from Jim Shaddock, a psychologist/counselor for David Harris, grandson to Mr. and Mrs. Harris, who lived with them before, during and after Mr. Harris' death. This report gave an account of David's experiences just before Mr. Harris' death, and supports that David had stated that the claimant was experiencing great emotional difficulty dealing with his physical pain at that time, not due to family conflict. He denied domestic problems existed between Mr. and Mrs. Harris. David stated that, on the day before the suicide, Mr. Harris left the house out of despair over his inability to control his pain.

Based upon the Hearing testimony, the arguments presented by the claimant's attorney, new evidence of record, and my review of the prior written evidence of record at this time, I find that the prior decision of the office dated May 26, 2005 should be set aside and the case remanded for additional development.

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 timely filed within the applicable time limitation period of the Act, that an injury was sustained 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 injury¹.

An award of compensation in a survivor's claim may not be based on surmise, conjecture, or speculation, or on a claimant's belief that the employee's death was caused, precipitated, or

¹ *Etaine Pendleton*, 40 ECAB ____ (1989) [89-0982 issued July 31]; *Donald R. Vanheln*, 40 ECAB ____ (1989) [89-0658 issued August 25].

aggravated by the employment. A claimant's opinion that an injury accepted by the Office ultimately caused the employee's death is insufficient to establish causal relationship.²

For suicide to be compensable, Office procedures provide that the chain of causation from the work injury to the suicide must be unbroken. If the evidence indicates or suggests the existence of other factors in the employee's life which may break the chain-of-causation (such as personal or family problems, nonemployment-related injuries etc.), the claims examiner must develop such factors to determine what effect, if any, they had in causing the employee to commit suicide, and whether they constitute independent intervening factors sufficient to break the direct chain of causation from the injury to the suicide. Courts have found that the evidence in each case must be examined in order to determine whether, but for the employment injury, would the employee have committed suicide. Courts and commissions applying the chain-of-causation test will review the evidence to determine whether the causal chain, extending from an established work injury to the suicide, is direct or whether it has been broken by other intervening influences.³

In this case, the District Office found that the opinion of Dr. Vijapura represented the weight of medical evidence. The District Office also referred to him as the "referee" medical examiner. I disagree with both of these assessments.

In assessing medical evidence, the number of physicians supporting one position or another is not controlling. The weight of such evidence is determined by the reliability of the medical report obtained; its probative value; its convincing quality; the care of analysis manifested; and the medical rationale expressed in support of the doctor's opinion.⁴ The Board has held that medical opinions based upon an incomplete history or which are speculative or equivocal in character have little probative value.⁵

I find that Dr. Vijapura's report is not based on a complete history of injury. The language in his report is equivocal and speculative. He gives little or no rationale in support of his opinion. I do not find his report represents the weight of medical evidence of record. The reports supplied by

² Sharon Yonak (Nicholas Yonak), 49 ECAB ___ (Docket No. 96-471, issued December 23, 1997).

³ Carolyn King Palermo (Travis Palermo), 45 ECAB ___ (Docket No. 91-1736, issued January 10, 1994).

⁴ John A. Ceresoli, Sr., 40 ECAB ___ (1988) [88-1565 issued November 28, 1988].

⁵ Geraldine H. Johnson, 44 ECAB ___ (Docket No. 92-1611, issued June 9, 1993).

the attending physicians in this case are at least equivalent in probative value as that of Dr. Vijapura.

Further, although Dr. Vijapura was noted by the District Office as the "referee physician" in a memorandum of file, I do not find that to be the case. In its prior decision on this case, the Branch of Hearings and Review found that the opinion of the DMA was of little probative value. As such, it was not sufficient to create a true conflict in medical opinion under the provisions of the Act, when contrasted with the opinions of the attending physicians. Dr. Vijapura was a "second opinion" examiner in this case, not a "referee."

In assessing all the medical evidence of record, I find that there is no medical report on file that adequately addresses the "chain of causation" issue, to the extent that a decision regarding the claim could be made at this point. Additional medical development of the claim is therefore necessary. But before that can be done, the Statement of Accepted Facts (SOAF) must be updated to include an accurate description of the medications that the claimant was taking due to his work-related injury, up to the time of his death. Also, the SOAF should note the nature of the argument the claimant had with his wife prior to leaving the home on the night prior to his death, according to Ms. Harris' testimony. Lastly, the SOAF must contain only facts established by the evidence of record, not conjecture. It is inappropriate to start a paragraph in a SOAF with the words "Witnesses state ..." Witnesses may state many things, but it is the role of the Office to determine the factual background for the case.

Because the prior SOAF was flawed, to maintain the impartial nature of the independent medical exam, I find it would be appropriate at this time to develop the medical evidence of record through review of the file by a new, independent, Board-certified examiner in the appropriate specialty, to determine whether the claimant's chronic pain and depression stemming from his accepted, work-related injury proximately caused the mental derangement that led to his suicide, or if there was some other independent intervening factor sufficient to break the direct "chain of causation" from the work injury to the suicide. The new medical reports of record, including that from David's counselor, should be provided to the examining physician.

Upon receipt of the report, the District Office should undertake any additional development of the claim as it deems necessary, and issue a de novo decision on the issue of whether the claimant's suicide was work-related, and whether Ms. Harris is entitled to FECA survivor's benefits under the provisions of the Act.

For the reasons set forth above, the Office's decision of May 26, 2005 is hereby set aside, and the case REMANDED for additional actions, described above.

Dated: JUN 30 2006
Washington, D.C.



~~DAVID S. LEACH~~
Hearing Representative
for
Director, Office of Workers'
Compensation Programs