

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EDWIN ACEVEDO and DEPARTMENT OF THE ARMY,  
DHRM, Fort McCoy, WI

*Docket No. 00-2505; Submitted on the Record;  
Issued October 26, 2001*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in rescinding acceptance of appellant's claim for an alleged work injury on January 11, 2000.

On January 11, 2000 appellant, then a 41-year-old heavy mobile operator, filed a notice of traumatic injury and claim for compensation alleging that he experienced back pain on that date while working on a truck at work. He stopped work on January 11, 2000 and has not returned.

On February 16, 2000 the Office received a facsimile transmission from the employing establishment with the following items attached: (1) a copy of appellant's CA-1 claim form; (2) a CA-20 attending physician's report signed by Dr. Jose V. Santos Pico, a Board-certified neurosurgeon;<sup>1</sup> (3) an Office surgery request form;<sup>2</sup> and (4) a CA-16 form dated January 24, 2000 signed by Dr. Jose A. Mulero Fernandez, a family practitioner.

In the CA-16 form, Dr. Fernandez noted that appellant was under his care for complaints of chronic low back pain resulting from appellant having lifted heavy objects at work on January 11, 2000. He diagnosed discogenic disease, L5-S1 disc herniation and L3-4 disc bulging. Dr. Fernandez checkmarked a box indicating that appellant's low back pain was related to his employment.

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<sup>1</sup> Dr. Pico noted that appellant was treated on January 24 and 31, 2000. He recorded appellant's history of injury and complaints of low back pain since January 2, 2000. Dr. Pico checkmarked a box indicating that appellant's diagnosed condition of "herniated disc L4-5" was not caused or aggravated by an employment activity. He also opined that appellant was totally disabled from work pending hospitalization for surgery.

<sup>2</sup> The Office surgery request form is dated February 7, 2000, Dr. Pico recommended that appellant undergo a discectomy at L4-5 for a herniated disc. He stated that appellant had a previous lumbar injury from which he "apparently recovered -- now reinjured while [at] home."

Based on the evidence received on February 16, 2000, the Office accepted the claim on February 29, 2000 for aggravation of a herniated disc. Appellant accordingly received continuation of pay and was placed on the periodic rolls for total disability. He filed several CA-7 claims for wage loss for the period of April 9 to July 15, 2000. Appellant was approved for light-duty work effective September 26, 2000.

In a March 8, 2000 memorandum, the employing establishment notified the Office that appellant's treating physician was suggesting surgical intervention. Attached to the memorandum was a copy of a computerized tomography (CT) scan of appellant's lumbar spine dated January 12, 2000, which showed mild degeneration changes, straightening of the lumbar lordosis and disc herniations at L4-5 and L5-S1. There was also a January 24, 2000 treatment note from Dr. Pico indicating that appellant gave a history of having experienced back pain since January 2, 2000.

On April 4, 2000 the Office received an undated attending physician's report (CA-20) signed by Dr. Pico, noting that appellant had experienced acute onset of low back pain while performing house chores. Dr. Pico noted preexisting injury or disease of low back pain nor radicular at that time. The date of injury was listed as January 11, 2000. Dr. Pico diagnosed a large herniated disc on the right side and recommended that appellant undergo a discectomy and physical therapy.

In a May 23, 2000 report, Dr. Dwight M. Santiago, advised that appellant had undergone lumbar disc surgery on March 2, 2000 with infection complications. He stated that appellant urgently needed to start physical therapy and rehabilitation due to increasing back pain and loss of motion.<sup>3</sup>

On June 13, 2000 the employing agency submitted 35 pages of medical documentation,<sup>4</sup> including medical records from Hospital Pavia dated February 22, 2000. A "Patient History" related that appellant had a history of previous episodes of low back pain with adequate recovery. It is further noted that appellant was in a usual state of health until January 2, 2000 when he experienced acute back pain while performing house chores.

The 35-page transmission also included progress records from Dr. Jose A. Mulero Fenandez. In a progress note dated January 4, 2000, he stated that appellant had "[low] back pain since 2 days ago upon bending forward. No radiation -- Mild difficulty to walk." Dr. Fernandez also treated appellant on January 12, 14 and 17 with no mention of a January 11, 2000 work injury.

In letter dated June 16, 2000, the Office requested a comprehensive report from Dr. Pico. He was further asked to address the causal relationship between appellant's diagnosed back

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<sup>3</sup> Dr. Santiago prepared medial status reports on April 22 and May 23, 2000 listing a date of injury on January 11, 2000. The diagnoses included herniated disc and reported that appellant was totally disabled for work for six weeks.

<sup>4</sup> The bulk of the treatment notes were between March 22, 1995 and January 17, 1996, which predates the alleged work injury of January 11, 2000.

condition and his alleged work injury. Dr. Pico was provided 30 days to respond. However, the Office issued its decision on June 26, 2000.

In a decision dated June 26, 2000, the Office rescinded acceptance of appellant's claim on the grounds that the medical evidence of record established that appellant's back condition was not causally related to the claimed work injury of January 11, 2000.

The Board finds that the Office failed to sustain its burden of proof in rescinding acceptance of appellant's claim for compensation.<sup>5</sup> Section 8128 of the Federal Employees' Compensation Act states the following:

“Review of award. (a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may--

(1) end decrease or increase the compensation previously awarded;  
or

(2) award compensation previously refused or discontinued.”

The regulation implementing the above section of the Act is found at 20 C.F.R. § 10.610, which states:

“The Act specifies that an award for or against payment of compensation may be reviewed at any time on the Director's own motion. Such review may be made without regard to whether there is any new evidence or information. If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time and on the basis of existing evidence) may modify, rescind, decrease or increase compensation previously awarded, or award compensation previously denied. A review on the Director's own motion is not subject to a request or petition and none shall be entertained.”

In this case, at the time the Office accepted appellant's claim, it had before it a Form CA-16 filled out by appellant's supervisor, showing a date of injury as January 11, 2000. The history provided by Dr. Fernandez on Part B of the CA-16, attending physician's report, states that appellant lifted a heavy object on that date and developed low back pain. The diagnosis was “discogenic disease.” As to the question of history or evidence of concurrent or preexisting injury, disease or physical impairment, the physician notes “yes” and reported “low back pain but not discogenic disease.” Dr. Fernandez listed numerous findings including L5-S1 disc

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<sup>5</sup> The Board does not have jurisdiction to review additional evidence submitted by appellant subsequent to the Office's final decision. 20 C.F.R. § 501.2(c). Additionally, although appellant references on appeal an Office decision dated July 26, 2000, there is no decision in the record by that date. The Board notes that the Office sent appellant an informational letter on July 26, 2000 asking that he clarify whether or not he wished to appeal to the Board, request a formal hearing or request reconsideration. Appellant responded on July 20, 2000, indicating that he was pursuing an appeal with this Board. Accordingly, the record does not contain a final decision by the Office dated July 26, 2000. *See generally* 20 C.F.R. § 10.126 (1999).

herniation and L3-4 bulging disc. He indicated that the condition was caused by the employment activity and stated, "Patient works as a mechanic and lifts many heavy objects. Dr. Fernandez noted the date of the first examination as January 14, 2000 and he signed the CA-16 on January 24, 2000. His medical notes reveal he treated appellant on January 4, 12 and 14, 2000.

The Board notes that while the Office noted that it received evidence indicating that appellant was treated for back pain due to an injury he sustained at home on January 2, 2000, none of this evidence disproves appellant's contention that he sustained a lifting injury on January 11, 2000. It does not negate that information provided by Dr. Fernandez on the CA-16 that appellant has discogenic disease, a condition that was not diagnosed until after appellant's work injury. No inference can be drawn from the evidence cited by the Office in its June 26, 2000 decision that appellant did not lift something heavy at work on January 11, 2000 causing him to ask his supervisor for a Form CA-16 and seek medical attention for lower back pain he alleged he experienced following the lifting incident that day. The record simply does not show the Office made a factual error in accepting this claim merely because there was a report of injury at home on January 2, 2000. Moreover, the Board finds the Form CA-16 submitted by Dr. Fernandez probative as to whether appellant sustained an injury on January 11, 2000. Thus, the Board concludes that the Office failed to carry its burden of proof in rescinding acceptance of appellant's claim.

The June 26, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC  
October 26, 2001

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member

Michael J. Walsh, Chairman, dissenting:

In this case, the Office of Workers' Compensation Programs accepted appellant's claim for aggravation of a herniated disc on February 29, 2000. Acceptance was based on a CA-16 form completed by appellant's family physician, Dr. Jose A. Mulero Fernandez, on January 24,

2000, which stated that appellant injured his back on January 11, 2000 while performing heavy lifting.

Subsequent to the acceptance of the claim, however, the Office received new medical evidence indicating that appellant's herniated disc was aggravated by a nonwork-related lifting incident and not the alleged work of January 11, 2000. Specifically, the office received treatment notes from Dr. Fernandez dated around the time of the work injury, on January 12, 14 and 17, 2000 which did not mention that appellant injured his back in the performance of duty. Rather, in a January 4, 2000 treatment note, Dr. Fernandez reported the date of onset of appellant's back pain to be January 2, 2000. Hospital records shed more light on the issue by noting that appellant experienced lower back pain at home on January 2, 2000 after performing house chores.

Appellant was also treated by Dr. Jose V. Santos Pico, a Board-certified neurosurgeon, who reported on several occasions that appellant's back condition was stable until he was performing house chores on January 2, 2000 and began complaining of acute lower back pain. None of the physicians of record discuss the events at work on January 11, 2000 that would have led to an aggravation of appellant's herniated disc. Other than the CA-16 form, which is not a rationalized opinion, there is no medical evidence to establish that appellant's disabling back condition was causally related to the alleged work injury.

I find that the new medical evidence obtained by the Office after the initial acceptance of appellant's claim fails to establish a causal relationship between appellant's back condition and his January 11, 2000 employment incident. Furthermore, the weight of the medical evidence as a whole fails to support a finding that appellant sustained a disabling back injury on January 11, 2000 in the performance of duty as alleged. Although the Office requested a comprehensive medical report from appellant's treating physician explaining the relationship between appellant's herniated disc and his alleged work injury, the Office did not receive a response to its request. I believe the Office properly rescinded acceptance of appellant's claim for compensation and the decision of June 26, 2000 should be affirmed.

Michael J. Walsh  
Chairman