

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK L. BERTRAND and DEPARTMENT OF THE NAVY,
PORTSMOUTH NAVAL SHIPYARD, Portsmouth, NH

*Docket No. 01-1221; Submitted on the Record;
Issued April 4, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant established that he sustained a recurrence of disability due to his January 14, 1994 employment injury commencing April 3, 1997.

The Office of Workers' Compensation Programs accepted appellant's claim for a cervical strain, left shoulder sprain, left elbow sprain, left hand sprain and cervical subluxation. Appellant worked light duty after his January 14, 1994 employment injury until September 18, 1994 when he returned to regular duty. On April 22, 1997 appellant filed a claim for a recurrence of disability alleging that he continued to have pain in his lower neck, shoulder, arm, fingers and hand and indicated that he stopped working on April 3, 1997.

By decision dated September 13, 1997, the Office denied the claim, stating that the evidence of record failed to establish that the claimed recurrence was causally related to the January 14, 1994 employment injury.

By letter dated September 30, 1997, appellant requested an oral hearing before an Office hearing representative which was held on February 23, 1999 and submitted additional evidence.

In a report dated March 12, 1999, appellant's treating physician, Dr. William S. Sutherland, a Board-certified orthopedic surgeon, stated that he reviewed appellant's description of his fall on January 14, 1994. He stated that the mechanism of appellant's injury would stretch the brachioplexus. Dr. Sutherland stated that the mechanism of the shoulder being "distracted away from the neck does pull on the brachioplexus and would account for the type of symptoms that he had." He stated that there was a "clear causal relationship" of appellant's fall to his current symptoms which were consistent with a brachioplexopathy.

In his report dated April 26, 1999, Dr. Sutherland stated that he identified appellant's work-related injury from 1994 to be a significant right upper extremity brachioplexus stretch injury. He stated that in a brachioplexus injury the group of nerves traveling from the neck to various parts of the upper extremity have been stretched leading to a painful upper extremity that

had minimal abilities to move and function. He stated that the injury left appellant with minimal abilities to his upper extremity productively. Dr. Sutherland, however, based his conclusion on appellant's assertion that he fell on his right side on January 14, 1994 and snapped his neck to the left.

By decision dated May 10, 1999, the Office hearing representative remanded the case for the Office to refer appellant to a second opinion physician to address whether appellant's current symptoms including neck, shoulder and arm pain were work related. In a report dated September 7, 1999, the second opinion physician, Dr. Charles M. Blitzer, a Board-certified orthopedic surgeon, stated that appellant had chronic cervical right upper extremity pain "which would seem perhaps on the basis of brachial plexus traction injury sustained January 14, 1994." He stated that he could not account for appellant's interval of functioning well between the end of 1994 and April 1997, as he would not expect a brachial plexus traction injury to take a downward turn after a relatively static two-year period.

In a report dated October 1, 1999, Dr. Blitzer stated that, by traction injury, he meant a brachial plexus stretch injury which was consistent with appellant's description of the incident that he landed on the apex of the right shoulder with his head being deviated to the left. He stated that falling in that way could cause a stretch injury to the brachial plexus. Dr. Blitzer stated that "[t]he description of brachial plexus symptoms being related to his injury of 1994 is purely historical" and he remained at a loss as to why there would be a significant downward cause after a static two-year period. In his report dated December 13, 1999, Dr. Blitzer stated that if the facts were that appellant landed on his left side on January 14, 1994 as in the Office's statement of accepted facts, he could not attribute the cause of appellant's symptoms in his right upper extremity to the January 1994 employment injury.

By decision dated January 7, 2000, the Office denied the claim, stating that the weight of the medical evidence rested with Dr. Blitzer, and the evidence of record did not establish that appellant's alleged recurrence of disability on April 3, 1997 was causally related to the January 14, 1994 employment injury.

By letter dated February 3, 2000, appellant requested an oral hearing before an Office hearing representative but subsequently changed his request to a review of the written record.

By decision dated August 17, 2000, the Office hearing representative affirmed the Office's January 7, 2000 decision.

By letter dated January 17, 2001, appellant requested reconsideration of the Office's decision and submitted additional evidence consisting of the Office's January 7, 2000 decision, the Office's statement of accepted facts dated July 16, 1999, the reports of the referral physician, Dr. Blitzer's reports dated September 7, October 1 and December 13, 1999 and August 3, 2000, a report from appellant's treating physician, Dr. Sutherland, dated November 17, 2000 and an excerpt from the February 23, 1999 hearing. The only new evidence appellant submitted was

Dr. Blitzer's August 3, 2000 report and Dr. Sutherland's November 17, 2000 report. In his August 3, 2000 report, Dr. Blitzer stated that he had reviewed the statement of accepted facts and noted:

"It is unclear from paragraph [one] where 'claimant's neck snapped backwards and to the side as he landed on the ground,' whether his neck snapped to the right or left. If indeed his neck snapped strongly to the left, then indeed one could have the potential to have anterolateral, *i.e.*, right-sided brachial plexus stretch. If his neck did not go to the left, rather as he landed on his shoulder and the neck deviated to the right with pressure on it, I do not believe this would account for right brachial plexus injury.

"I am not sure that I am able to definitively state which way his neck went based on the information that I have."

In his November 17, 2000 report, Dr. Sutherland stated:

"The mechanism of injury you describe of [appellant] slipping on ice, both feet coming out from under him and falling onto his left side with his neck snapping backwards and to the left was, more probably than not, the mechanism for stretching the brachio-plexus which travels through the side of the neck and into the upper extremity. Any force that separated the neck from the shoulder can yield that type of injury."

Dr. Sutherland opined that it was "consistent with a brachio-plexus injury that a direct fall on the left side could cause some immediate appreciable pain that takes the majority of the attention of a person." He stated: "[a] stretched nerve may not be as symptomatic right away as it may be days to weeks later when inflammation peaks and nerve root irritation is more sympathetic."

In the excerpt from the February 23, 1999 transcript, appellant described how his fall on the ice occurred, stating that he struck the curb with his right shoulder, his head came down on the flat area where the black ice was referring to a copy of a picture and he struck the ice and twisted his neck off to the left, "creating the stretch into [his] right cervical." In the statement of accepted facts, the Office stated that on January 14, 1994 appellant slipped on the ice when both feet "came up from under him." The Office stated that appellant fell on his left side and struck his left elbow on a granite curbstone forcing his left arm into his rib cage as he fell. The Office stated that appellant's neck snapped backwards and to the side as he landed hard on the ground.

In his request, appellant contended that the statement of accepted facts and appellant's description of the incident establish that he snapped his head upon impact. Appellant contended that if he fell on his left side and his head snapped backwards and to the side, it stands to reason his head must have snapped to the left. Appellant contended that Drs. Blitzer's and Sutherland's reports establish that appellant's cervical condition was related to the January 14, 1994 employment injury.

By decision dated March 15, 2001, the Office denied appellant's request for reconsideration.

The Board finds that the case is not in posture for decision.

Appellant has the burden of establishing by reliable, probative and substantial evidence that the recurrence of a disabling condition for which he seeks compensation was causally related to his employment injury.¹ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.²

In this case, a conflict exists between the opinion of appellant's treating physician, Dr. Sutherland, that appellant's neck and upper extremity condition or brachioplexopathy was causally related to the January 14, 1994 employment injury and the opinion of the referral physician, Dr. Blitzer, that if, as in the statement of accepted facts, both feet came out from under appellant on January 14, 1994 and, according to appellant, he landed on his left side, appellant's symptoms in his right upper extremity were not causally related to the January 1994 employment injury. Section 8123(a) of the Federal Employees' Compensation Act provides that, if there is a 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.³ To resolve the conflict in the medical evidence between Dr. Sutherland's and Dr. Blitzer's opinions as to whether appellant's neck and upper extremity condition were causally related to the January 14, 1994 employment injury, the Office should refer appellant with a statement of accepted facts and the case record to an impartial medical specialist for another medical evaluation. After further development as it deems necessary, the Office should issue a *de novo* decision.

¹ *Dominic M. DeScala*, 37 ECAB 369 (1986).

² *Louise G. Malloy*, 45 ECAB 613, 617 (1994).

³ *Henry W. Sheperd, III*, 48 ECAB 382, 385 n.6 (1997); *Wen Ling Chang*, 48 ECAB 272, 273-74 (1997).

The March 15, 2001 and the August 17, 2000 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further actions consistent with this decision.

Dated, Washington, DC
April 4, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member