

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**NANCY A. BOURN, Appellant**

**and**

**DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION,  
Kansas City, MO, Employer**

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**Docket No. 05-1810  
Issued: May 16, 2006**

*Appearances:*

*Beth Regier Foerster, Esq.*, for the appellant  
*Miriam D. Ozur, Esq.*, for the Director

Oral Argument March 9, 2006

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On August 26, 2005 appellant, through counsel, filed a timely appeal from an August 9, 2005 decision of the Office of Workers' Compensation Programs denying her claim of injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant sustained a cervical injury during an annual flight physical on October 6, 2000.

**FACTUAL HISTORY**

On October 10, 2000 appellant, then a 41-year-old air traffic control specialist, filed a claim of traumatic injury noting that she underwent an annual flight physical on October 6, 2000

during which she sustained reinjury to her cervical spine.<sup>1</sup> In an October 26, 2000 description of her injury for the Office, appellant stated: “During my yearly flight physical, the flight surgeon instructed me to sit on the examination table. Appellant then put his hands over either side of my head and twisted my neck. He did this just moments after discussing my surgery.” She experienced pain to her neck, right arm and hand with numbness. The employing establishment controverted the claim.<sup>2</sup>

In an October 12, 2000 memorandum, Connie Phalon, a nurse, noted that she was present on October 6, 2002 in the examination room with appellant and the flight physician. She stated:

“... Dr. Munyan did not in any way cause her any pain or discomfort at any time as visible by her facial expressions or verbally; nor did the doctor ask her to do anything outside of normal ROM [range of motion]. She was told to look to the right, then left, bend her head slightly for thyroid and carotid artery check -- these were the only opportunities to move her neck. During the entire exam[ination] she did not display any painful sounds, verbal expressions of discomfort, or grimacing of facial expressions. As I recall she was in a hurry to pick up family members and was smiling. She never communicated to myself or the doctor any discomfort at any time during the exam[ination] other than the clinic was cool.”

An October 19, 2000 treatment note of Dr. Steven J. Hess, an attending neurosurgeon, related the history that the flight surgeon twisted appellant’s neck during the October 6, 2000 examination. He noted that, when he last saw appellant, “she was having some symptoms but physical therapy in late December [1999] had totally resolved her symptoms. She was pain-free until October 6, 2000.” Dr. Hess suspected that she sustained a cervical strain and recommended physical therapy. An accompanying form report noted that appellant was disabled from October 19 to 23, 2000, when she could resume regular work. Dr. Hess indicated that she was referred for a magnetic resonance imaging (MRI) scan.

On October 20, 2000 the Office advised appellant that it required additional information concerning the claim. Additional records were submitted from Dr. Hess pertaining to his prior treatment of appellant.

In a February 1, 2001 decision, the Office denied appellant’s claim. It found that she did not submit sufficient medical evidence to support a diagnosed condition resulting from the October 6, 2000 flight examination.

On May 1, 2001 appellant requested reconsideration. She described the October 6, 2000 physical, stating: “As the examination began the Flight Surgeon, instructed me to sit upon the

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<sup>1</sup> The record reflects that appellant sustained a nonemployment-related cervical condition in December 1998. She underwent cervical discectomies at C5-6 and C6-7 with anterior interbody fusion at both levels on April, 12 1999. Appellant filed a claim for her condition with the Office but it was not accepted.

<sup>2</sup> On October 12, 2000 Kirby Elliott stated that he became appellant’s first line supervisor on August 13, 2000 and that she had complained off and on of neck pain. He had a conference with appellant on October 4, 2000, at which time she noted she was out of sick leave and discussed a congenital neck problem. Appellant indicated that sometimes she felt like not working radar positions.

examination table, then without any warning or indication that he was going to do so, he unexpectedly twisted my head and neck to a point where I felt an immediate sharp pain in my lower neck area. I immediately stated that his actions were painful and that he had hurt me. Dr. Munyan immediately stepped back and apologized for his actions.” Appellant contended that she had been working pain-free prior to this incident and that the statements of her supervisor were incorrect. She enclosed a statement from a coworker who described the flight surgeon as twisting his head on examination.

Dr. Linda M. Johnson, a neurologist, first examined appellant on November 8, 2000 and noted C6 sensory loss and that an MRI scan showed a C5-6 epidural mass causing stenosis. The history of injury related was that appellant experienced a “sudden onset of right shoulder pain and thumb numbness next day after physician rapidly rotated head to side.” Dr. Johnson opined that this “may be a dis[c] reherniation caused by manipulation.” In a January 25, 2001 attending physician’s form report, Dr. Jennifer Finley, a specialist in physical medicine and rehabilitation, diagnosed myofascial pain, status post multilevel cervical fusion and right carpal tunnel syndrome. She noted a history of the October 6, 2001 incident and marked yes, indicating that appellant’s myofascial pain was caused by this activity. Dr. Finley indicated that appellant was totally disabled.

In a May 8, 2001 decision, the Office denied modification of the February 1, 2001 denial of the claim. The Office noted that a discrepancy existed between appellant’s history of injury and the history of the examination related by Nurse Phalon. The Office accepted, however, that appellant was required to move her head during the examination. It determined, however, that the medical evidence was insufficient to establish how the movement of her head during the examination caused a personal injury.

On May 3, 2002 appellant, through counsel, filed a request for reconsideration and submitted medical evidence from Dr. Sergio Delgado, a Board-certified orthopedic surgeon. In a November 21, 2001 report, Dr. Delgado reported his findings on examination of appellant that date for cervical and right arm radicular complaints. He compared MRI scan studies of the cervical spine dated from January 18, 1999 to November 4, 2000 and set forth appellant’s history of medical treatment. Appellant was reported good health until late 1998 when, after twisting her neck, she was diagnosed with a herniated disc at C5-6 for which she underwent surgery. She received physical therapy following surgery and returned to work from August 1999 to October 6, 2000. An MRI scan obtained on July 12, 1999 was ordered by Dr. Hess in view of persistent cervical and arm complaints. It showed fusions with no recurrent disc herniations. Appellant described that she had minimal complaints until the October 6, 2000 examination, when her neck was forcefully twisted. An MRI scan of November 4, 2000, followed by a myelogram, were judged to be within normal limits expecting for postoperative findings of minimal degenerative changes with no evidence of a recurrent disc herniation. Additional diagnostic studies revealed bilateral carpal tunnel syndrome. Dr. Delgado stated that appellant had not returned to work and was symptomatic in her right arm with minimal neck and shoulder complaints. On physical examination, he noted limited range of motion of the neck with a well-healed low anterior cervical scar from the fusion surgery. There was no tenderness, spasm or

guarding in the paracervical muscles. Dr. Delgado advised that appellant had a preexisting neck condition which did not appear related to her work activities resulting in surgery. He stated:

“Normal progression of her condition would expect resolution of her cervical and right arm complaints as a result of the surgery performed and subsequent physical therapy. In fact, she states, and records show, that she was able to function with minimal cervical or arm complaints prior to the incident following her physical examination of October 6, 2000. I believe this incident as reported could have caused recurrent irritation of her cervical previously injured nerve roots with recurrence of symptoms. I do not believe that spontaneous progression of her complaints would have occurred without a specific incident triggering this recurrence and that she would have been almost symptom[-]free except for the incident reported.”

Dr. Delgado stated that appellant’s carpal tunnel syndrome was not present prior to her return to work and that she related that her work required a repetitive use of her upper extremities. He stated this “would indicate that her development of carpal tunnel syndrome bilaterally would be compatible with a work-related causation for such electromyographic changes.” Dr. Delgado opined that appellant could return to work with restrictions, noting her symptoms were minimal, subject to any limitation concerning her medication. In a December 12, 2001 note, the physician repeated his diagnosis of a C5-6 cervical neuropathy secondary to the incident described by appellant.

In a July 18, 2002 decision, the Office denied modification of the May 8, 2001 decision. The Office noted that appellant had not established as factual that the flight surgeon had forcefully twisted her neck, noting was accepted that she was put through cervical range of motion manipulations during the examination. It found that Dr. Delgado’s opinion on causal relationship to be speculative, noting it was unclear whether appellant’s right arm symptoms were related to a cervical condition or to the diagnosed carpal tunnel condition which the physician related to her work activities and not to the October 6, 2000 incident.

Appellant, through counsel, requested reconsideration by letter dated July 11, 2003 and submitted additional evidence, including an August 6, 2002 addendum from Dr. Delgado. He reviewed the prior findings on examination and stated:

“On page 5 of my original report under Conclusions, I stated, ‘I believe that this incident (referring to the October 6, 2000 injury claim) *could* have cause recurrent irritation of her cervical previously nerve roots with recurrence of symptoms.

“My physical examination revealed no objective evidence to substantiate this opinion nor EMG studies of May 30, 2001, suggest any proximal nerve abnormalities.

“Since pain is subjective in nature, there is not objective data to substantiate this opinion.”

Dr. Delgado recommended additional diagnostic testing and stated that, on the basis of the information available, "I would agree with the claims' examiners conclusion as I would not expect carpal tunnel syndrome findings to cause proximal arm complaints."

On August 4, 2003 the Office denied modification of the July 18, 2002 decision. It was noted that Dr. Delgado's August 6, 2002 letter did not provide objective evidence to substantiate the opinion expressed in his prior reports. Appellant was advised that she could file a separate claim for carpal tunnel syndrome arising from repetitive job duties as the present claim concerned the October 6, 2000 incident and any resulting medical condition.

On August 4, 2004 appellant, through counsel, again requested reconsideration and presented the August 4, 2004 note of Dr. Delgado in support of her contention that a compensable injury was established as arising from the October 6, 2000 examination. The physician stated:

"There was significant decrease in cervical motion after the October 6, 2000 physical examination. I would have expected resolution of her cervical and right arm complaints as a result of the surgery performed on April 1, 1999 (discectomy and fusion). A specific incident triggering a recurrence of her complaints would have been the most probable cause of recurrence of symptoms. The only incident reported by [appellant] is the neck manipulation on October 6, 2000. Inflammatory reaction following this incident would explain her recurrent complaints."

In a September 8, 2004 letter, Paul Infanti, the air traffic manager for the employing establishment, responded to appellant's reconsideration request stating that contemporaneous records noted that appellant had complained of pain for at least eight weeks prior to the examination. It attached the September 1, 2004 note of Dr. Joel A. Dickmann, an osteopath and regional flight surgeon. He stated that the medical records indicated that appellant experienced intermittent bouts of cervical pain prior to the October 6, 2000 examination and that she did not express any concerns or difficulty during the examination to the physician or assisting nurse.

On October 22, 2004 the Office denied modification of the August 4, 2003 decision. It noted that it did not accept as factual that the flight surgeon forcefully twisted her neck during the examination but that appellant moved her neck to the right, left and bent her head to allow him to examine her thyroid and carotid artery. The medical evidence was found insufficient to establish that appellant sustained injury related to the examination.

### **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing that he or she sustained an injury while in the performance of duty.<sup>3</sup> The Office begins with the analysis of whether "fact of injury" has been established. This consists of two general components which must be considered in conjunction with whether the employee has established a traumatic injury. The first is whether the employee actually experienced the

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<sup>3</sup> See *Melinda C. Epperly*, 45 ECAB 196 (1993).

employment incident that is alleged to have occurred at the time, place and in the manner alleged. The second is whether the employment incident caused a personal injury, generally established through the submission of medical opinion evidence.<sup>4</sup> The medical evidence must include a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment incident.<sup>5</sup> Such medical opinion must be one of reasonable medical certainty and supported by rationale explaining the nature of the relationship of the diagnosed condition to the incident implicated by the claimant.<sup>6</sup>

### ANALYSIS

The Office has accepted that appellant underwent a cervical examination on October 6, 2000; however, it did not accept appellant's claim that her neck was forcefully twisted by the flight surgeon on that day. Of record is the contemporaneous statement of Nurse Phalon, present in the examination room. She opined that the flight surgeon did not ask appellant to do anything outside of moving her neck to look right, left and bend her head. Nurse Phalon characterized appellant as not displaying or communicating any sign of discomfort to the physician or herself. This is in contrast with appellant's May 1, 2001 description of the examination in which she noted that the flight surgeon unexpectedly twisted her neck and that she "stated that his actions were painful and that he had hurt me. Dr. Munyan immediately stepped back and apologized for his actions." Based on this evidence, the Office did not error by accepting that appellant underwent routine cervical range of motion manipulations during the examination.

The medical evidence submitted by appellant is not sufficient to establish that she sustained injury due to the flight examination. The October 19, 2000 treatment note of Dr. Hess indicated that he suspected a cervical strain and recommended physical therapy. He did not provide a firm diagnosis of appellant's cervical condition or affirmatively state that her preexisting condition had been aggravated by the October 6, 2000 examination. Dr. Hess noted that he would obtain additional diagnostic testing. The November 16, 2000 report of Dr. Johnson noted C6 sensory loss and that an MRI showed a C5-6 epidural mass causing stenosis. She opined that this "may be a dis[c] reherniation caused by manipulation." While the medical report of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal.<sup>7</sup> Dr. Johnson's opinion that appellant's cervical condition "may be" caused by manipulation is speculative. She provided no medical rationale to explain how appellant's preexisting cervical condition was caused or aggravated by the examination of the flight surgeon. Dr. Finley marked "yes" to a form report indicated that appellant's myofascial pain was caused by the examination. It is well established that a physician checking a box "yes"

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<sup>4</sup> See *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>5</sup> See *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>6</sup> See *Ricky S. Storms*, 52 ECAB 349 (2001).

<sup>7</sup> See *Thomas A. Faber*, 50 ECAB 566 (1999).

to a form report, without additional explanation or rationale on the issue of causal relationship, is of diminished probative value.<sup>8</sup>

Dr. Delgado provided findings following examination of appellant, noting her complaints on November 21, 2001 of cervical and right arm radicular symptoms. The history of injury he obtained from appellant was that of a forceful twisting of her neck by the flight surgeon. As noted, this depiction of the October 6, 2000 examination has not been accepted as factual. Dr. Delgado characterized the November 4, 2000 MRI as within normal limits, except for postoperative findings of degenerative changes, with no evidence of a recurrent herniated disc. As to causal relation, he stated: "I believe this incident as report[ed] could have caused recurrent irritation of her cervical previously injured nerve roots with recurrence of symptoms." Dr. Delgado's opinion is of reduced probative value in that it is based on a history of injury that is not corroborated by the contemporaneous evidence of record.<sup>9</sup> Moreover, the opinion is speculative in nature as the physician noted that the examination "could have" caused irritation to appellant's previously injured nerve roots. On December 12, 2001 Dr. Delgado repeated his diagnosis of a C5-6 cervical neuropathy secondary to the incident as described by appellant. On August 6, 2002 he noted that he reviewed his prior reports and statement on causal relation. Dr. Delgado noted that his physical examination of appellant "revealed no objective evidence" to substantiate his prior opinion nor did EMG studies of May 30, 2001 suggest any proximal nerve abnormalities, as he had previously suggested. He concluded that there was no objective evidence to substantiate appellant's complaints or his prior opinion. Dr. Delgado did agree that he would not expect the carpal tunnel findings to cause proximal arm complaints. This report of Dr. Delgado does not contribute any further probative findings or opinion on the relevant issue of causal relationship. In fact, the physician appears to backtrack from his prior statements. Most recently, on August 4, 2004, he provided a brief note in which he stated that a "specific incident triggering a recurrence of her complaints would have been the most probable cause of [a] recurrence of symptoms." He added that the only incident related by appellant was the October 6, 2000 neck manipulation and that an inflammatory reaction following this incident would explain her complaints. The Board finds that the reports of Dr. Delgado fail to provide a medical opinion of reasonable medical certainty on the issue of causal relationship. Taken as a whole, the reports of the physician are contradictory and fail to explain how appellant's preexisting cervical condition was aggravated or contributed to by routine manipulations performed during the October 6, 2000 flight examination.<sup>10</sup>

### **CONCLUSION**

The Board finds that appellant has failed to establish that she sustained a cervical injury causally related to the October 6, 2000 flight examination.

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<sup>8</sup> See *Linda Thompson*, 51 ECAB 695 (2000).

<sup>9</sup> See *Caroline Thomas*, 51 ECAB 451 (2000).

<sup>10</sup> See *Conrad Hightower*, 54 ECAB 796 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 9, 2005 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: May 16, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board