

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRUCE A. BURTON and DEPARTMENT OF THE NAVY,
WEAPONS SUPPORT FACILITY, Seal Beach, CA

*Docket No. 00-1499; Submitted on the Record;
Issued September 6, 2001*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly found that appellant failed to meet his burden of proof to establish that his alleged neck, left shoulder and headache conditions were sustained in the performance of duty.

On February 7, 1998 appellant, then a 42-year old transportation specialist, injured his left shoulder while moving an ammunition barge. He filed a claim for benefits on February 17, 1998, which the Office accepted for left shoulder acromioclavicular strain on March 30, 1998.

On April 29, 1998 appellant filed a claim based on occupational disease, alleging that he was experiencing blackouts, headaches, left shoulder and neck pain caused or aggravated by factors of his employment.¹ In support of his claim, appellant submitted a Form CA-20 report dated April 29, 1998 from Dr. Paul Choi, a Board-certified orthopedic surgeon, who noted weakness in sensation in his left arm, with weakness in his left wrist and grip strength. Dr. Choi indicated that the results of a magnetic resonance imaging (MRI) scan on April 22, 1998 had revealed a herniated disc at C5-6 and he checked a box on the form indicating that he believed the condition found was caused or aggravated by employment activity.

Dr. Choi referred appellant to Dr. Mark E. Anderson, a Board-certified neurologist, who stated in a report dated May 8, 1998 that appellant was experiencing pulsating pain in the left biceps and shoulder area, radiating all through the left arm, which had been persisting since February 1998. Dr. Anderson noted that appellant had experienced four episodes of severe headaches, including one syncopal episode following a headache. He diagnosed left thoracic outlet syndrome.

¹ The statement of accepted facts dated June 11, 1998 indicates that appellant was off work from February 9 through March 9, 1998, when he returned to light-duty work and that he has not worked since March 12, 1998.

In a follow-up report dated June 15, 1998, Dr. Anderson stated that he now ruled out left thoracic outlet on examination, although he noted the cervical MRI scan had indicated a herniated disc at C5-6. He found it puzzling that appellant's herniated disc was on the right, despite the fact that all of his symptomatology was on the left side. Dr. Anderson stated that appellant's diagnosis was currently a bit obscure and difficult to obtain, and advised that he was keeping him on total disability.

In order to clarify whether appellant's claimed conditions were causally related to his employment, the Office referred appellant's claim to Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon. In his June 29, 1998 report, after reviewing the statement of accepted facts, the medical history and stating findings on examination, Dr. Dorsey opined that although the February 7, 1998 employment injury was sufficient to cause cervical musculoligamentous sprain or strain, appellant had no clinical findings for radiculopathy or reflex sympathetic dystrophy. He advised that appellant had no other ongoing diagnosis or clinical condition medically connected to the 1998 work injury, or to any other employment factors. Dr. Dorsey concluded that appellant was capable of performing his job as marine transportation specialist.

By decision dated August 7, 1998, the Office denied appellant's claim, finding based on Dr. Dorsey's report that he failed to establish he had sustained a medical condition or disability causally related to factors of his federal employment.

By letter dated August 19, 1998, appellant requested an oral hearing, which was held on February 16, 1999. In support of his claim, appellant submitted a March 10, 1999 report from Dr. Choi, who stated:

"It is my medical opinion that [appellant] did sustain a significant soft tissue injury to his left upper extremity, neck and left chest wall injury of the pectoralis major and at the time of the injury of February 7, 1998 and that his symptoms were all related to his injury sustained at that date. He did have a difficult course and complex problem in view of the fact that he also had evidence of disc herniation although this was on the contralateral side, not [affecting] his symptomatic left upper extremity. Although [appellant] does have preexisting degenerative changes in his cervical spine it is my medical opinion that his current symptoms are the result of his injuries sustained at work on February 7, 1998."

By decision dated May 12, 1999, an Office hearing representative affirmed the August 7, 1998 decision.

By letter dated November 29, 1999, appellant's attorney requested reconsideration. Appellant submitted the August 26, 1999 report of Dr. Jon J. Hanlon, a Board-certified orthopedic surgeon, who stated:

"With respect to his neck, he certainly had a preexisting degenerative disc disease with a RIGHT[-]SIDED herniated disc at C5-6. (Emphasis in the original). There is no indication whatsoever that the disc herniation has caused any nerve root impingement. However, in association with degenerative disc disease, one

frequently develops degenerative changes within the joints of Luschka and the facet joints. I believe that this is what is creating his sudden momentary pain that he describes in the left side of his neck that may or may not, depending upon the incident, lead to the occurrence of his left-sided headaches. The left-sided neck and shouldertop symptoms, by his description, occurred only after the [February 7, 1998 employment injury]. I concur with Dr. Dorsey that he sustained a sprain and strain of his neck that was superimposed upon previous silent underlying cervical disc disease. However, I disagree with Dr. Dorsey that his condition resolved and is one that was first not related to the incident and second, not to be taken seriously.”

By decision dated December 9, 1999, the Office denied the claim, finding that appellant did not submit evidence sufficient to warrant modification of the previous decision.

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

In the present case, there was disagreement between Drs. Dorsey, Hanlon and Choi regarding whether appellant’s alleged neck, left shoulder and headache conditions were sustained in the performance of duty. Dr. Hanlon stated that appellant had a preexisting degenerative disc disease with a right-sided herniated disc at C5-6, a condition which frequently leaves the patient susceptible to degenerative changes within the Luschka and facet joints. He noted that appellant’s left-sided neck and shoulder symptoms, as he described them, occurred only after the February 7, 1998 employment injury. Dr. Hanlon stated that he concurred with Dr. Dorsey that appellant sustained a sprain and strain of his neck preexisting cervical disc disease, but disagreed with his opinion that appellant’s condition had resolved, was not serious and was unrelated to the 1998 work incident. In addition, Dr. Choi stated in his March 10, 1999 report, that appellant sustained a significant soft tissue injury to his left upper extremity, neck and left chest wall injury of the pectoralis major at the time of the February 7, 1998 employment injury, and advised that all of his current symptoms were related to this injury.

Dr. Dorsey stated in his referral opinion that appellant had no subjective or objective findings which would indicate an ongoing condition medically connected to the February 1998 employment injury, or to any other factors of his employment. He advised that the finding of a herniated disc at C5-6 on the right side was unrelated to his alleged work-related symptoms in his left shoulder and on the left side of his neck. Based on his examination and on the medical evidence of record, Dr. Dorsey concluded that appellant was able to perform his usual job as a transportation specialist. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or “referee” physician, also known as an “impartial medical examiner.”² It was therefore incumbent upon the Office to refer the case to a properly selected impartial medical examiner, using the Office procedures, to resolve the existing conflict. Accordingly, as the Office did not refer the case to an impartial medical examiner, there remains an unresolved conflict in medical opinion.

² Section 8123(a) of the Federal Employees’ Compensation Act provides in pertinent part, “(i)f 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.” *See Dallas E. Mopps*, 44 ECAB 454 (1993).

Accordingly, the case is remanded to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate impartial medical specialist selected in accordance with the Office's procedures, to resolve the outstanding conflict in medical evidence. The Office should therefore, on remand, refer the case to an appropriate medical specialist to submit a rationalized medical opinion on whether appellant's claimed alleged neck, left shoulder and headache conditions were sustained in the performance of duty. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The Office of Workers' Compensation Programs decision of December 9, 1999 is therefore set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
September 6, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member