

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUGENE H. LOWERY and DEPARTMENT OF DEFENSE,
REDSTONE ARSENAL, AL

*Docket No. 00-740; Submitted on the Record;
Issued January 24, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant has established that he has any ongoing back conditions or periods of disability after March 22, 1994, causally related to his federal employment.

On December 14, 1993 appellant, then a 57-year-old store worker, filed a claim for traumatic injury alleging that on December 10, 1993 he sustained injuries to his lower right back and hip area when he slipped and fell while pulling a pallet jack in the produce cooler. In support of his claim, appellant submitted several medical reports from his attending physicians, which contained diagnoses of several back conditions, including a herniated nucleus pulposus at L4-5.

In a decision dated October 14, 1998, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that, while appellant alleged on his claim form that he first received medical treatment on December 14, 1993, all the medical evidence of record dated from April 1994 to 1998 and, therefore, he had not submitted any medical evidence to support that he sustained an injury on December 10, 1993.

By letter dated November 23, 1998, appellant requested reconsideration and submitted additional medical evidence in support of his claim.

In a decision dated February 16, 1999, the Office found the newly submitted evidence insufficient to warrant modification of the prior denial. The Office noted that since 1983, appellant had filed eleven claims for compensation with the Office, at least two of which had been accepted. Specifically, the Office previously accepted that on March 22, 1994, appellant sustained a low back strain as a result of unloading produce, but denied a claim for a recurrence of disability on March 22, 1995. In addition, the Office accepted that on April 18, 1998 appellant sustained a lumbosacral strain and right shoulder contusion as a result of falling backward while pulling produce off a rack.

By letter dated March 2, 1999, appellant requested reconsideration and submitted additional evidence in support of his request.

In a decision dated April 13, 1999, the Office found that a newly submitted "Individual Sick Slip," signed by an employing establishment medical officer on December 14, 1993 and containing a diagnosis of lumbar strain sustained on December 10, 1993, was sufficient to establish that appellant sustained an injury on December 10, 1993. The Office, therefore, vacated its October 14, 1998 and February 16, 1999 decisions and accepted appellant's claim for a lumbar strain. The Office further found, however, that the medical evidence of record did not warrant acceptance of any disability after March 22, 1994, or acceptance of a herniated disc, causally related to the December 10, 1993 injury, as the record indicated that on March 22, 1994 appellant sustained a new injury.

By letter dated June 7, 1999, appellant requested reconsideration of the Office's April 13, 1999 decision and submitted additional medical evidence in support of his request.

In a decision dated September 23, 1999, the Office found the newly submitted evidence to be irrelevant to the issue in this claim and, therefore, insufficient to warrant reopening the claim for further merit review.

The Board finds that the case is not in posture for decision and requires further development.

Appellant has submitted supporting medical evidence regarding an ongoing employment-related back condition. In treatment notes dated March 23 through April 15, 1994, Dr. Louis A. Bowick, appellant's treating physician, notes that appellant presented complaining of back pain after having been jarred while using a forklift to unload produce at work.

Appellant was then referred to Dr. Rhett B. Murray, a Board-certified neurological surgeon, who stated in his initial report dated April 27, 1994, that appellant reported having slipped and fallen in a produce cooler, striking his back on a wooden pallet. He diagnosed lumbar radiculopathy and recommended that magnetic resonance imaging (MRI) be performed.

In a report dated May 10, 1994, Dr. Murray noted that an MRI performed that day revealed a large herniated disc at L4-5 with obvious nerve root compression and surrounding inflammation and recommended a right L4-5 lumbar laminectomy and discectomy. In a progress note dated July 18, 1994, he noted that while appellant had not yet received approval from the Office for a lumbar laminectomy, he was no longer in any pain and was released to return to work.

In a report dated March 30, 1995, Dr. Murray noted that following his last evaluation in May 1994, appellant had returned to work without problems, but had recently developed recurrent pain going down his right leg. He concluded that appellant was suffering from a recurrent disc herniation and recommended a repeat MRI. In a follow-up report dated April 18, 1995, Dr. Murray noted that a repeat MRI showed less nerve root swelling and epidural inflammation at L4-5, but that there was still a piece of disc herniated at this level with a small fragment migrated inferiorly. He concluded that appellant's condition was "a recurrence of the same problem as before as the same level is involved and was likely aggravated by work."

The record also contains an undated attending physician's report, Form CA-20, completed by Dr. Murray, which lists a diagnosis of herniated nucleus pulposus L4-5 in 1994, with a recurrent herniation in 1995. The form notes the date of injury as March 22, 1994, gives the history of injury as "slipped in produce cooler landing on a pallet" and indicates by checkmark that the diagnosed conditions are causally related to employment. On a January 15, 1996 attending physician's report, Form CA-20, Dr. Murray listed a diagnosis of herniated nucleus pulposus at L4-5 with nerve root compression and indicated by checkmark that this injury was causally related to a March 22, 1994 employment-related fall.

Finally, the record contains several medical reports from Dr. Murray dating from 1998. In a report dated May 13, 1998, Dr. Murray noted that he had previously treated appellant for a L4-5 disc herniation in 1995 and that while appellant had made a modest improvement from this, he "fell at work in April and, since that time, he has been having increasing back pain radiating down his right leg to the foot." He concluded that appellant had had a recurrence of a disc herniation and recommended a repeat MRI. In a report dated June 9, 1998, Dr. Murray noted that an MRI performed that day revealed improvement, with the previously seen disc herniation at L4-5 having shrunken back. In a separate letter to the Office, also dated June 9, 1998, he stated, in pertinent part: "[Appellant] suffered a herniated disc of his lumbar spine, which was work related."

The Board finds that the uncontroverted medical evidence is sufficiently supportive of a causal relationship between appellant's diagnosed conditions and his accepted work injuries to require further development of the claim.¹ As noted above, in addition to appellant's December 14, 1993 claim, which the Office accepted for a lumbosacral strain, the Office also accepted, in two separate claims, that on March 22, 1994, appellant sustained a low back strain as a result of unloading produce with a forklift and that on April 18, 1998 appellant sustained a lumbosacral strain and right shoulder contusion as a result of falling backward while pulling produce off a rack.

Although the case record as submitted on appeal does contain some references to appellant's additional back injury claims, it does not contain copies of these claims or a complete copy of the records pertaining to these claims. As appellant's December 10, 1993 injury was to the same part of the body injured in each of these accepted claims, these records are pertinent to the current appeal and are necessary for complete consideration and adjudication of the issues raised on appeal. The Board, therefore, finds that the appeal docketed as 00-740 is not in posture for a decision as the Board is unable to render an informed adjudication of the case.

Accordingly, the case will be remanded for reconstruction of the record to include all of appellant's back injury claims.² The Office should then refer appellant, the combined case record and a statement of accepted facts to an appropriate medical specialist for an opinion on whether appellant has any ongoing back conditions or periods of disability, not previously accepted by the Office, causally related to his employment by either proximate causation,

¹ See *Horace Langhorne*, 29 ECAB 820 (1978).

² FECA Bulletin No. 97-10 (issued February 15, 1997) provides that cases should be doubled when a new injury case is reported for an employee who has filed a previous injury claim for the same part of the body.

precipitation, acceleration or aggravation. After such further development as the Office deems necessary, it should issue an appropriate decision to protect appellant's appeal rights.

The decisions of the Office of Workers' Compensation Programs dated September 23 and April 13, 1999 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
January 24, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member