

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BILL G. MAJERS and DEPARTMENT OF THE AIR FORCE,  
UTAH NATIONAL GUARD, Spanish Fork, UT

*Docket No. 98-2474; Submitted on the Record;  
Issued April 14, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant established that he sustained an injury to his cervical spine in the performance of duty on July 26, 1995 or on January 3, 1993.

On July 26, 1995 appellant, then a 50-year-old heavy mobile equipment repairer, filed a notice of traumatic injury, alleging that on that same date he was thrown to the floor while mounting a tire in the course of his federal employment and injured his left shoulder, right elbow, left knee and neck.<sup>1</sup>

Following an Office request for additional information, appellant indicated that he previously injured his left shoulder and neck in January 1993. He stated that a shoulder decompression was performed in April 1993.

On May 24, 1994 Dr. DeVon A. Nelson, a Board-certified orthopedic surgeon, stated that he anticipated that appellant would have no residuals from his shoulder condition. He stated, however, that appellant's cervical spine problem remained undetermined. On August 5, 1994 Dr. Nelson indicated that both appellant's shoulder and neck injury occurred at the same time because he had absolutely no symptoms in the shoulder or neck prior to his injury of January 5, 1993. On January 23, 1995 he stated that he advised appellant not to have his cervical pain treated until his shoulder pain resolved because he felt that they might be related. Consequently, Dr. Nelson stated appellant let 14 months pass before he ordered a magnetic resonance imaging (MRI) scan. He concluded that based on appellant's explanation both the cervical spine and shoulder injury occurred at the same time.

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<sup>1</sup> Appellant previously filed a claim for an injury to his left shoulder occurring on January 3, 1993 which the Office of Workers' Compensation Programs accepted for a left shoulder strain and decompression surgery. The Board notes that the medical reports of record refer to the January 3, 1993 injury as having occurred on differing dates, such as January 5, February 3 and April 1993.

By decision dated January 9, 1996, the Office denied appellant's claim because fact of injury was not established. In an accompanying memorandum, the Office found that appellant established that the claimed event or incident occurred at the time, place and in the manner alleged. It found, however, that a medical condition resulting from the accepted trauma or factors was not supported by the medical evidence. The Office noted that appellant did not seek treatment for his injury until one month and three days after it occurred, that Dr. Nelson failed to consider appellant's history of preexisting injury, that his conclusion was not supported by the MRI scan requested, and that he failed to submit a narrative medical report with a history of the July 26, 1995 injury.

On December 13, 1995 Dr. Lynn M. Gaufin, a Board-certified neurological surgeon, noted appellant's complaints of pain in the neck, shoulder and left arm. He indicated that appellant reported two industrial injuries that caused this pain. Dr. Gaufin stated that appellant's first injury occurred in April 1993, when a wheel fell on him causing pain in the neck and left shoulder. He stated that this injury required shoulder surgery. Dr. Gaufin also noted an injury on July 26, 1995 when appellant slipped while changing a tire causing increased pain to his neck and left shoulder. He stated that an MRI scan taken on September 27, 1995 demonstrated a shallow disc herniation at C5-6 and that there was a small herniation in the neural foramina, laterally on the left. Dr. Gaufin reviewed appellant's past medical history and conducted physical and neurological examinations. He found that appellant lacked about 15 degrees of full range of motion of the cervical spine. Dr. Gaufin diagnosed a herniated C5-6 intervertebral disc with acute cervical radiculopathy, left and a history of injury to his left shoulder requiring arthroscopy with decompression. On January 8, 1996 he indicated that appellant continued to have pain in his left neck, shoulder and arm. Dr. Gaufin diagnosed cervical radiculopathy secondary to a herniated C5-6 intervertebral disc, left. He also noted a history of injury to the left shoulder requiring arthroscopy and decompression. On January 18, 1996 Dr. Gaufin again diagnosed C5-6 herniated disc and stated that a C5-6 discectomy and fusion with allograft would be performed on February 22, 1996.

On January 29, 1996 appellant requested reconsideration.

On February 5, 1996 the Office reviewed the merits of the case and denied modification because the evidence was not sufficient to warrant modification of the prior decision. In an accompanying memorandum, the Office noted that the new medical reports appellant submitted failed to discuss the impact of appellant's July 26, 1995 incident on his prior conditions. It further stated that the physicians failed to state what condition was related to the July 26, 1995 incident.

On March 8, 1996 Dr. Nelson stated that appellant was adamant that prior to his injury of January 1993 he had no symptoms of any kind in his neck or shoulder. He stated that appellant underwent an arthroscopic shoulder decompression in April 1993 and that this resolved appellant's shoulder symptoms, but that appellant continued to have neck discomfort. Dr. Nelson stated that a subsequent work up revealed significant disc disease in the cervical spine. He reported that in July 1995 the situation with the neck was exacerbated by a second injury. Dr. Nelson indicated that appellant's history was indicative that the condition that he

now has was directly related to the accidents at work in that he was totally without symptoms prior to the accident and the symptoms were exacerbated in a major way by the second accident.

On April 1, 1996 Dr. Gaufin stated that appellant reported industrial accidents on April 1993 and July 26, 1995. He noted that appellant reported that he definitely injured his neck and shoulder as a result of the July 26, 1995 accident. Dr. Gaufin opined that appellant had a herniated disc at C5-6 and that he previously sustained a shoulder injury requiring arthroscopy and decompression. He stated that to the best of his medical ability, appellant's symptoms were a direct result of the industrial injuries he sustained on January 3, 1993 and July 26, 1995.

On April 17, 1996 appellant requested reconsideration.

By decision dated April 22, 1996, the Office reviewed the merits of the case and found that the evidence was not sufficient to warrant modification of the prior decision. In an accompanying memorandum, the Office indicated that, in his March 8, 1996 letter, Dr. Nelson failed to provide a definitive response regarding what condition was caused or aggravated by the July 1995 work incident. The Office further noted that Dr. Gaufin provided a speculative opinion and did not provide a specific diagnoses stemming from the July 1995 incident.

On February 12, 1996 Dr. Gaufin diagnosed a herniated disc at C5-6 and stated that appellant needed to be on light duty. On May 31, 1996 he examined appellant for pain in the neck, shoulder and left arm which appellant attributed to industrial injuries in April 1993 and July 1995. He stated that an MRI scan taken on September 27, 1995 demonstrated a shallow disc herniation C5-6 and a mild small herniation of the neural foramina far laterally on the left. Dr. Gaufin diagnosed a herniated C5-6 intervertebral disc with acute cervical radiculopathy. He also found a history of industrial injury requiring surgery on the left shoulder. Dr. Gaufin performed an anterior cervical discectomy, foraminotomy and a nerve root decompression, bilaterally, and an anterior cervical interbody arthrodesis, C5-6, with allograft, on May 31, 1996. His final diagnosis was an acute and chronic cervical radiculopathy secondary to a degenerative disc with spondylosis and herniation, C5-6.

On September 25, 1996 appellant requested reconsideration.

By decision dated November 25, 1996, the Office ordered that the request for review be denied because the evidence submitted in support of the application was found to be cumulative, repetitious, irrelevant or immaterial and was not sufficient to warrant review of the prior decision. In an accompany memorandum, the Office noted that appellant failed to submit a medical report containing an accurate history of the July 26, 1995 work incident, a diagnosis related to the incident and a rationalized opinion from a doctor explaining how the work incident and diagnosed condition are related.

On January 15, 1997 appellant requested reconsideration.

By decision dated February 7, 1997, the Office found that because appellant's January 15, 1997 reconsideration request neither raised substantive legal questions nor included new and relevant evidence, it was insufficient to warrant a review of its prior decision.

On March 3, 1997 Dr. Gaufin reviewed the history of appellant's injuries stemming from the April 1993 work incident and the July 26, 1995 work incident. He stated that as a result of the industrial injury on July 26, 1995 appellant sustained a herniated disc causing an acute cervical radiculopathy at C5-6 on the left. Dr. Gaufin further stated that this resulted in a permanent radiculitis requiring appellant to have surgery with an anterior cervical discectomy, nerve root decompression and interbody arthrodesis on May 31, 1996. He concluded that the acute cervical radiculopathy was a direct result of his industrial injury from his head and neck hitting a table as he fell backwards while changing a large tire.

On May 20, 1997 appellant requested reconsideration.

The Office subsequently referred appellant, along with a statement of accepted facts and case records of appellant's previous claims, to Dr. Alan F. Ketelhohn, a Board-certified orthopedic surgeon. Dr. Ketelhohn stated that since there were no clinical findings made until two months after the July 26, 1995 work incident that no diagnosis could be made regarding a neck injury on July 26, 1995. Furthermore, he found no contemporaneous evidence of a neck injury occurring on February 3, 1993 which would support such a diagnosis. Dr. Ketelhohn concluded therefore that appellant had a degenerative cervical disc that has been wearing over time, but that was not caused or aggravated by the two alleged work events.

By decision dated August 13, 1997, the Office reviewed the merits of the case and found that the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision. In an accompanying memorandum, the Office found that the weight of the medical opinion evidence rested with the opinion of Dr. Ketelhohn, who reviewed all the relevant evidence and found that the contemporaneous evidence failed to establish that appellant sustained a cervical injury on July 26, 1995.

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a cervical spine injury in the performance of duty on July 26, 1995 or on January 3, 1993.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his or her claim<sup>3</sup> including the fact that the individual is an "employee of the United States" within the meaning of the Act,<sup>4</sup> that the claim was timely filed within the applicable time limitation period of the Act,<sup>5</sup> 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.<sup>6</sup> These are the

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> See *Daniel R. Hickman*, 34 ECAB 1220 (1983); see also 20 C.F.R. § 10.110.

<sup>4</sup> See *James A. Lynch*, 32 ECAB 216 (1980); see also 5 U.S.C. § 8101(1).

<sup>5</sup> 5 U.S.C. § 8122.

<sup>6</sup> See *Melinda C. Epperly*, 45 ECAB 196 (1993).

essential element of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>7</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a “fact of injury” has been established. First, the employee must submit evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.<sup>8</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>9</sup>

In the instant case, there is no dispute that appellant was an “employee” within the meaning of the Act, nor that appellant timely filed his claim for compensation. Moreover, the Office accepted that appellant sustained “an injury.” Nevertheless, a person who claims benefits for a work-related condition has the burden of establishing by the weight of the medical evidence a firm diagnosis of the condition claimed and a causal relationship between that condition and factors of federal employment.<sup>10</sup> In this case, appellant’s assertion that he sustained a cervical condition as a result of his January 3, 1993 or July 26, 1995 work incidents was supported by the opinions of Dr. Nelson, a Board-certified orthopedic surgeon, and by Dr. Gaufin, a Board-certified neurosurgeon.

On August 5, 1994 Dr. Nelson opined that appellant’s cervical disc herniation stemmed from his January 1993 injury because he did not present with these symptoms until after the injury. Subsequently, on March 8, 1996 he again related appellant’s cervical condition to his work accidents because appellant was totally without cervical spine symptoms prior to the January 1993 accident and these symptoms were exacerbated by the second accident in July 1995. Because Dr. Nelson’s opinion related appellant’s cervical condition to the work incidents based solely on the fact that appellant demonstrated symptoms following the work incidents his opinion is insufficient to establish causal relation.<sup>11</sup>

Appellant also relied on the reports of Dr. Gaufin to establish a causal relationship between his cervical condition and his work incidents in 1993 and 1995. In his reports dated April 1 and May 31, 1996 and March 3, 1997, Dr. Gaufin concluded that appellant’s acute cervical radiculopathy stemmed from his industrial injuries of 1993 and 1995. He, however, never provided a medical rationale explaining how appellant’s cervical condition resulted from his injuries in 1993 and 1995. Accordingly, his opinion is of diminished probative value.<sup>12</sup>

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<sup>7</sup> See *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>8</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>9</sup> *Id.*

<sup>10</sup> *Patricia Bolleter*, 40 ECAB 373 (1988).

<sup>11</sup> *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

<sup>12</sup> *Jean Culliton*, 47 ECAB 728 (1996).

Accordingly, because appellant failed to submit any rationalized medical evidence relating his cervical spine condition to the employment incidents in 1993 and 1995, appellant failed to meet his burden or proof.

The decision of the Office of Workers' Compensation Programs dated August 13, 1997 is affirmed.

Dated, Washington, D.C.  
April 14, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member