

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT J. STABB and DEPARTMENT OF THE INTERIOR,  
BUTTE FALLS RANGER DISTRICT, Butte Falls, OR

*Docket No. 02-2280; Submitted on the Record;  
Issued February 21, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant sustained a sarcoma cancer condition causally related to factors of his employment.

This is the second appeal in this claim. In the prior decision, the Board set aside the Office of Workers' Compensation Programs' decision denying merit review.<sup>1</sup> The Board found the September 20, 2000 medical report from Dr. Ashley S. Peterson, an attending Board-certified family practitioner, constituted new and relevant evidence pertaining to the issue of causal relationship between appellant's cancer and his federal employment and, thus, warranted a merit review. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On remand, the Office referred the case record and a statement of accepted facts, to Dr. Robert M. Levenson, Jr., a Board-certified internist and medical oncologist, for a second opinion evaluation.

In a report dated May 1, 2002, Dr. Levenson, based upon a review of the medical records and statement of accepted facts, diagnosed soft tissue sarcoma of unknown etiology. Dr. Levenson noted:

“With respect to [appellant's] federal employment, he has documented multiple contacts with both 2,4,5-T and 2,4-D, being exposed to these substances without any protective equipment. The relationship between the exposure to these phenoxy herbicides and development of malignancy is unclear. Some limited epidemiological data has suggested that there is a causal relationship to exposure and various malignancies including soft-tissue sarcoma. On the other hand a large review of Vietnam [V]eterans with extensive exposure to 2,4,5-T and 2,4-D

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<sup>1</sup> Docket No. 01-975 (issued January 15, 2002).

failed to reveal any direct relationship between sarcoma and these agents. Soft-tissue sarcoma is a rare disease in any event and relationship to [appellant]’s tumor to his phenoxy herbicide exposure is simply unknown.”

Regarding the literature supplied by appellant, Dr. Levenson stated:

“[Appellant’s] supplied literature supports the unclear nature of phenoxy herbicide exposure and the development of malignancies. Several retrospective studies among patients with high exposures suggest that they are indeed at risk among patients for a development of soft-tissue sarcoma; however, these studies involve small numbers of patients and were conducted as far back as the 1950s. [Appellant] has also supplied literature which documents no known link between soft-tissue sarcoma and phenoxy herbicide exposure.”

In conclusion, Dr. Levenson opined that “current medical literature continues to show no convincing proof that there is a relationship between sarcoma and herbicide/pesticide exposure.”

By decision dated June 26, 2002, the Office denied appellant’s claim on the grounds that the weight of the medical evidence, as represented by the opinion of Dr. Levenson, established that the employee’s sarcoma cancer is not causally related to his employment.

The Board finds that the case is not in posture for a decision due to a conflict in medical opinions.

Section 8123(a) of the Federal Employees’ Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>2</sup> When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>3</sup>

The Board finds that there is a conflict in the medical evidence under section 8123(a) between Dr. Peterson, who found that the employee’s sarcoma cancer was causally related to his exposure to various toxins in his federal employment and Dr. Levenson, who found that the employee’s cancer was not caused by factors of his employment. Both physicians are highly qualified, both provided rationale for their conclusions and both referenced medical literature in their reports. The Office should refer the relevant factual and medical records to an appropriate specialist for a reasoned opinion regarding whether appellant’s sarcoma cancer was causally related to factors of his federal employment. After such further development as the Office deems necessary, it should issue an appropriate decision.

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<sup>2</sup> 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

<sup>3</sup> *Gertrude T. Zakrajsek (Frank S. Zakrajsek)*, 47 ECAB 770 (1996).

The decision of the Office of Workers' Compensation Programs dated June 26, 2002 is hereby set aside and the case remanded for further development consistent with this decision of the Board.

Dated, Washington, DC  
February 21, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member