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Gosman and Civil Aviation Safety Authority [2013] AATA 48 (31 January 2013)

Last Updated: 31 January 2013

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Division	GENERAL ADMINISTRATIVE DIVISION
File Number	2011/5644
Re	Geoffrey Gosman APPLICANT
And	Civil Aviation Safety Authority RESPONDENT

DECISION

Tribunal	Deputy President P E Hack SC
Date	31 January 2013
Place	Brisbane (heard in Cairns)

The decision under review is set aside and the matter remitted to the respondent for reconsideration in accordance with a direction that the applicant did not knowingly or recklessly make a false or misleading statement in relation to his application for a medical certificate.

.....
Deputy President P E Hack SC

Catchwords

CIVIL AVIATION – medical certificate – knowingly or recklessly made false or misleading statement in relation to application for medical certificate – medical certificate refused – applicant did not suffer from glaucoma at any time – use of medication for longer than two consecutive weeks not demonstrated – applicant failed to disclose sleep apnoea – sleep apnoea treated successfully – non-disclosure of sleep apnoea neither knowing nor reckless – not satisfied applicant knowingly or recklessly made false or misleading statement in relation to application for medical certificate – decision set aside – remitted for reconsideration

Legislation **Civil Aviation Safety** **Regulations 1988 (Cth) r 67.180(7)(a)**

Cases

Secondary Materials

REASONS FOR DECISION

Deputy President P E Hack SC

Introduction

1. The applicant, Mr Geoffrey Gosman, holds a private pilot licence. In order to undertake a duty authorised by that licence he is obliged by r 5.04(1) of the [Civil Aviation Regulations 1988](#) (Cth) to hold a current medical certificate appropriate to that licence. In November 2011 a delegate of the respondent, the [Civil Aviation Safety Authority](#) (CASA), decided to refuse to issue Mr Gosman with a medical certificate. That decision was made because the delegate concluded that Mr Gosman had knowingly or recklessly made a false or misleading statement in relation to his application for that medical certificate.
2. Mr Gosman seeks a review of that decision. He contends that he did not knowingly or recklessly make any false or misleading statement.

The legislation

3. By virtue of r 5.04(1) of the [Civil Aviation Regulations](#) the holder of a flight crew licence must not perform the duty authorised by the licence if the person does not hold a current medical certificate appropriate to that licence. [Regulation 5.04\(3\)](#) makes a class 1 or class 2 medical certificate appropriate in the case of the holder of a private pilot licence.
4. Medical certificates are issued under [Part 67](#) of the [Civil Aviation Safety Regulations 1998](#) (Cth). That Part provides for the appointment of appropriately qualified persons as Designated Aviation Medical Examiners (or DAMEs), sets out the medical standards for the issue of medical certificates and provides for the issue and administrative control of medical certificates.
5. The [Civil Aviation Safety Regulations](#) require the holder of a private pilot licence to undertake a medical examination by a DAME before the grant by CASA of a medical certificate. That examination must be repeated at regular intervals for the medical certificate to be renewed.
6. The particular regulation in issue here is r 67.180 of the [Civil Aviation Safety Regulations](#). It sets out the requirements to be satisfied for the issue of a medical certificate. But r 67.180(7) also sets out circumstances under which CASA must not issue a medical certificate. It provides, so far as is presently relevant:

(7) CASA must not issue a medical certificate to an applicant if it is satisfied that the applicant:

(a) has knowingly or recklessly made a false or misleading statement in relation to the application for the medical certificate; or

...

It is relevant to notice that according to a note appended to r 67.180(2) of the [Civil Aviation Safety Regulations](#),

A false statement in relation to the issue of a certificate is an offence punishable by imprisonment for 12 months – see the Criminal Code, section

137.1.

The case for CASA

7. Mr Gosman was seen by Dr Simon Birchley, a DAME, on 25 November 2010. In advance of the examination by Dr Birchley, his office staff completed some of the details of a medical questionnaire and examination form and recorded those details in typescript. Dr Birchley then completed the questionnaire by asking questions of Mr Gosman and recording his answers. There is no suggestion that the answers given by Mr Gosman were not recorded or inaccurately recorded.
8. Section 4 of the questionnaire was directed to matters of medical history. Questions 1 and 6 are relied upon by CASA. Those questions were,

Since the last aviation medical examination, or in the last two years, has the applicant:

1. *been admitted to a hospital or suffered from any medical condition which may affect his/her ability to exercise the privileges of his/her licence?*

...

6. *taken any medically prescribed drugs for longer than two consecutive weeks?*

Each of those questions was answered in the affirmative and further details were given on a later page. But Mr Gosman did not disclose to Dr Birchley, as CASA contends was the fact, that he was suffering, or had suffered, from two conditions, glaucoma and sleep apnoea, that might affect his ability to exercise the privileges of his licence. And he did not disclose, says CASA, that he had been prescribed, and taken for longer than two consecutive weeks, the medication Xalatan, an eye drop used for treating glaucoma.

9. CASA accepts that it is only Mr Gosman's answers given in the examination of 25 November 2010 that may be considered for the purposes of r 67.180(7)(a) of the [Civil Aviation Safety Regulations](#). Despite that, a considerable part of its case was devoted to seeking to demonstrate that in examinations by Dr Birchley on 23 January 2003, 23 June 2004 and 27 November 2007 he had given answers that CASA contends were knowingly or recklessly false or misleading.
10. The submissions for CASA did not descend to any detailed examination or analysis of what the expressions "knowingly" or "recklessly" conveyed. Its representative appeared to accept that the matters that needed to be demonstrated for me to be satisfied that Mr Gosman had knowingly or recklessly made a false or misleading statement in relation to the application were:
 - (a) that as at November 2010 Mr Gosman suffered from, or in the period from November 2007^[1] had suffered from, the conditions of glaucoma or sleep apnoea;
 - (b) that in the period from November 2007 Mr Gosman had used Xalatan for longer than two consecutive weeks;
 - (c) that Mr Gosman knew that he was suffering from these conditions and had used the medication and made a conscious decision not to disclose those facts;
 - (d) alternatively to paragraph (c), that Mr Gosman answered the questions indifferent to the truth or otherwise.

Did Mr Gosman suffer from glaucoma?

11. Glaucoma is a significant condition in aviation because it affects peripheral vision. I am prepared to infer that pilots need good peripheral vision. No medical practitioner was called to give evidence that Mr Gosman suffered from glaucoma. Instead CASA relied upon references in Mr Gosman's medical records, produced in response to a summons. Three documents were

relied upon. They are all of a similar format and appear to be reports sent by Dr Jim Peters, an ophthalmic physician, to Dr Rainer Dressler, Mr Gosman's general practitioner at the time, following consultations that Dr Peters had with Mr Gosman. The reports are dated August 2002, July 2003 and September 2005^[2]. In each report the condition of glaucoma is referred to in a summary of conditions at the outset of the report followed generally by some text regarding the condition. The report of August 2002, by way of example, says this,

...

2. *Primary open angle glaucoma treated with Xalatan, nocte, right and left.*

...

Thank you for referring the above patient, whom I reviewed on 17th July 2002. He reported some deterioration in his near vision, especially in his left eye, and occasional non-compliance with Xalatan, nocte, right and left, for his primary open angle glaucoma.

12. The content of the other reports is no different; they take the matter no further.
13. The evidence falls well short of demonstrating that Mr Gosman suffered from glaucoma from November 2007 onwards. The latest of the reports is from September 2005. Moreover the evidence from Mr Gosman's current ophthalmic surgeon, Dr Stephen O'Hagan, is to the contrary. In a report to CASA of 10 November 2011 Dr O'Hagan wrote,

[Mr Gosman] was originally diagnosed with glaucoma by Dr Peters who commenced him on treatment with Xalatan and after several years of following him showing no signs of progression, he ceased the Xalatan. There was no visual field loss and in fact his last computerised perimetry with us showed full visual fields in both eyes with no loss of vision.

...

I have enclosed a copy of the most recent visual fields for your perusal. I can see no reason why Geoffrey does not meet the standard for his Pilot's Licence with corrective lenses. In my opinion the original diagnosis was probably incorrect and Geoffrey was placed on Xalatan due to ocular hypertension and not glaucoma. I suspect that is what Geoffrey suffers from

...

14. On this aspect of the matter Mr Gosman says that he has never suffered from glaucoma and did not ever consider that he did. He says that at the time Dr Peters was concerned about pressures in his eyes that were a little higher than normal and, for that reason, suggested Xalatan. I have no reason to doubt that evidence. The product information on Latanoprost (Xalatan) lodged by CASA following the hearing says that the,

... medicine is used to treat lower raised pressure in the eye and to treat glaucoma.

15. I am well short of being satisfied that Mr Gosman was suffering from glaucoma at any time from November 2007 onwards.

Did Mr Gosman suffer from sleep apnoea?

16. Mr Gosman accepts that he suffers from sleep apnoea and that he did so at the time of the medical examination in November 2010 and in the period leading up to it.

Did Mr Gosman use Xalatan?

17. The material^[3] demonstrates that Mr Gosman was prescribed Xalatan in January 2008, May 2009 and June 2010 and that it was supplied in January, March, September and December 2008, June 2009 and July 2010. What is not demonstrated is that Mr Gosman had taken, or used, the medication for longer than two consecutive weeks such as would make the failure to disclose false or misleading. Mr Gosman denied that he did use the medication in that period and, as will appear, I accept his evidence.

A knowingly false statement?

18. I should say at the outset that I regard Mr Gosman to be a reliable and credible witness. The account he gives is logical and accords with common sense. He was certainly an argumentative and difficult witness, seized with the righteousness of his cause, but I think in the circumstances it is understandable that he was offended by the conclusions reached by CASA. I see no reason not to accept his evidence despite CASA's sustained attack on his credit.
19. In light of my conclusion above Mr Gosman's failure to disclose the fact of his having suffered from sleep apnoea in the period prior to the November 2010 examination means that he made a false or misleading statement in relation to his application for a medical certificate. The question that now arises is whether that statement was knowingly false.
20. According to Mr Gosman it was not knowingly false. That is so, he says, because he obtained appropriate medical treatment and regarded the condition as "fixed", it "was not a problem any longer".
21. CASA submits that I ought not accept Mr Gosman's evidence. It propounds a case that Mr Gosman has a history of providing false answers to questions in examinations in 2003, 2004 and 2007 as well as the 2010 examination. CASA submits^[4] that in his 2007 examination Mr Gosman failed to disclose conditions of diabetes, glaucoma and narcolepsy and that he failed to disclose that he had been taking Ritalin. It submits^[5] that in the 2003 and 2004 examinations he failed to disclose the conditions of diabetes and glaucoma. CASA's representative was never able to satisfactorily explain to me how these conclusions, assuming that they could be reached, could assist in deciding whether Mr Gosman knowingly (or recklessly) made a false or misleading statement in relation to his application for a medical certificate in November 2010. In the result, that is of no consequence as I do not accept that Mr Gosman was required to disclose the matters relied upon by CASA.
22. I have already concluded that Mr Gosman did not suffer from glaucoma at any time. He cannot then be regarded as having failed to disclose the condition in the course of his 2003, 2004 and 2007 examinations.
23. Mr Gosman disclosed the fact that he was diabetic in the course of his 2010 examination. It seems likely that he has suffered from diabetes for some years. He was referred to a diabetes educator as long ago as 1999 however he says that he was never told by his former general practitioner that he suffered from diabetes. When the problem first arose he changed his diet and achieved a drastic weight loss. He assumed that he had averted the problem. That assumption, now recognised as erroneous, was reinforced by home glucose tests which were always in the normal range. Moreover, Mr Gosman says, he was never prescribed medication for diabetes further reinforcing the erroneous assumption.
24. The falsity of the assumption was demonstrated in June 2009 when a new general practitioner, Dr Andrew Jay, prescribed medication for diabetes following blood tests. It was only then that Mr Gosman realised that he did have diabetes and that his earlier assumption was false. He disclosed the condition and the medication prescribed in the course of Dr Birchley's November 2010 examination. The fact of that disclosure corroborates Mr Gosman's evidence that, prior to June 2009, he was not really conscious of having diabetes. Logic suggests that if, as CASA suggest, he had consciously and knowingly failed to disclose the condition in many earlier examinations he would have continued to do so. The fact that, on this occasion, he disclosed the condition confirms that the earlier non-disclosures were not knowing non-disclosures.
25. This account of events receives further support from the letter from Dr Jay of 7 August 2012.
26. There was then no knowing failure on Mr Gosman's part to disclose the condition of diabetes

during the 2003, 2004 and 2007 examinations.

27. There is no evidence that Mr Gosman suffers from narcolepsy or that he had been prescribed Ritalin. CASA's case is based on a report of Dr Graham Simpson, a consultant physician, of 22 October 2008. The report, to Mr Gosman's then general practitioner, read,

Thank you for getting Geoffrey back to see me after a gap of over 3 1/2 years. As you know when I saw him in early 2005 I was pretty convinced he had bad obstructive sleep apnoea although he was convinced he had narcolepsy and he has been taking Ritalin off his own back more or less ever since. However fortunately an anaesthetist in Townsville has persuaded him to have an assessment prior to his forthcoming knee operation. His symptoms remain fairly severe. He is worried about both his driving license and private pilot's license. I was able to reassure him about his driving license but he will need to contact CASA if he does prove to have OSA. I will see him shortly with these results.

28. Mr Gosman accepts that he had a conversation with Dr Simpson in which narcolepsy and Ritalin were mentioned but he says that it was a conversation in jest; he did not ever have narcolepsy and has not had a prescription for Ritalin (nor otherwise obtained it) for years. I accept his evidence.
29. Thus I reject CASA's case based upon claimed earlier non-disclosures.
30. What remains is the condition of sleep apnoea. CASA's submissions^[6] suggest that Mr Gosman has probably suffered from sleep apnoea since 2005 although it was not diagnosed until 2008. That diagnosis appears to have been made in about October that year when Mr Gosman saw Dr Simpson^[7]. Mr Gosman commenced using a CPAP machine thereafter. According to Dr Simpson, by 19 November 2008 that strategy had improved his condition. Dr Simpson conceded that Mr Gosman had improved "quite significantly" by March 2009. He accepted that, by that stage, it was reasonable for Mr Gosman to treat the condition as having been controlled.
31. It was for this reason that Mr Gosman came to regard the sleep apnoea as being "cured"; because the condition was alleviated by the use of the CPAP machine he did not turn his mind to the condition in the course of Dr Birchley's examination. As I have said, I accept his evidence. There was a failure to disclose on his part but I am not satisfied that it was a knowing failure.
32. It follows that I am not satisfied that Mr Gosman knowingly failed to disclose any information that he was obliged to disclose in the course of the November 2010 examination.
33. It remains to deal with the alternative allegation that Mr Gosman was reckless in not disclosing the sleep apnoea in the course of that examination. CASA suggests, by reference to a dictionary definition, that reckless in this context means "utterly careless of the consequences of action". I do not regard Mr Gosman's failure as satisfying that test. It was not unreasonable on his part to have overlooked the fact that he suffers from this condition given its successful treatment. It is evident from the answers that he gave to Dr Birchley that Mr Gosman did take some care in answering the questions asked of him; I do not consider that he was reckless in omitting to mention the condition of sleep apnoea in the circumstances.
34. I am then not satisfied that Mr Gosman knowingly or recklessly made a false or misleading statement in relation to his application for a medical certificate and the decision should, to that extent, be set aside. There is accordingly no basis upon which the certificate must necessarily be refused however I am not in a position to make a decision in substitution for that decision. I propose to remit the matter to CASA for reconsideration in accordance with the direction incorporating my conclusion. Whether Mr Gosman is otherwise entitled to a medical certificate is a matter for CASA to determine.

I certify that the preceding 34 (thirty-four) paragraphs are a true copy of

the reasons for the decision herein of
Deputy President PE Hack SC

.....
Associate

Dated 31 January 2013

Date(s) of hearing	8 November 2012 & 7 December 2012
Applicant	In person
Advocate for the Respondent	Mr CJ Saggar, Legal Services Division ← Civil Aviation Safety → Authority

[1] The preceding aviation medical examination was undertaken on 27 November 2007.

[2] Pages 1, 2 and 4 of exhibit 3. The exact dates cannot be discerned from the copies available to me.

[3] Exhibit 11.

[4] Exhibit 14, paragraph 61.

[5] Exhibit 14, paragraphs 68 and 74.

[6] Exhibit 14, paragraph 75.

[7] Exhibit 3, page 8.

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