

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of the Estate of LORETTA KROETSCH and ENVIRONMENTAL PROTECTION  
AGENCY, WASTE MANAGEMENT DIVISION, Grosse Ile, MI

*Docket No. 97-1403; Submitted on the Record;  
Issued March 7, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to rescind acceptance of the employee's claim for an emotional condition; and (2) whether the employee established that she developed colon cancer in the performance of her federal employment.

On October 29, 1992 the employee, then a 37-year-old environmental scientist and on-scene coordinator,<sup>1</sup> filed a notice of occupational disease and claim for compensation alleging that she developed major depression in the course of her federal employment. The employee indicated that she first became aware of her condition on December 1, 1989 and first realized her illness was related to her employment on September 17, 1990. The employee stopped work on September 11, 1990 and, after a period of psychiatric hospitalization at Chelsea Community Hospital, returned to work on September 17, 1990. The employee resigned from the employing establishment on March 1, 1991. On March 11, 1991 the employee began working full time with Camp, Dresser and McKee, a private employer. The employee subsequently reduced her hours at Camp, Dresser and McKee to part-time work and on September 17, 1991 she stopped work completely and did not return. On January 26, 1993 the Office accepted the employee's claim

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<sup>1</sup> The employee's duties as an on-scene coordinator included the responsibility to initiate any actions necessary to abate public health and environmental threats from various sites where substances such as oil or hazardous waste had been released. The employee conducted investigations of a site to discover the nature of any hazards present and determine whether corrective action was warranted. The employee also responded to emergency events and initiated on-site mitigative activity on "time-critical" removal actions. The employee typically managed project budgets of up to \$2,000,000.00, and acted to ensure environmental regulatory compliance during field actions, and to ensure the health and safety of on-site workers and the affected communities, coordinating her actions with state and local authorities. The employee's working conditions included on-site coordinating and directing field efforts for up to several months at a time, living in hotels and sometimes out of her vehicle. She often worked all available daylight hours and wore personal protective equipment such as enclosed suits with air filtration equipment for breathing. The wearing of protective equipment was physically exhausting and could lead to heat exhaustion in warmer weather.

for anxiety reaction and depressive reaction as a result of having to work extended shifts under difficult physical conditions on-site and away from home for extended periods of time, and as a result of having to rewrite required reports within tighter time frames, and with more detail, than generally required of her coworkers.<sup>2</sup> Subsequent to filing her emotional condition claim, the employee was diagnosed with advanced colon carcinoma, for which she filed a separate claim. The employee died from colon cancer on May 7, 1996.

By letter dated June 14, 1993, the Office informed the employee that she would receive compensation for the period of her employment with Camp, Dresser and McKee from March through September 1991 on the basis of the difference between her actual earning and her weekly pay rate at the employing establishment.<sup>3</sup> The Office further informed the employee that she would not be compensated for the period of her hospitalization in the fall of 1990, as she was not in a leave-without-pay status at that time. Finally, the Office advised the employee that as there was no evidence in the record that she had undergone any ongoing psychiatric care or treatment since October 1991, and therefore the Office had no medical basis to determine her medical status since that time, such as whether or not there was partial or total disability and for what period of time, whether such was due to any residual effects of her accepted condition, and whether her condition had resolved, the case would be referred for further medical development.

The Office based its acceptance of the employee's claim on the reports of Dr. Judith A. Kovach, the employee's treating clinical psychologist, who stated that disrespectful, discriminatory and abusive treatment received by the employee at the hands of her supervisor,<sup>4</sup> along with the continuing high pressures of being on the road a large percentage of the time, the physically exhausting work, and the critical, even life and death, responsibilities she held when answering emergency responses, were major stresses and caused the employee great anxiety, interfered with her sleep and precipitated her major depressive episode in 1989. Dr. Kovach further stated that, even after leaving the employing establishment, the employee's continuing depression rendered her unable to maintain a level of attendance and performance in her new employment, and she was eventually forced to accept a termination of employment.

On July 22, 1993 the Office referred the employee, the case record, a list of questions to be addressed and the statement of accepted facts to Dr. Edward C. Dorsey, a Board-certified psychiatrist, for a second opinion evaluation. He examined the employee on August 18, 1993 and reviewed the available medical records, noting that the employee had been adopted as a child, had endured the suicide of her mother, had a history of substance abuse, and had been

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<sup>2</sup> The employee identified numerous additional situations and incidents which she alleged contributed to her emotional condition, but the Office found these additional factors noncompensable as they involved either administrative or personnel matters, were unrelated to the day-to-day duties of her position, or were unsupported allegations or perceptions.

<sup>3</sup> The Office noted that the employee's work at Camp, Dresser and McKee had been primarily part time due to restrictions imposed by residuals of the anxiety and depressive reactions sustained during her employment with the employing establishment.

<sup>4</sup> The Office did not accept the employee's allegations regarding her supervisor as compensable factors of employment.

diagnosed with colon cancer. Dr. Dorsey found that there was no psychiatric diagnosis, only an Axis II diagnosis of personality traits of substance dependency, unspecified. He explained his diagnosis, stating:

“The multiaxial system seems inadequate in this many-faceted case. There seem unusual strengths, *e.g.*, her efficient and unemotional dealing with her cancer, along with a weakness for narcotic drugs in this scattered characterological picture, perhaps not unusual among persons with similar early challenges who survive childhood and adolescence through sheer instinctual force. In mitigation of the Axis II diagnosis, since teen-age she has ‘employed’ narcotics rather than been dominated by narcotics. Drugs could not sink this ironclad personality.”

In response to the Office’s inquiry as to the role of the employee’s employment in the development of her diagnosed conditions, Dr. Dorsey stated:

“Employment stresses were a lightning rod, a borrowed, rational path of least resistance for stresses of infantile origins prior to the dawn of memory which have no ‘signature,’ or imagery of their own. There seems to this examiner no relationship of [employing establishment] employment to symptoms either by direct cause, aggravations, precipitation or acceleration.

“It remains unknown to this examiner when the psychiatric disability, if there was any, ended.... Absence of Axis I diagnosis infers current baseline condition, meaning that regular employment appears not the direction of her life now.”

By letter dated January 11, 1994, the Office requested clarification from Dr. Dorsey on the issue of when the psychological component of the employee’s 1989 illness, if any, ceased.

In a follow-up report dated January 14, 1994, Dr. Dorsey questioned the employee’s psychological incapacity to earn wages in 1989, citing the fact that she was employed during that period, and further stated:

“As I understand it [the employee] went to counseling because of numerous complaints of work-related stresses. Neither during the examination, nor in the list of accepted facts could I discern work stresses sufficient to precipitate, etc., psychological disability.”

By letter dated January 27, 1994, the Office referred the employee to Dr. Saul Forman, a Board-certified psychiatrist, for an impartial medical examination.<sup>5</sup> He was similarly provided with the complete medical record, a list of questions to be addressed and the statement of accepted facts. Dr. Forman examined the employee on February 18, 1994 and reviewed the available medical and factual records. In his report dated February 22, 1994, he diagnosed Axis

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<sup>5</sup> The record contains a January 11, 1994 memorandum from the Office finding that a conflict of opinion existed between Drs. Kovach and Dorsey. However, neither the letter of referral to the employee, nor the letter to Dr. Forman indicated that there was a conflict in this case, but rather indicated that a second opinion was requested.

I major depression, and Axis II paranoid and passive aggressive traits. With respect to the causal relationship, if any, between the employee's diagnosed conditions and her federal employment, Dr. Forman stated:

“The patient was able to work full time after leaving [the employing establishment]. There is information in the Chelsea records that her problems with supervision in the [employing establishment] were not unlike those she experienced as a child (which she did not discuss with me). She also has had numerous other work-related experiences, all of which she told me have been short lived and ended with termination. This is noted in her work when she was a chemist, and she had many jobs which were ended, and also when she left her last job. I find conflicting material in her statements, her psychotherapist's statements, and her supervisor's statements as to who did what to whom although her supervisor's reports, which are not based on any psychological studies but simply a review of her behaviors, are in agreement with the material from Chelsea Hospital which points to her having a long-standing behavioral disorder and a possible disorder of thinking. Therefore, it is unlikely that this particular job at the [employing establishment] contributed to her major depression.”

In a decision dated March 14, 1994, the Office found that the evidence of file failed to establish that the claimed medical condition and disability from December 1, 1989 and continuing was causally related to the occupational illness of December 1, 1989. The employee requested an oral hearing, which was held on February 15, 1996, and submitted additional evidence in support of her request.<sup>6</sup>

In a decision dated April 23, 1996, an Office hearing representative found that the employee had failed to establish that her psychiatric condition and any periods of claimed disability were causally related to factors of her federal employment. The Office found that the weight of the medical evidence rested with the opinion of Dr. Forman, whom the hearing representative accorded special weight as an impartial medical examiner. In so doing, the Office rescinded its January 25, 1993 acceptance of the employee's claim for employment-related anxiety and depressive reactions.

By letter dated January 21, 1997, the employee, through counsel, requested reconsideration of the Office's decision and submitted additional medical evidence in support of her request.

In a decision dated January 24, 1997, the Office found the newly submitted medical evidence insufficient to warrant review of the prior decision.

The Board finds that the Office did not meet its burden of proof to justify rescinding its acceptance of the employee's claim, as there is an unresolved conflict in the medical opinion

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<sup>6</sup> The employee submitted a November 21, 1995 report from Dr. Kovach, in which she reiterated her original conclusions. The employee also submitted a letter from Dr. Calmeze H. Dudley, a psychiatrist, who treated the employee in 1990 and 1991, and an affidavit from a coworker at the employing establishment, on the issue of job stress.

evidence.

Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where the Office later decides that it erroneously accepted a claim. To justify rescission of a claim, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument or rationale.<sup>7</sup> Merely reviewing the evidence of record and arriving at a different conclusion is not sufficient for the Office to meet its burden of proof.<sup>8</sup>

In the present case, the Office accepted appellant's claim based on the reports of Dr. Kovach, appellant's treating psychologist, who opined that appellant's emotional condition was precipitated by factors of her employment, including the continuing high pressures of being on the road a large percentage of the time, the physically exhausting work, and high level of responsibility for critical issues. In contrast, Dr. Dorsey, the Office second opinion physician, opined that there was no relationship, either by direct cause, aggravation, precipitation or acceleration, between the accepted factors of appellant's employment and her emotional symptoms. The Office properly found that there was a conflict of medical opinion between Drs. Kovach and Dorsey. To resolve this conflict the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,<sup>9</sup> referred the case record to Dr. Foreman, a Board-certified psychiatrist. In making this referral, however, the Office did not notify the employee of Dr. Foreman's status as impartial medical examiner. The Board therefore finds that Dr. Foreman was not properly selected as an impartial specialist and that his report may not be used to resolve the conflict of medical opinion in this case.<sup>10</sup> Therefore, the Board finds that the Office did not meet its burden of proof to rescind its acceptance of the employee's claim.

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<sup>7</sup> *Josie P. Waters*, 45 ECAB 513 (1994).

<sup>8</sup> *George E. Reilly*, 44 ECAB 458 (1993).

<sup>9</sup> 5 U.S.C. § 8123(a) states in pertinent part, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

<sup>10</sup> See *Henry J. Smith, Jr.*, 43 ECAB 524 (1992); *reaff'd on recon.*, 43 ECAB 892 (1992) (the claimant was notified of the identity of the physician but not of the existence of a conflict of medical opinion; the Board found that the claimant was deprived of the opportunity to request to participate in the selection of the impartial specialist or to raise any objection to the physician selected).

The Board further finds that this case is not in posture with respect to whether the employee established that she developed colon cancer as a result of toxic substance exposure in her federal employment.

On September 12, 1993 the employee filed a notice of occupational disease and claim for compensation alleging that she developed metastatic colon cancer as a result of exposure to toxic chemicals during her federal employment. The employee's cancer was diagnosed in June 1993.

On December 16, 1993 the Office reviewed the employee's notice of occupational disease and claim for compensation and advised her of the type of factual and medical evidence needed to establish her claim. The employee was given 30 days to submit such evidence. The Office requested that the employee submit a reasoned opinion addressing how the employee's condition resulted from her work duties.

In a narrative statement submitted in support of her claim, the employee stated that she was in the field for approximately 71 weeks during the years 1986 through 1991, and that when in the field, she estimated that she spent approximately 5 to 10 hours a week in the "hot zone," or area of greatest danger from contamination, and the remaining 45 to 55 hours a week on the site, but outside the actual "hot zone." She explained that on occasion her on-site office trailer was located in, or within 15 feet of, the actual "hot zone," and that even the area outside the designated "hot zone" was not entirely free from contamination. The employee stated that when she entered the "hot zone" she wore varying degrees of protective clothing, but did not wear protection or monitor the area when she was outside of the "hot zone." A partial list of substances she recalled being present on her sites included polychlorinated biphenyl (PCBs), polyaromatic hydrocarbons (PAHs), solvents, cyanides, radiation and creosote. The employee also asserted that her home office complex had inadequate ventilation, contained numerous research laboratories, and that some of the buildings contained asbestos. The employee noted that she had experimented with drugs such as marijuana, hashish and mescaline when she was an adolescent, and had smoked approximately one-half pack of cigarettes a day since her high school years, increasing to one pack a day while employed at the employing establishment. The employee stated that medical evidence from her treating physician would follow.

By letter dated March 25, 1994, the employing establishment controverted the employee's claim, asserting that the employee had overestimated the number of weeks spent in the field, which actually amounted to approximately 44 five-day weeks, rather than the 71 weeks alleged by the employee. The employing establishment further stated that a review of the "hot zone" entry logs established that during her time in the field, the employee spent a cumulative total of approximately 25 hours in the "hot zone," and wore protective gear during those periods. The employing establishment submitted the "hot zone" entry logs in support of its assertions. Finally, the employing establishment stated that the home office had been subjected to several safety surveys and that it was determined that asbestos was not in the area where the employee worked and was not a health risk to building occupants. The surveys further concluded that while the heating and air-conditioning system was a problem, there was no danger from exposure to laboratory fumes.

The employee subsequently submitted a February 3, 1994 medical report and several

treatment notes from her treating physician, Dr. Craig J. Gordon, an osteopath. In his report, Dr. Gordon noted that at the age of 38 the employee had been diagnosed with widespread cancer, believed to have originated in the sigmoid colon with a tumor noted to be full thickness, with lymph node metastases. He noted that the employee had “significant history of toxic waste exposure,” having been exposed to cyanide, arsenic and other heavy metals, radioactive isotopes including radium, PCBs, dioxins, C56, multiple herbicides and pesticides as well as PAHs. Dr. Gordon further noted that the employee related to him that, while employed at the employing establishment, she had been working without a respirator for more than a year. With respect to the cause of the employee’s cancer, Dr. Gordon stated:

“Because of the significant exposure to known carcinogenic agents, it certainly should be considered that exposure to any of the known toxins previously described could have accelerated or precipitated her colon carcinoma. It is difficult to know what effect any of these carcinogens had to an oncogenic expression and biologic transformation to a neoplastic process. I am aware of an article published in the ‘Lancet,’ in October of 1987, page 803, that describes an adolescent 11-year-old boy, who developed colorectal cancer after dioxin exposure.... Naturally I am similarly concerned regarding the potential similar risks associated with exposure to the previously noted compounds above. With the above information in mind, it would be appreciated if you could consider seriously investigating the possibility that neoplastic transformation may have been initiated by the previously known agents....”

In a decision dated April 17, 1995, the Office accepted as factual that for the majority of her working days with the employing establishment, the employee was in an office setting, with no known exposure at that location to chemicals or substances not normally found in a normal office setting. The Office further accepted that for approximately 216 days, the employee was at field locations, and of this time, a little over a total of 40 hours was spent in the “hot zone” area, with protection worn by the employee. The Office denied the employee’s claim, however, on the grounds that the medical evidence submitted by Dr. Gordon was speculative and therefore insufficient to establish a causal relationship between the employee’s diagnosed cancer and her employment.

The employee requested an oral hearing, which was held on November 30, 1995. At the hearing, the employee testified to her employment duties and to many of the substances present on the sites where she worked. She added that when she started with the employing establishment in 1986, she was fitted for a full face respirator but was not actually issued a respirator that fit her face for nine or ten months. The employee further stated that she actually entered “hot zones” during this time, despite her lack of respiratory protection.

In a decision dated May 16, 1996, an Office hearing representative affirmed the prior decision of the Office.

By letter dated January 21, 1997, the employee requested reconsideration and submitted, in support of her request, a January 9, 1997 report from Dr. Michael Kelly, a Board-certified

internist.

In a decision dated January 24, 1997, the Office found the new medical evidence insufficient to warrant modification of the prior decision.

An employee seeking benefits under the Act<sup>11</sup> 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,<sup>12</sup> and that an injury was sustained in the performance of duty as alleged. The claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment. As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.<sup>13</sup> However, while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.<sup>14</sup>

In this case, the employee has claimed that she developed cancer as a result of her exposure to toxic substances in the course of her employment. In support of her claim, the employee submitted reports from Dr. Gordon, discussed above, and Dr. Kelly.

In his report dated January 9, 1997, Dr. Kelly fully discussed the employee’s history of employment and medical treatment, and listed the results of his findings on physical examination. He noted the employee’s work duties with the employing establishment from 1986 to 1991, and noted that she described always being able to smell materials when on field sites. He further noted the employee’s assertion that she did not have respiratory protection for the first nine months of employment, as there was none that would fit her. Dr. Kelly’s primary diagnosis was adenocarcinoma of the colon, and he stated that his secondary diagnosis of peripheral neuropathy, was related to her chemotherapy. He also diagnosed depression and status post disc herniation. With respect to the employee’s diagnosed colon cancer and its cause, Dr. Kelly stated:

“[The employee] clearly has an incurable and terminal illness, which seems clearly related to employment exposures that occurred to her [while] employed at [the employing establishment]. I have enclosed a long list of references with respect to colon cancer origins. Many of the compounds and chemicals that have been demonstrated to produce colon cancer have been part of [the employee’s] work history. From a latency period, the onset of the cancer some five years after the significant exposures seems quite significant, as such a latency period is that

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<sup>11</sup> 5 U.S.C. §§ 8101-8193.

<sup>12</sup> *Donald R. Vanlehn*, 40 ECAB 1237, 1238 (1989).

<sup>13</sup> *Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

<sup>14</sup> *Udella Billups*, 40 ECAB 260, 269 (1989).



typically seen with cancers of this type. The diagnosis of colon cancer at a relatively young age is another startling fact leading to an environmental/occupational etiology....

“In summary, [the employee’s] colon cancer has occurred as a direct result of exposures that occurred to her in the course of her employment with the [employing establishment]. This decision is based upon the exposure to multiple carcinogens that occurred while employed, the lack of protection that was provided to her, and the lack of any other exposure history....”

The Board finds that the report of Dr. Gordon is insufficiently rationalized to establish causal relationship between the employee’s cancer and her employment exposures. While Dr. Kelly’s opinion is not uncertain or speculative and he did not fully discuss which chemicals to which the employee was exposed were the likely causes of her condition. Dr. Kelly did provide supporting rationale for his conclusions, citing the employee’s documented involvement with various known carcinogenic chemicals, periods of unprotected exposure, the appropriateness of the latency period, and the employee’s young age at the time of the diagnosis. Further, the “hot zone” entry logs supplied by the employing establishment do reflect that the employee had entered zones without a respirator on several occasions, totaling about 2 to 3 hours of exposure. Therefore, the Board finds that Dr. Kelly’s report is sufficient to require further development by the Office on the issue of whether a causal relationship exists between the employee’s diagnosed colon cancer and factors of her federal employment.<sup>15</sup>

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<sup>15</sup> See *Horace Langhorne*, 29 ECAB 820 (1978).

The decisions of the Office of Workers' Compensation Programs dated January 24, 1997 and May 16, 1996 pertaining to the employee's cancer claim, and January 24, 1997 and April 23, 1996 decisions pertaining to her claim for an emotional condition, are set aside and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
March 7, 2000

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member