

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SOLOMON POLEN and DEPARTMENT OF DEFENSE,  
DEFENSE REUTILIZATION & MARKETING SERVICE,  
Philadelphia, PA

*Docket No. 97-1794; Submitted on the Record;  
Issued March 1, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether appellant established that he sustained an injury in the performance of duty on April 26, 1994; and (2) whether appellant established that he sustained a permanent aggravation of his preexisting cerebral palsy due to an occupational injury on April 26, 1994 or to other factors of his federal employment.

On April 28, 1994 appellant, then a 55-year-old supervisory reutilization specialist, filed a claim for "soft tissue injuries and acute low back strain" sustained on April 26, 1994 when he "fell down while walking" as he set up a display of surplus items for sale in an employing establishment cafeteria.<sup>1</sup> The Office of Workers' Compensation Programs accepted as factual and appellant does not contest, that he was not carrying anything at the time of the fall and that he did not strike any intervening object before he hit the floor. The Office also accepted that after the fall, appellant was "left on the site in a state of mild disorientation" for more than one hour, with right arm and shoulder pain, to answer customer questions and guard the display.<sup>2</sup> On August 26, 1994 appellant filed an occupational disease claim, alleging that he sustained a permanent aggravation of his cerebral palsy beginning in January 1994 due to being made to work beyond the physical limitations of his cerebral palsy.

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<sup>1</sup> The claim form was filled out by Debra F. Brown, an employing establishment official. Appellant did not participate in filling out the form. Undated June 1994 statements by appellant's coworkers Darrell Vaz and Jimmie Bats corroborate that appellant fell the morning of April 26, 1994 in the cafeteria while setting up a sales display, was not carrying anything at that time and did not strike an intermediate object when he fell.

<sup>2</sup> In an April 28, 1994 incident report, Ms. Dale Bennett, appellant's supervisor, stated that on April 26, 1994, at approximately 9:30 a.m., appellant was at the cafeteria to supervise assembly of a sales display when he fell while walking. She noted that appellant was "not carrying anything nor was anything on the floor of the cafeteria at the time of the fall. However, [appellant] does have Cerebral Palsy that manifests itself in his legs." The Board notes that Ms. Bennett was not a witness to the April 26, 1994 incident.

In support of his claims, appellant submitted medical reports from Dr. Stephen M. Gollomp, an attending Board-certified psychiatrist and neurologist of professorial rank, who began treating appellant in 1983 for congenital cerebral palsy of the spastic type. In April 1995 the Office referred appellant, along with a January 12, 1995 statement of accepted facts and the medical record to Dr. Steven Mandel, a Board-certified neurologist of professorial rank, for a second opinion examination. Based on an April 28, 1995 report from Dr. Mandel attributing appellant's April 26, 1994 fall to the preexisting cerebral palsy condition unaffected by work factors,<sup>3</sup> by decision dated May 31, 1995, the Office denied appellant's claim. Appellant disagreed with this decision and requested a hearing.

By decision dated and finalized on November 13, 1995, an Office hearing representative remanded the case for further development and appointment of an impartial medical examiner, finding that the opinions of Drs. Gollomp and Mandel were of virtually equal weight. The Office then referred appellant, a statement of accepted facts and the medical record to Dr. Marcia L. Halpern, a Board-certified neurologist, to resolve the conflict of medical opinion. Dr. Halpern submitted a March 19, 1996 report finding that appellant fell due to cerebral palsy and that work factors had no influence on the condition. Based on Dr. Halpern's opinion as impartial medical examiner, in an April 8, 1996 decision, the Office again denied appellant's claim, finding that causal relationship was not established. Appellant again requested a hearing held November 21, 1996. By decision dated January 31, 1997 and finalized on February 7, 1997, an Office hearing representative affirmed the Office's April 8, 1996 decision. The hearing representative found that Dr. Halpern's March 19, 1996 report was sufficient to establish that appellant fell solely due to idiopathic cerebral palsy, with no evidence that work factors played any causative role. The hearing representative further found that there was no evidence that the April 26, 1994 fall "worsened appellant's underlying cerebral palsy."

Initially, the Board finds that appellant failed to meet his burden of proof to establish that he sustained an injury in the performance of duty on April 26, 1994.

It is a general rule of workers' compensation law that an injury occurring on the industrial premises during working hours is compensable unless the injury is established to be within an exception to the general rule.<sup>4</sup> One exception applies to falls in the workplace: When

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<sup>3</sup> In an April 28, 1995 report, Dr. Mandel reviewed appellant's history of injury and treatment and the medical record, noting "residual problems involving his [right] shoulder and left elbow." Dr. Mandel noted that in mid-April 1995, appellant accepted a "cashier-type" position at the employing establishment. On examination Dr. Mandel found spastic quadriparesis, increased tone of the lower extremities, posturing in the left upper and lower extremities, abnormal gait and stance, kyphoscoliosis, slight hyperreflexia on the right, "[r]educed position and vibratory sense in both lower extremities," a "tendency to fall" when standing, "fine tremor, dystonic positioning and mild choreoathetoid movements that are increased with intention." Dr. Mandel disagreed with Dr. Gollomp's opinion that "stress and work demands" worsened appellant's cerebral palsy, causing him to fall, or that the fall worsened appellant's underlying neurologic condition. Dr. Mandel agreed with Dr. Gollomp that "climbing ladders and working on a warehouse floor that was uneven, were conditions not advisable for this gentleman because of the possibility of injury. At the same time, [appellant] ... did not sustain an injury as a result of those conditions, but ... because of a fall related to his underlying cerebral palsy." In an accompanying form, Dr. Mandel prohibited lifting over 20 pounds, walking on uneven surfaces and climbing ladders.

<sup>4</sup> *Martha G. List*, 26 ECAB 200 (1974).

a personal, nonoccupational pathology causes an employee to collapse and to suffer injury upon striking the immediate supporting surface and there is no intervention or contribution by any hazard or special condition of the employment, the injury is not a personal injury while in the performance of duty as it does not arise out of a risk connected with the employment.<sup>5</sup> However, when it is established that work factors worsened or otherwise affected an idiopathic condition, thereby causing an employee to collapse, such a fall is considered to be within the performance of duty.

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>6</sup> Here, finding that a conflict of medical opinion existed, the Office referred appellant to Dr. Halpern, a Board-certified neurologist, to resolve the conflict of medical opinion. In a comprehensive report dated March 19, 1996, Dr. Halpern found that appellant's fall was solely due to cerebral palsy and that work factors had no influence on the condition.<sup>7</sup> The Board, therefore, finds that appellant failed to establish that he sustained an injury in the performance of duty on April 26, 1994.

The Board further finds that appellant has not established permanent worsening of his cerebral palsy due to work factors.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;<sup>8</sup> (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;<sup>9</sup> and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.<sup>10</sup> The medical opinion must be one of reasonable medical certainty,<sup>11</sup> 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.<sup>12</sup>

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<sup>5</sup> *Edward V. Juare*, 41 ECAB 126 (1989).

<sup>6</sup> *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

<sup>7</sup> Appellant submitted no medical evidence subsequent to Dr. Halpern's report.

<sup>8</sup> *See Ronald K. White*, 37 ECAB 176, 178 (1985).

<sup>9</sup> *See Walter D. Morehead*, 31 ECAB 188, 194 (1979). The Office, as part of its adjudicatory function, must make findings of fact and a determination as to whether the implicated working conditions constitute employment factors prior to submitting the case record to a medical expert; *see John A. Snowberger*, 34 ECAB 1262, 1271 (1983); *Rocco Izzo*, 5 ECAB 161, 164 (1952).

<sup>10</sup> *See generally Lloyd C. Wiggs*, 32 ECAB 1023, 1029 (1981).

<sup>11</sup> *See Morris Scanlon*, 11 ECAB 384-85 (1960).

<sup>12</sup> *See William E. Enright*, 31 ECAB 426, 430 (1980).

Dr. Gollomp explained in a February 7, 1995 report that appellant's cerebral palsy condition was a "static disease, so progression is not an issue. As I have known [appellant] for over [11] years, I can unequivocally state that this lower extremity spasticity has not progressed in any manner. It is only worsened when he has been put under great duress or fatigue." Dr. Gollomp explained that appellant's duties and the fall "caused a temporary aggravation of his underlying spasticity." This report was made more than nine months after the April 26, 1994 fall and states clearly that appellant's cerebral palsy had not permanently worsened. Thus, Dr. Gollomp's opinion negates appellant's claim that the April 26, 1994 fall or other work factors caused a permanent aggravation of his cerebral palsy.

The decision of the Office of Workers' Compensation Programs dated January 31, 1997 and finalized on February 7, 1997 is hereby affirmed.

Dated, Washington, D.C.  
March 1, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member