

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES E. BARKER and DEPARTMENT OF DEFENSE,
ROBINS AIR FORCE BASE, GA

*Docket No. 00-1689; Submitted on the Record;
Issued April 16, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's January 12, 2000 request for reconsideration.

On February 2, 1995 appellant, then a 42-year-old computer specialist, filed an occupational disease claim asserting that his degenerative cervical disc disease was the result of his federal employment. He explained as follows: "Being a computer programmer most of the day is spent with my back and neck in the same static position, stressing the same muscles, tendons and disc relentlessly for hours at a time."

In a decision dated January 18, 1996, the Office denied appellant's claim on the grounds that the evidence failed to demonstrate a causal relationship between the claimed condition and appellant's federal employment.

In a report dated October 20, 1995, appellant's attending orthopedic surgeon, Dr. Robert A. Nelson, stated that the problems that appellant experienced in his cervical spine were degenerative in nature "although it is possible that his job may aggravate his condition and cause him to be symptomatic."

On July 5, 1996 an Office hearing representative reviewed the written record and affirmed the denial of appellant's claim. The hearing representative found that Dr. Nelson's opinion was speculative and in no way established a link, other than a symptomatic one between appellant's cervical condition and his job.

In a February 15, 1997 report to appellant's attorney, Dr. Nelson addressed the issue of causal relationship in more depth:

"[Appellant] is a gentleman whom I have been following now since 1991. As per your documents, [appellant] has had an ongoing problem with his neck and arm dating back to the early 1980's. He has worked as a computer programmer for the

[employing establishment] since 1981. Over the course of his employment he has complained of episodic severe neck and left-sided arm pain. [Appellant] was diagnosed with a herniated disc for which he subsequently underwent a neck fusion. [He] did well following his first surgery and was discharged from my care. However, [appellant] returned in November 1995 with similar pain, this time located on the right side of his upper extremity. Again he was diagnosed with a ruptured disc and subsequently underwent a second surgical procedure. Over the course of his follow-up we had various discussions concerning his work as a computer programmer and the tasks that are involved, *i.e.*, constant turning of the head, keeping his upper body in a relatively unnatural position and constant use of his arms and fingers for keying in information. I felt at that time that his job probably contributed to his neck and arm pain. The documents provided in your recent letter show, I feel with great certainty, that [appellant's] previous workstations were ergonomically inadequate. Again, this gentleman has worked at his workstation for some 8 to 10 hours, 5 days a week. Over the course of his employment, I feel that this poorly designed system did, in fact, contribute to his degenerative disc disease and subsequent rupture. This is based on my understanding of the spine, wherein simply moving the head in relationship to the body up and down does not necessarily contribute to degenerative changes. However, turning the head sideways and up and down will, in fact, lead to degenerative changes as well as tears in the supporting structures about the neck. In fact, if one was to look at the exhibits presented in your argument, you would see that [appellant's] previous workstations involved not only turning the head up and down, but also constantly turning the neck either to the left or the right to look at the screens on his computer terminal. Again, I feel any person placed in this environment will, in fact, develop what [appellant] has, *i.e.*, degenerative disc disease with the possibility of disc rupture.

“Again, this letter is written in response to questions concerning whether or not his previous workstations contributed to his degenerative disc disease and subsequent ruptured disc. I feel that it did and would be happy to discuss this matter with you.”

In a report dated May 27, 1997, Dr. Derrick D. Phillips, an orthopedic surgeon, and Office referral physician expressed his opinion as follows:

“The patient basically gives a history thus of developing progressive neck symptoms without any specific history of any injury. My opinion is that the patient predominately developed gradual arthritic changes of his cervical spine with secondary disc herniation and it is feasible that, while his work environment did not actually cause the arthritic changes, the work he performed as a computer terminal operator could have indeed aggravated this underlying condition. The patient, however, indeed still shows evidence of arthritic changes and most likely will develop progressive symptoms in time despite how limited his present physical activities may be. My opinion is that the patient's work environment did not within itself specifically cause the arthritic changes of his cervical spine, but that type of environment indeed can aggravate an underlying preexisting

condition and lead to the present scenario of symptoms that force the patient to seek medical attention.”

The Office requested clarification from Dr. Phillips. In a supplemental report dated August 28, 1997, Dr. Phillips responded as follows:

“The patient works as a computer programmer and that job, by his history or an explanation of the job requires that he sit at a terminal using his hands, keeping his neck on one set position for various periods of time. He does not perform any significant lifting, bending or stooping and my opinion is that, while that type of work does not necessarily cause any arthritis to one’s cervical spine nor will it necessarily accelerate the arthritis condition when one is required to keep their neck in a set position for various periods of time; some tightness in the local cervical muscles may develop and this might simply cause some secondary aggravation of preexisting underlying arthritis. Whenever you have an arthritis situation and the involved joint is left in one position for various periods of time some secondary stiffness and discomfort along with other symptoms may develop. The most reasonable way to resolve such symptoms is simply to move the involved joint and change the position of the involved joint and this in most cases will resolve the symptoms.

“It is thus my opinion that, once again, this gentleman has a preexisting underlying condition and the type of job he performs might simply at times lead to additional symptoms from that condition. The symptoms will most likely develop if they do occur from the patient having to hold his neck in a constant position and these symptoms usually resolve by simply some gentle movement of the neck or gentle range of motion exercises to relieve any stiffness that might set in. The type of work the patient performs does not within itself cause him any arthritis involving his neck nor will it directly affect the progression of the arthritis that most likely will develop in his neck.”

On December 19, 1997 an Office medical adviser reported that studies in the New England Journal of Medicine by Dr. Scott Boden, an orthopedic surgeon, at Emory University, revealed that there is no correlation between disc degeneration and painful symptoms. Frequently symptoms may result from improper use of normal joints and muscles and over certain ages abnormal discs, even ruptured ones, may be found in individuals with no pain or relative symptoms. The medical adviser reported that turning the head up and down and sideways could not lead to degenerative changes; these are usually genetic. He stated that work position adjustments might be in order but this did not prove causation of degeneration. It was not scientifically logical, he reported, that turning the head sideways and up and down could lead to degenerative changes.

In a decision dated December 24, 1997, the Office reviewed the merits of appellant’s claim and denied modification of its prior decision. The Office noted that Dr. Nelson based his opinion on a substantial amount of head turning whereas appellant himself has explained that his neck and back must remain in the same static position for the majority of the time that he is at

work. The Office found that, while appellant's work might have caused an increase of symptoms, such an increase was not compensable.

On June 20, 1998 appellant requested reconsideration. He asserted that the Office totally disregarded the numerous reports and opinions provided by Dr. Nelson. Appellant referred to previously submitted photographs of his workstation as proof that substantial head turning was required. He took exception to any reference to cervical arthritis and insisted that this case was about disc degeneration with resulting disc herniation. Appellant objected to any reliance by the Office on general medical information contained in published articles. He asserted that it made no difference whether his work precipitated or aggravated his disc degeneration as the result is the same: "But for [appellant's] employment and ergonomically inadequate workstation he would not have suffered the subsequent disc herniations and undergone the required surgeries." Appellant submitted two additional reports from Dr. Nelson, who stated that appellant's cervical condition and ongoing problems stemmed directly from his job as a computer programmer.

In a decision dated October 2, 1998, the Office reviewed the merits of appellant's claim and again denied modification of its prior decision. The Office found that Dr. Nelson's opinion was essentially the same as he previously had stated and that the opinion of Dr. Phillips and the Office medical adviser constituted the weight of the medical opinion evidence.

On January 12, 2000 appellant requested reconsideration. He argued that the information he provided initially was not fairly and objectively reviewed. Appellant submitted copies of medical reports that were previously submitted and considered.

He also submitted new evidence. In an October 25, 1998 report, Dr. Nelson noted that plain x-rays at the time of the original surgery in May 1991 did not reveal any degenerative disc disease at the surgical level of C6-7. Dr. Nelson noted that appellant's problem at that time was a disc herniation, not degeneration. He stated that it was totally improper to deny compensation benefits based on a one-time evaluation performed some six years after the original injury.

An undated report by Dr. Pedro L. Tamayo, an orthopedic surgeon and Office referral physician, stated in its entirety: "It is my opinion that this patient has degenerative disc disease, arthritis which is aggravated from excessive time spent working on the computer in the same position daily."

In a November 30, 1999 report, Dr. George S. Stefanis, appellant's neurological surgeon, stated as follows: "I feel that anyone who does the type of job that [appellant] does where he is constantly looking down could aggravate, weaken a disc and ultimately cause it to herniate and become symptomatic as [appellant's] neck has become."

Appellant also submitted a December 18, 1996 letter from the Chief of the Logistics System Support Branch, who noted appellant's responsibilities since 1981 and stated: "The use of his hands and upper body positions for the last 15 years could be a contributing factor to his condition."

In a decision dated February 24, 2000, the Office denied appellant's January 12, 2000 request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error on the part of the Office.

The Board finds that the Office properly denied appellant's January 12, 2000 request for reconsideration.

Section 10.607 of the Code of Federal Regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.¹

The latest decision by the Office on the merits of appellant's claim was the October 2, 1998 decision denying modification. Appellant had one year from the date of this decision to request reconsideration but did not make his request until January 12, 2000. Because he sent his request more than one year after the October 2, 1998 decision, the request is untimely.

Further, appellant's January 12, 2000 request for reconsideration fails to demonstrate clear evidence of error in the Office's October 2, 1998 decision. The argument and evidence that appellant submitted to support his request is repetitive. The Office previously considered Dr. Nelson's opinion and determined that greater evidentiary weight should be given to the opinions of Dr. Phillips and the Office medical adviser. Dr. Nelson's October 24, 1998 report merely reinforces his apparent disagreement with Dr. Phillips and does not clearly establish the element of causal relationship.

Dr. Tamayo's undated opinion is supportive of appellant's claim but is no more probative than the opinion already given by Dr. Nelson. It is not the number of doctors expressing an opinion that persuades; it is the medical reasoning provided and Dr. Tamayo offered no medical rationale to explain his one-sentence opinion.

The November 30, 1999 opinion of Dr. Stefanis is also unpersuasive. His opinion is speculative and fails to explain how appellant's employment activity can physically cause a disc to herniate.²

Finally, causal relationship is a medical issue³ and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The Chief of the Logistics System Support Branch is simply not competent to express an expert opinion on the matter.

There is no dispute in this case that appellant has submitted medical opinion evidence tending to support his claim. The record, however, also shows medical opinion evidence tending to support the contrary. That there may be a conflict in medical opinion between appellant's attending physicians and at least one of the Office referral physicians is no basis for the payment

¹ 20 C.F.R. § 10.607.

² See *Philip J. Deroo*, 39 ECAB 1294 (1988) (although the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute medical certainty, neither can such opinion be speculative or equivocal).

³ *Mary J. Briggs*, 37 ECAB 578 (1986).

of benefits. The Office weighed the evidence as part of its adjudicatory function and determined that the weight of the evidence fails to establish appellant's claim. Appellant's untimely request for reconsideration fails to show that this determination was on its face erroneous.

The February 24, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
April 16, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member