

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLYNDON D. ROSE and DEPARTMENT OF THE ARMY,
BLUE GRASS ARMY DEPOT, Richmond, KY

*Docket No. 02-1993; Submitted on the Record;
Issued April 17, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an injury to his back and shoulder causally related to factors of his employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

This case was previously before the Board.¹ By decision dated September 6, 2001 the Board remanded the case for further development.

On June 29, 1999 appellant, then a 45-year-old packer (forklift operator), filed an occupational disease claim alleging that he sustained a cervical and shoulder strain due to working in uncomfortable positions, continuous lifting and pulling on heavy boxes and continuous stooping and bending. He indicated that he first became aware of his condition on June 9, 1999.

By decisions dated October 25 and December 7, 1999 and July 24, 2000, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that he sustained a medical condition causally related to factors of his employment.

In a report dated June 9, 1999, Dr. Frank A. Burke, appellant's attending Board-certified orthopedic surgeon, stated that appellant's right shoulder and cervical discomfort began two to three weeks previously when he awakened with some generalized shoulder and neck region discomfort. He stated that appellant had a history of lumbar back pain with neurological symptoms. Dr. Burke provided findings on examination and diagnosed right shoulder and cervical muscle strain and mild median neuropathy.

In a report dated September 22, 1999, Dr. Burke stated that appellant, "at the time of the initial evaluation, was unsure of previous accident or injury that were the cause of his symptoms,

¹ See Docket No. 00-2770 (issued September 6, 2001).

but he did later recall an incident that did occur at work which was reported and for which he was seen by medical personnel.” He stated that appellant worked “in a very physical capacity in his job with significant upper body utilization required.” Dr. Burke further stated:

“[Appellant’s] presentation in clinic along with his history and findings from a recent MRI [magnetic resonance imaging] study would be very congruent with his injury having occurred at work. It is unlikely that the bulging noted on the MRI [scan] was caused secondary to natural aging versus work in a physical capacity.”

In a report dated March 17, 2000, Dr. Burke stated that appellant had a work-related cumulative trauma injury to his right shoulder and neck. He stated that his injury was “specifically related to his work as a packer.”

In a report dated April 14, 2000, Dr. Howard D. Markowitz, an orthopedic surgeon and an associate of Dr. Burke, stated that an MRI revealed disc bulging at C5-6 and that appellant attributed his condition to a work injury in June 1999. He stated that it was possible that his work injury “stirred up this pathology in his cervical spine causing him this discomfort.”

By letter dated October 23, 2001, the Office referred appellant, together with a statement of accepted facts and copies of medical reports, to Dr. Robert L. Keisler, a Board-certified orthopedic surgeon, for an examination and evaluation of whether appellant had any medical condition causally related to factors of his employment.

In a report dated November 5, 2001, Dr. Keisler provided a history of appellant’s condition, detailed findings on examination and x-ray results, and a review of the medical evidence. He noted that appellant initially missed three days of work in June 1999 and then returned to work with a restriction against heavy lifting. Dr. Keisler diagnosed degenerative disc and facet disease of the cervical spine with probable intermittent radiculopathy at C6 on the right. He stated:

“[Appellant’s] symptoms and signs from the onset consist of spontaneous discomfort in the neck, shoulder and radicular distribution of the right upper extremity, not related to use or position of the right upper extremity. All examinations of the shoulder have been negative, including my examination, and these all include provocative tests for impingement, for internal derangements of the shoulder. It should be noted that most individuals at age 45 have measurable and detectable findings in the rotator cuff area, a normal process of aging. All the symptoms and signs suggest a cervical origin with a radicular component....this is clearly a developmental degenerative process, relatively common in the population. There is no indication of a relationship to work activities.”

By decision dated December 6, 2001, the Office denied appellant’s claim on the grounds that the weight of the medical evidence, as represented by the report of Dr. Keisler, established that appellant did not sustain a work-related injury.

By letter dated January 9, 2002, appellant requested reconsideration.

With his request for reconsideration appellant submitted evidence previously considered by the Office.

By decision dated June 19, 2002, the Office denied appellant's request for reconsideration.

The Board finds that this case is not in posture for a decision due to an unresolved conflict in the medical opinion evidence.

In a report dated September 22, 1999, Dr. Burke stated that appellant worked "in a very physical capacity in his job with significant upper body utilization required." He further stated:

"[Appellant's] presentation in clinic along with his history and findings from a recent MRI study would be very congruent with his injury having occurred at work. It is unlikely that the bulging noted on the MRI was caused secondary to natural aging versus work in a physical capacity."

In a report dated March 17, 2000, Dr. Burke stated that appellant had a work-related cumulative trauma injury to his right shoulder and neck. He stated that his injury was "specifically related to his work as a packer."

In a report dated April 14, 2000, Dr. Markowitz, an orthopedic surgeon and an associate of Dr. Burke, stated that a MRI revealed disc bulging at C5-6 and that it was possible that his work injury "stirred up this pathology in his cervical spine causing him this discomfort."

In a report dated November 5, 2001, Dr. Keisler, a Board-certified orthopedic surgeon and an Office referral physician, diagnosed degenerative disc and facet disease of the cervical spine with probable intermittent radiculopathy at C6 on the right. He stated that all examinations of appellant's shoulder had been negative and he noted that most individuals at age 45 had measurable and detectable findings in the rotator cuff area, a normal process of aging. Dr. Keisler stated that appellant's condition was clearly a developmental degenerative process and there was no indication of a relationship to work activities.

Section 8123(a) of the Federal Employees' Compensation Act provides, 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."²

In this case, the Board finds that there is a conflict in the medical opinion evidence between appellant's physicians, Dr. Burke and Dr. Markowitz, and the Office referral physician, Dr. Keisler, as to whether appellant's back and shoulder conditions are causally related to factors of his employment. On remand, the Office should refer appellant, together with a statement of accepted facts and copies of the medical records, to an appropriate Board-certified impartial medical specialist for an examination and evaluation to resolve the conflict.

² 5 U.S.C. § 8123(a); see *Juanita H. Christophe*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

In light of the Board's resolution of the first issue in this case, the second issue is moot.

The decisions of the Office of Workers' Compensation Programs dated June 19, 2002 and December 6, 2001 are set aside and the case is remanded for further development consistent with this decision.

Dated, Washington, DC
April 17, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member