

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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

*Docket No. 01-722; Submitted on the Record;
Issued May 24, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the employee established that she developed colon cancer in the performance of her federal employment.

This case is before the Board for the second time. In the first appeal, the Board set aside the Office of Workers' Compensation Programs' decisions pertaining to the employee's cancer claim.¹ The Board found that the report from Dr. Michael Kelly, a Board-certified internist and attending physician, was sufficient to warrant further development of the evidence on the issue of whether the employee's colon cancer is causally related, either directly or by precipitation, aggravation or exacerbation, to exposure to various toxins during her federal employment.² 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. John M. Trauscht, a Board-certified internist and medical oncologist, for a second opinion evaluation. By decision dated November 7, 2000, the Office denied the employee's claim on the grounds that the weight of the medical evidence, as represented by the opinion of Dr. Trauscht, established that the employee's colon cancer is not causally related to her employment.

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

¹ The Board further set aside the decisions of the Office dated January 24, 1997 and April 23, 1996, pertaining to the employee's separate claim for an emotional condition. The Board found that the Office did not meet its burden of proof to justify rescinding its acceptance of the employee's claim for an emotional condition, due to an unresolved conflict in the medical opinion evidence. The claim currently on appeal pertains solely to the employee's cancer claim.

² *Loretta Kroetsch*, Docket No. 97-1403 (issued March 7, 2000).

As discussed in the prior appeal, in a 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. Dr. Kelly diagnosed adenocarcinoma of the colon and with respect to its cause, 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 typically seen with cancers of this type. The diagnosis of colon cancer at a relatively young age [of 38] 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."

In a report dated August 11, 2000, Dr. Trauscht, the Office referral physician, discussed the employee's history of employment and medical treatment and reviewed the medical evidence of record. He opined that the employee's diagnosed cancer was not caused, aggravated, precipitated or exacerbated by factors of her employment and explained his conclusion, stating:

"Colo/rectal cancer is a common neoplasm with 6 [percent] of Americans expected to develop disease in their lifetimes. The risk increases after age 40 and rises sharply in ages 50 [to] 55 although patients younger than 40 do present with the disease. Some of these patients have well defined risk factors *i.e.*,: familial polyposis syndrome or strong family history but as well many cases have no definable risk factors. The causative agents in colo/rectal cancer are unknown. Genetic, experimental and epidemiologic studies suggest that colo/rectal cancer results from complex interactions inherited susceptibility and environmental factors. Those contributing environmental factors felt to be associated with an increased risk of colo/rectal carcinoma include: (1) Dietary fat and red meat intake. (2) Increased bile acid concentration in intestinal tract. (3) Lower calcium intake. (4) Lower vegetable and fiber intake. (5) Sedentary lifestyle. (6) Alcohol consumption. (7) Cigarette smoking. To the best of my knowledge there is not substantial scientific evidence that exposure to various toxic compounds other than the above increases the risk of development of colo/rectal carcinoma."

"A family history of colo/rectal carcinoma in first degree relatives is also an important risk factor and in this patient (adopted) that history is unknown. In addition it is currently a hypothesis that adenomatous polyps (adenomas) are precursors to the vast majority of colo/rectal carcinoma. The interval between

development of these adenomas and the subsequent development of an invasive colo/rectal carcinoma is thought to be some years perhaps up to 10. It is likely that [appellant's] cancer was present for some time before her diagnosis in 1993, perhaps even as long as several years. This would seem to imply a fairly short latency if this abnormality was triggered by her exposures encountered from 1986 to 1991."

Section 8123(a) of the Federal Employees' Compensation Act provides that when there is 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.³ 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.⁴

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

³ 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

⁴ *Gertrude T. Zakrajsek (Frank S. Zakrajsek)*, 47 ECAB 770 (1996).

The November 11, 2000 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, DC
May 24, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member