

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

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| <b>E.K., claiming as widow of L.K., Appellant</b>  | ) |                                  |
|  | ) |                                  |
| <b>and</b>   | ) | <b>Docket No. 08-421</b>         |
|  | ) | <b>Issued: December 24, 2008</b> |
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| <b>DEPARTMENT OF THE ARMY, MOBILITY<br/>EQUIPMENT COMMAND,<br/>Saigon, Republic of Vietnam, Employer</b> | ) |                                  |
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*Appearances:*  
*James R. Linehan, Esq., for the appellant*  
*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 December 18, 2007 appellant, through counsel, filed a timely appeal of an October 1, 2007 merit decision of the Office of Workers' Compensation Programs denying the employee's claim for wage-loss compensation for the period September 25, 1997 to October 1, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has established that the employee was totally disabled from September 25, 1997 to October 1, 2002 due to his accepted employment-related injuries.

**FACTUAL HISTORY**

This case has previously been before the Board. In an October 6, 2005 decision, the Board affirmed the Office's November 26, 2004 decision finding that the employee's peripheral neuropathy was not causally related to his employment. The Board reversed the Office's

determination that the employee's bladder cancer was not causally related to his employment. The Board explained that the employee established that his bladder cancer was causally related to his employment exposure to Agent Orange and pesticides in Vietnam.<sup>1</sup> The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.<sup>2</sup>

The Office subsequently accepted the employee's claim for bladder cancer, bladder neck cancer and obstruction, calculus of the kidney and other disorder of the kidney, filling defect of the bladder/kidney or ureter and secondary cancer of other genitourinary organs.<sup>3</sup>

On June 6, 2006 appellant filed a claim for wage-loss compensation (Form CA-7) for the period September 25, 1997 to October 1, 2002. In a June 21, 2000 letter, she contended that the employee's pancreatitis and cardiac conditions were causally related to his urinary tract cancer.

By letter dated July 12, 2006, the Office addressed the medical evidence appellant needed to submit to establish that an infection of the employee's pancreas and other internal organs, arteritis, angina and psychological conditions and his disability for work during the claimed period, were causally related to his accepted employment-related injuries.

On October 26, 2006 appellant filed a CA-7 form for the claimed period. In a March 22, 2000 report, Dr. Peter A. Petroff, an attending Board-certified internist, stated that the employee's total disability for work was caused by his work-related asbestosis and chronic obstructive lung disease. In an October 6, 2006 report, he stated that the employee was totally disabled for work due to severe chronic obstructive lung disease, bladder cancer and shortness of breath which he experienced with any activity. A March 22, 1999 work capacity evaluation (Form OWCP-5c) of Dr. Randall C. Bell, a Board-certified internist, stated that the employee was totally disabled for work. Surgical reports indicated that the employee underwent bladder and prostate surgery on September 25, 1997, January 15, 1998 and June 13, 2000. In reports dated from September 17, 1997 through July 2, 1999, Dr. M. Sheldon Polsky, a Board-certified urologist, stated that the employee was status post transurethral resection of the prostate gland bladder neck contracture, transitional cell carcinoma of the bladder and recurrent carcinoma of the bladder and bladder instillations. He advised that he sustained hematuria and incomplete opacification of the right collecting system of undetermined etiology, right renal calculus and a tumor protruding from the right ureteral orifice. In a November 6, 2000 report, Dr. Polsky cited

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<sup>1</sup> *Elizabeth H. Kramm, (Leonard O. Kramm), 57 ECAB 117 (2005).*

<sup>2</sup> On May 17, 1999 the employee, then 74 years old, filed an occupational disease claim for bladder cancer and peripheral neuropathy that he attributed to his exposure to Agent Orange and pesticides while working as a maintenance management specialist, resource management specialist and equipment specialist in Vietnam from October 21, 1968 to April 25, 1975. He worked and stayed in areas where Agent Orange and pesticides were applied and he was exposed to these chemicals 24 hours a day at times. The employee's voluntary retirement became effective May 2, 1980. He was unaware of the relationship between his condition and his herbicide exposure until 1997. On March 2, 2006 appellant filed a claim for compensation for survivor's benefits (Form CA-5), contending that the employee's death on October 1, 2002 was caused by the accepted employment-related malignant neoplasm bladder cancer. By letter dated May 19, 2006, the Office accepted the claim for survivor's benefits.

<sup>3</sup> The Office accepted the employee's claim for asbestosis.

medical literature in support of his opinion that the employee's bladder and ureteral cancer were causally related to his herbicide exposure, based on studies showing that the herbicides used in Vietnam were related to the development of bladder cancer. He advised that further surgery might be required if a malignancy developed in the ureter or kidney. Dr. Polsky opined that the employee was unable to perform his prior work duties due to his urinary condition. He was also unable to run, jump, lift more than 10 pounds or walk more than five minutes. Dr. Polsky concluded that the employee was not fit for world-wide duty.

In a June 28, 2006 letter, Suzie Jasek, owner of Menco Inc. (Gravelly Tractors), stated that the employee was ordered by his physician to retire from his parts manager position at her company on June 12, 1998 due to his illness and surgeries. Following the urinary tract cancer diagnosis and surgeries commencing in September 1997, he had to take extensive time off work for medical treatment. Ms. Jasek noted that the employee's urostomy bag did not stay intact due to his humid work environment.

In a July 2, 2007 letter, the Office advised appellant that the record was insufficient to establish that the employee sustained gastrointestinal and cardiac conditions causally related to his accepted employment-related bladder cancer. It found that the record was sufficient to establish that the employee lost intermittent time from work on September 25 and 26, November 17 and December 1 and 29, 1997 and January 12 and 15 and February 3 and 24, 1998. Therefore, the employee was entitled to compensation for those dates. However, the evidence was insufficient to establish that he was disabled on any other dates during the period September 25, 1997 through October 1, 2002 due to his accepted employment-related injuries. Appellant was afforded 30 days to submit additional evidence. She did not respond within the allotted time period.

By decision dated October 1, 2007, the Office denied appellant's claim of international disability. The evidence of record failed to establish that the employee was totally disabled from September 25, 1997 through October 1, 2002 due to his accepted employment injuries with the exception of the previously approved dates.

### **LEGAL PRECEDENT**

Under the Federal Employees' Compensation Act, the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.<sup>4</sup> For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.<sup>5</sup> Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.<sup>6</sup> The fact that a condition manifests itself during a period of employment does not raise an inference

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<sup>4</sup> See *Prince E. Wallace*, 52 ECAB 357 (2001).

<sup>5</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>6</sup> *Gary J. Watling*, 52 ECAB 278 (2001).

that there is a causal relationship between the two.<sup>7</sup> The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his disability and entitlement to compensation.<sup>8</sup>

### ANALYSIS

The Office accepted that the employee sustained bladder cancer, bladder neck cancer and obstruction, calculus of the kidney and other disorder of the kidney, filling defect of the bladder/kidney or ureter and secondary cancer of other genitourinary organs while in the performance of duty. On June 6 and October 26, 2006 appellant sought compensation for wage loss, contending that the employee was totally disabled from September 25, 1997 to October 1, 2002. On October 1, 2007 the Office found that the employee was not totally disabled for work during the claimed period with the exception of the approved dates set forth in its July 2, 2007 letter. Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between the employee's claimed disability and the accepted conditions.<sup>9</sup>

The surgical reports stated that the employee underwent bladder and prostate surgery on September 25, 1997, January 15, 1998 and June 13, 2000. The reports do not address whether the employee was totally disabled during the claimed period due to his accepted employment injuries. Further, the Office has not accepted the employee's claim for a prostate condition. The Board finds that the surgical reports are insufficient to establish appellant's claim.

Dr. Bell's March 22, 1999 OWCP-5c form stated that the employee was totally disabled for work. However, he failed to address whether the employee's disability was causally related to the accepted employment injuries. The Board finds that Dr. Bell's OWCP-5c form is insufficient to establish appellant's claim.

Dr. Petroff's March 22, 2000 report stated that the employee's total disability for work was caused by his work-related asbestosis and chronic obstructive lung disease. In an October 6, 2006 report, he stated that the employee was totally disabled for work due to his severe chronic obstructive lung disease, bladder cancer and shortness of breath which he experienced with any activity. Dr. Petroff failed to adequately explain how the employee's disability was causally related to his employment-related bladder cancer and asbestosis.<sup>10</sup> Moreover, the Office has not accepted the employee's claim for chronic obstructive lung disease.

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<sup>7</sup> *Manuel Garcia*, 37 ECAB 767 (1986).

<sup>8</sup> *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>9</sup> *Alfredo Rodriguez*, 47 ECAB 437 (1996).

<sup>10</sup> *A.D.*, 58 ECAB \_\_\_\_ (Docket No. 06-1183, issued November 14, 2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

Similarly, Dr. Polsky's November 6, 2000 report is insufficient to establish appellant's claim. He opined that the employee's bladder and ureteral cancer were causally related to his herbicide exposure, based on studies showing that the herbicides used in Vietnam were related to the development of bladder cancer. Dr. Polsky noted that further surgery might be required. He opined that the employee was unable to perform his prior work duties due to his urinary condition. The employee was also unable to run, jump, lift more than 10 pounds or walk more than five minutes. Dr. Polsky concluded that the employee was not fit for world-wide duty. He, did not adequately address how and why the employee's disability was causally related to his employment-related bladder cancer and asbestosis or why it was so debilitating so as to prevent him from working.<sup>11</sup>

Dr. Polsky's reports covering intermittent dates from September 17, 1997 through July 2, 1999 stated that the employee was status post transurethral resection of the prostate gland bladder neck contracture, transitional cell carcinoma of the bladder and recurrent carcinoma of the bladder and bladder instillations. He also stated that the employee sustained herniaturia and incomplete opacification of the right collecting system of undetermined etiology, right renal calculus and a tumor protruding from the right ureteral orifice. However, Dr. Polsky did not address whether the employee was totally disabled during the claimed period due to his accepted employment injuries.

Appellant failed to submit rationalized medical evidence establishing that the employee's total disability during the period September 25, 1997 to October 1, 2002 resulted from the residuals of his accepted employment-related bladder cancer, bladder neck cancer and obstruction, calculus of the kidney and other disorder of the kidney, filling defect of the bladder/kidney or ureter and secondary cancer of other genitourinary organs. The Board finds that she has not met her burden of proof.

### **CONCLUSION**

The Board finds that appellant has failed to establish that the employee was totally disabled from September 25, 1997 to October 1, 2002 due to his accepted employment-related injuries.

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<sup>11</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 1, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 24, 2008  
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