

**United States Department of Labor
Employees' Compensation Appeals Board**

D.S., claiming as daughter of O.K., Appellant

and

**DEPARTMENT OF AGRICULTURE, FOREST
SERVICE, Fishlake National Forest, UT,
Employer**

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**Docket No. 07-860
Issued: August 22, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 2, 2006 appellant filed a timely appeal from the September 26, 2006 merit decision of an Office of Workers' Compensation Programs' hearing representative, who affirmed the denial of her claim for death benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this claim.

ISSUE

The issue is whether the employee's death was causally related to his occupational exposure to herbicide.

FACTUAL HISTORY

On November 30, 1975 appellant, then a 66-year-old retired general district assistant, died of respiratory arrest due to or as a consequence of metastatic carcinoma of the prostate. On August 4, 2004 appellant, on behalf of her sister and her mother, filed a claim for death benefits. She attached a July 14, 2005 attending physician's report from Dr. Mark W. Greenwood, Board-

certified in family medicine, who was given a history of appellant's possible exposure to Agent Orange. Dr. Greenwood offered his opinion on causal relationship: "It is unknown if exposure to Agent Orange contributed to the employee's death by prostate cancer."¹

In a decision dated March 21, 2005, the Office denied appellant's claim for compensation. The Office noted that there was no response to its request for additional information.

Appellant requested an oral hearing before an Office hearing representative. She submitted a claim package, which she stated contained sufficient evidence to establish that the employee was exposed to 2,4,5-T.² The record indicates that the employee participated in a project to increase water yield in the Sheep Creek watershed in southern Utah by converting plant cover from deep-rooted aspen and brush to shallow-rooted grasses. Rotating duties with eight others, the employee mixed herbicide with diesel oil as a carrier, loaded the herbicide into the holding tank of a helicopter, stood with a flag on the border of the last sprayed strip to signal where the helicopter should spray next and cleaned equipment at the end of the day. Three to six aerial applications were made in 1965, one in 1966 and two or three in 1967. In small plot studies, herbicides were also injected into individual trees and applied to stumps.

Appellant contended that it was not a coincidence that the nine individuals involved in the employing establishment's use of 2,4,5-T all had health conditions related to exposure to Agent Orange. She submitted published reports on the possible health effects of exposure to Agent Orange and on the medical conditions, including prostate cancer, recognized or presumptively recognized for service connection for Vietnam veterans based on exposure to Agent Orange.

Appellant also submitted portions of the December 1971 initial report on the employing establishment's Sheep Creek Water Evaluation Project, which provided details on the implicated applications of herbicide. The treatment section on page 5 of the report describes applications of 2,4-D³ to about 470 acres of the lower compartment of the watershed in amounts of two pounds acid equivalent per acre with diesel oil as a carrier, producing a mixture of three gallons per acre. Appendix D.2.1 shows the treatment record from June 23, 1965 to August 21, 1967. All applications were with 2,4-D. Elsewhere, the report states that treatment of 470 acres of the lower compartment included applying selective herbicides, "primarily 2,4-D," during the growing seasons of 1965, 1966 and 1967.

Appendix D.2.3 states that on June 23 and 24, 1965 applications of 2,4-D "and limited amounts of 2,4,5-T" were made to the lower compartment, but the description of the mixture does not mention the latter chemical: "Two pounds acid equivalent of 2,4-D mixed with diesel

¹ Appellant did not make a connection between the employee's death and his federal employment until July 2003. It appears that a coworker of the employee told a dermatologist that he once worked with a certain chemical. The dermatologist stated that this chemical was Agent Orange. Another coworker then contacted appellant to advise that the employee's death might be connected to occupational exposure to Agent Orange.

² 2,4,5-Trichlorophenoxyacetic acid (2,4,5-T).

³ 2,4-Dichlorophenoxyacetic acid.

were applied at the rate of three gallons per acre at each application.” A recommendation prepared as a guide for controlling sprouting in the lower compartment states:

“Spray the lower part (one fourth to one third) of the compartment above the lower gage and Youth Camp with defoliating type sprays only (Parqual, Ansar, *etc.*). Apply 2,4-D to the remaining part of the aspen. Apply 2,4-D and/or 2,4,5-T to oak sprouts.”

Following a hearing on July 17, 2006 appellant submitted a July 20, 2006 report from Dr. Greenwood who stated that the employee’s family asked him to comment on the employee’s exposure to Agent Orange as a possible causative agent to his death from prostate cancer. He noted that the family had provided all the history which he summarized. Dr. Greenwood then offered his opinion on causal relationship: “I am unable to say whether Agent Orange or any exposure to herbicides was a causative factor for his prostate cancer.”

In a decision dated September 26, 2006, the hearing representative modified the Office’s March 21, 2005 decision to find that the employee “was exposed to [h]erbicide 2,4,5-T or Agent Orange, as claimed.” The hearing representative affirmed the denial of compensation, however, because appellant submitted insufficient medical evidence specific to this case to support that the employee’s prostate cancer was connected to an occupational exposure to Agent Orange.

LEGAL PRECEDENT

The Federal Employees’ Compensation Act provides compensation for the death of an employee resulting from personal injury sustained while in the performance of his duty.⁴ Appellant has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the employee’s death was causally related to an employment injury or to factors of his federal employment. As part of this burden, appellant must submit a rationalized medical opinion, based on a complete and accurate factual and medical background, showing a causal relationship between the employee’s death and an employment injury or factors of his federal employment. Appellant’s unsupported belief is insufficient to establish causal relationship.⁵

Causal relationship is medical in nature and can be established only by medical evidence.⁶ Newspaper clippings, medical texts, and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship as they are of general application and are not determinative of whether the specific condition claimed was causally related to the particular employment injury involved.⁷

⁴ 5 U.S.C. § 8102(a).

⁵ See *Leonora A. Bucco (Guido Bucco)*, 36 ECAB 588 (1985); *Lorraine E. Lambert (Arthur R. Lambert)*, 33 ECAB 1111 (1982).

⁶ *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

⁷ *Gaetan F. Valenza*, 35 ECAB 763 (1984); *Kenneth S. Vansick*, 31 ECAB 1132 (1980).

ANALYSIS

The hearing representative found that the employee “was exposed to [h]erbicide 2,4,5-T, or Agent Orange, as claimed.” This finding deserves closer attention. Throughout her claim, appellant has used the terms 2,4,5-T and Agent Orange interchangeably. In fact, 2,4,5-T was one of the two active ingredients of Agent Orange, the other being 2,4-D, which was blended with 2,4,5-T in nearly equal amounts.⁸ As Agent Orange was a particular type of herbicide blend, it is not accurate to apply the label to a single ingredient. Casual and indiscriminate use of the label should be avoided and it may be medically important to distinguish the individual chemicals: During the manufacture of 2,4,5-T, a contaminant, TCDD⁹ (commonly called “dioxin”), was also produced in minute quantities. TCDD is thought to be the most toxic member of the dioxin chemical family.¹⁰

The best evidence of the employee’s occupational exposure is the December 1971 initial report on the Sheep Creek Water Evaluation Project. But this report, at least in the portion submitted to the record, makes little reference to the implicated herbicide 2,4,5-T. It makes no mention of Agent Orange. Indeed, it appears that only limited amounts of 2,4,5-T were applied on two dates, June 23 and 24, 1965 and it is not clear whether the employee worked as a flagger on those dates. If he did not work as a flagger, his exposure would have come from mixing and loading the herbicide and cleaning the equipment. So the exact nature of any exposure to 2,4,5-T is unclear. What appears clear is that, apart from the application of limited amounts of 2,4,5-T on these two dates, the employee’s occupational exposure was primarily to the herbicide 2,4-D.

It is, therefore, accepted that the employee was exposed to herbicide in the course of his federal employment, but only to the extent that the exposure is reliably documented in the December 1971 initial report on the Sheep Creek Water Evaluation Project. The Board will modify the hearing representative’s September 26, 2006 decision accordingly. Details of the applications described in the December 1971 initial report will give a physician the accurate factual history needed for a probative medical opinion on whether the employee’s particular occupational exposure caused or contributed to his prostate cancer and eventual death.

Appellant attempts to establish the element of causal relationship by submitting various publications on the health effects of Agent Orange, but as with all information of general application, this kind of evidence does not directly address the circumstances of a specific case. It may be that exposure to Agent Orange can cause prostate cancer, but neither the Office nor the Board may conclude that the employee’s occupational exposure to documented chemicals caused his prostate cancer absent probative medical evidence. Only a qualified physician is competent to address this question. Appellant has the burden of proof to submit a narrative report from a specialist who, based on the employee’s exposure and medical history, concludes that there is a causal relationship between the exposure and his metastatic carcinoma of the prostate and who

⁸ Veterans Health Administration, U.S. Department of Veterans Affairs, Vietnam Veterans and Agent Orange Exposure (March 2002) <<http://ww1.va.gov/agentorange/docs/VHAgentorange.pdf>>.

⁹ 2,3,7,8-Tetrachlorodibenzo-*p*-dioxin.

¹⁰ See *supra* note 8.

supports that conclusion with sound medical reasoning. Dr. Greenwood may reference medical studies and publications on the various health effects of certain chemicals to show that such an injury is medically possible, but it is for him to explain whether the employee's history is such that causation may be found to a reasonable medical certainty.

The only medical opinion addressing the employee's particular circumstances comes from Dr. Greenwood, the family practitioner. He was unable to conclude whether any exposure to herbicides was a causative factor for the employee's prostate cancer. His opinion does not support appellant's claim. This does not establish the critical element of causal relationship. The Board, therefore, finds that appellant has not met her burden of proof. The Board will affirm, as modified, the hearing representative's September 26, 2006 decision affirming the denial of compensation benefits.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that the employee's death was causally related to his occupational exposure to herbicide. Although the factual evidence establishes exposure to certain chemicals, the medical opinion evidence does not establish that this exposure caused or contributed to the employee's prostate cancer and eventual death.

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2006 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: August 22, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board