

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY GARRETT and U.S. POSTAL SERVICE,
POST OFFICE, Lexington, KY

*Docket No. 03-1843; Submitted on the Record;
Issued October 10, 2003*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant met his burden of proof to establish that he sustained a neurological condition due to his August 2, 1994 employment injury.

This is the second appeal in this case. The Board issued a decision¹ on February 8, 2002 in which it set aside a September 7, 2000 decision of the Office of Workers' Compensation Programs.² The Board determined that an employment incident occurred on August 2, 1994 when appellant fell at work.³ The Board noted that the submission of an October 2, 1997 report from Dr. David Pursley, an attending Board-certified neurologist, was sufficient to require further development of the medical evidence. The Board directed the Office to refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an evaluation and a rationalized medical opinion on whether appellant sustained a medical condition due to the August 2, 1994 employment incident. The facts and circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.

On remand the Office referred the case record and a statement of accepted facts to Dr. Robert L. Keisler, a Board-certified orthopedic surgeon, for an evaluation and a rationalized medical opinion on whether appellant sustained a medical condition due to the August 2, 1994 employment incident. In a report dated May 13, 2002, Dr. Keisler indicated that appellant sustained a fall at work in July 1994, which was diagnosed as "sprained knees." He noted that appellant fell again at work in August 1994 and that he received treatment for a period without a

¹ Docket No. 01-367 (issued February 8, 2002).

² On August 2, 1994 appellant, then a 41-year-old mail carrier, filed a claim alleging that he injured his leg and knee when he lost his balance in a vestibule and fell at work on that date. The Office had accepted that appellant sustained bilateral knee strains due to a fall at work on July 22, 1994.

³ In its prior decisions, the Office had determined that appellant had not established the occurrence of the employment incident on August 2, 1994.

specific diagnosis being found.⁴ Dr. Keisler indicated that on examination appellant exhibited spastic paraplegia and other abnormalities in his lower extremities. He diagnosed multiple level severe degenerative disc disease and/or diffuse idiopathic hyperostosis of the cervical, thoracic and lumbar spine; probable stenosis of the cervical, thoracic and lumbar spine; and status postlaminectomy and decompression at T8.

Regarding the nature of appellant's condition, Dr. Keisler stated, "This patient has a history of back problems of a significant nature ... with two falls in 1994 (record does not indicate severe injuries), with delayed, but progressive appearance of signs of paraplegia." He concluded that appellant had a multiple level spinal condition with neurological involvement, but that this condition appeared to be "progressive and preexisting" and was "not explainable by a single injury in July or August 1994."⁵ Dr. Keisler also stated, "the work-related injury in August 1994 does not appear to be related to this condition." He noted that the falls in 1994 did not cause appellant's current condition and noted that "any effect of the fall [sic] would have been temporary."⁶

By decision dated June 29, 2002, the Office denied appellant's claim on the grounds that the medical evidence did not show that he sustained an employment-related injury on August 2, 1994. The Office indicated that the weight of the medical evidence rested with the opinion of Dr. Keisler. Appellant requested an oral hearing before an Office hearing representative, which was held on February 25, 2003. Appellant's attending physician, Dr. Pursley, provided testimony at the hearing.

Dr. Pursley detailed the history of appellant's falls at work in July and August 1994. He indicated that, due to the July and August 1994 falls, appellant sustained a myelopathy of his thoracic spine, which probably developed into transverse myelitis of his thoracic spine. Dr. Pursley noted that both falls contributed to appellant's present condition, but that the August 1994 fall had a much greater effect than the July 1994 fall. He noted that the falls caused a disc rupture at T8 and that the resulting disc matter "crushed" appellant's spinal cord. Dr. Pursley indicated that appellant was diagnosed with multiple sclerosis and that his transverse myelitis constituted an early sign of this condition. He suggested that diagnostic testing from around the time of the 1994 falls did not show a herniated disc because such an abnormality is much harder to detect in the thoracic spine than in the lumbar spine.

By decision dated and finalized May 22, 2003, the Office hearing representative affirmed the Office's June 29, 2002 decision. The hearing representative found that appellant did not show he had a medical condition related to the August 2, 1994 employment incident. She

⁴ Dr. Keisler indicated that appellant's lower extremity condition rapidly worsened after August 1994. He noted that, by December 1994, appellant required a wheelchair and that he underwent thoracic spine surgery in 1996.

⁵ He noted that the absence of records from prior to 1994 made it difficult to determine the precise nature of appellant's preexisting condition, but that "it would appear to be significant."

⁶ Dr. Keisler indicated that diagnostic testing performed after August 1994 failed to reveal a "structural explanation" for appellant's neurological symptoms. He stated that appellant could not return to regular duty. In an attached form, he noted that appellant was a paraplegic who could not stand or ambulate for more than very brief periods.

indicated that the opinion of Dr. Keisler established that appellant did not sustain an employment injury on August 2, 1994.⁷

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

An employee seeking benefits under the Federal Employees' Compensation Act⁸ 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 timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁹ The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁰

In the present case, appellant claimed that he sustained an injury due to a fall at work on August 2, 1994.¹¹ The Board later determined that appellant submitted sufficient medical evidence to require further development of the medical evidence by the Office, to include referral to an appropriate medical specialist for an evaluation and a rationalized medical opinion regarding whether he sustained a medical condition due to the August 2, 1994 employment incident. On remand the Office referred appellant to Dr. Keisler, a Board-certified orthopedic surgeon, who produced a report dated May 13, 2002. At a hearing before an Office hearing representative on February 25, 2003, Dr. Pursley, an attending Board-certified neurologist, provided extensive testimony regarding appellant's condition.

Section 8123(a) of the 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."¹² When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical

⁷ She further determined that Dr. Pursley's opinion was of limited probative value because he "only had a vague understanding of the mechanics of the two work injuries."

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

¹⁰ *See Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

¹¹ The Office accepted that appellant sustained bilateral knee strains due to a prior fall at work on July 22, 1994.

¹² 5 U.S.C. § 8123(a).

evidence.¹³ The Board finds that there is a conflict in the medical evidence between Drs. Keisler and Pursley regarding whether appellant sustained an injury due to a fall at work on August 2, 1994.

In his May 13, 2002 report, Dr. Keisler diagnosed multiple level severe degenerative disc disease and/or diffuse idiopathic hyperostosis of the cervical, thoracic and lumbar spine; probable stenosis of the cervical, thoracic and lumbar spine; and status postlaminectomy and decompression at T8. He determined that appellant had a preexisting multiple level spinal condition with neurological involvement, which was progressive in nature, but indicated that this condition was not related to his falls on July 22 and August 2, 1994. Although Dr. Keisler indicated that the August 2, 1994 employment incident had a temporary effect, he did not provide a clear opinion that appellant sustained any specific medical condition on that date. His opinion, therefore, essentially provides an opinion that appellant did not sustain an employment injury on August 2, 1994.

In contrast, Dr. Pursley provided a significantly different assessment of appellant's current condition and the involvement of the August 2, 1994 employment incident. He determined that, due to the July 22 and August 2, 1994 falls, appellant sustained a myelopathy of his thoracic spine, which probably developed into transverse myelitis, a condition that he interpreted to constitute an early sign of multiple sclerosis. Dr. Pursley found that the August 2, 1994 fall played a major role in causing a ruptured disc at T8 and that the resulting disc matter "crushed" appellant's spinal cord. His opinion, therefore, essentially found that the August 2, 1994 employment incident significantly contributed to a major neurological condition.

Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence between Drs. Keisler and Pursley regarding whether appellant sustained an employment injury on August 2, 1994. On remand the Office should refer appellant, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on this matter.¹⁴ After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant's claim.

¹³ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

¹⁴ The Board notes that the record is missing documents that were submitted to the Office prior to the issuance of the Board's February 8, 2002 decision. The Office should attempt to assemble these documents and add them to the case record prior to referring the case to an impartial medical specialist.

The May 22, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
October 10, 2003

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member