

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

MICHAEL J. CRIBBEN, Appellant

and

**DEPARTMENT OF THE AIR FORCE,
PATRICK AIR FORCE BASE, FL, Employer**

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**Docket No. 03-1538
Issued: March 15, 2005**

Appearances:

*Gregory Eisenmenger, Esq., for the appellant
Office of the Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 4, 2003 appellant filed a timely appeal of an April 28, 2003 decision of an Office of Workers' Compensation Programs' hearing representative, which affirmed a May 31, 2002 decision that denied his claim for wage loss commencing February 13, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established a lumbar condition and disability as of February 13, 2002 causally related to his September 14, 1998 employment injury.

FACTUAL HISTORY

On September 29, 1998 appellant, then a 53-year-old quality assurance evaluator, filed a traumatic injury claim for compensation (Form CA-1) alleging that he sustained injuries in a motor vehicle accident on September 14, 1998. In a hospital report of that date Dr. Mark Mishkind, a surgeon, noted that appellant complained of lower back pain, neck pain, right shoulder pain and right-sided abdominal pain. An x-ray of the lumbar spine obtained that date noted spondylolisthesis and spondylolysis at L5-S1, and stated that this was a chronic process as

there were secondary degenerative changes. The Office accepted the claim for multiple contusions.

Appellant returned to work in October 1998 and worked intermittently. He continued to receive treatment for a cervical condition. In a report dated November 6, 1998, Dr. Richard Newman, a neurologist, diagnosed a right-sided cervical radiculopathy causally related to the September 14, 1998 injury. He noted that appellant had increased back pain consistent with the motor vehicle accident.

The Office accepted cervical radiculopathy as employment related. Appellant underwent a cervical discectomy on August 23, 2000 performed by Dr. Richard Hynes, an orthopedic surgeon. The Office accepted that the surgery was employment related.

On November 5 and 9, 2001 appellant underwent lumbar surgery. Dr. Hynes reported that the procedures include a revision laminectomy L3, 4, 5 and S1. By report dated January 3, 2002, Dr. Hynes stated that appellant was not ready to return to work and "I anticipate with the kind of work he does, he can never return to masonry work or anything like this." Dr. Hynes indicated that appellant could return to a supervisory capacity with limitations in six to nine months from the surgery. He noted that appellant had prior back problems over the years, but since the employment injury his pain had increased dramatically, and "there is certainly significant consideration for the fact that the medical causality would fall primarily upon the recent injury occurring at work." Dr. Hynes noted that he did not have records to review, but "if what [appellant] has described is in fact true, then certainly it is very possible that the major causation for his need for surgery could be related to his recent injury and not his preexisting problem, since he was doing masonry work."

In a report dated January 29, 2002, Dr. Hynes stated that he had reviewed medical records and "it is within a reasonable degree of medical probability that his current condition is a permanent aggravation of a preexisting condition. Based on patient history and having no prior records to review, this permanent aggravation is most likely causally related to his work-related injury of September 14, 1998."

Appellant submitted claims for compensation (Form CA-7) commencing February 13, 2002. In a note dated March 22, 2002, an Office medical adviser stated that appellant had a lumbar spine fusion for a failed laminectomy from 1980, and he could find no connection to the accepted condition of aggravation of cervical degenerative disc disease.¹ By letter dated April 5, 2002, the Office advised appellant that additional evidence was needed to support disability due to a lumbar condition.

By decision dated May 31, 2002, the Office denied appellant's claim for compensation commencing February 13, 2002 because the evidence did not support disability during the period claimed.

¹ There is no evidence that the Office accepted an aggravation of cervical degenerative disc disease.

In a report dated June 27, 2002, Dr. Hynes reviewed medical records and stated in pertinent part:

“Based on history and review of available medical records, the patient did have preexisting lumbar problems that were stable with prior history of lumbar fusion for spondylolisthesis L5-S1. He was able to perform masonry work for a number of years following those procedures. By history and available records, there was no evidence of treatment referable to his back or significant problems with his back until the described September 14, 1998 injury.

“Based on review of available medical records and patient history, he had no prior symptoms referable to the neck prior to his September 14, 1998 injury.

“Based on intraoperative findings of cervical herniated dis[c] C6-7, C7-T1 coupled with cervical spondylosis, I believe the major contributing cause of symptoms and need for medical care and subsequent cervical surgery are causally related to the September 14, 1998 injury.

“Based on intraoperative findings from the lumbar standpoint of pseudoarthrosis, advance degenerative changes L3-S1, prior surgical changes, and epineural fibrosis, the patient did have a preexisting condition related to the back, but the major contributing need for care and further surgery is within a reasonable degree of medical probability causally related to his history of injury, based on available medical records and historical review.

“His injury likely rendered his preexisting asymptomatic pseudo arthrosis and degenerative changes to a symptomatic state that became progressive over years and failed conservative therapy.”

Appellant requested a hearing, which was held on February 27, 2003. By decision dated April 28, 2003, the Office hearing representative affirmed the May 31, 2002 decision. The hearing representative stated that Dr. Hynes did not review the majority of appellant’s medical records and failed to provide a fully reasoned medical opinion.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees’ Compensation Act² has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an “employee of the United States” within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.³

² 5 U.S.C. §§ 8101-8193.

³ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

ANALYSIS

The record indicated that appellant was working as a quality assurance evaluator when he was injured in a motor vehicle accident on September 14, 1998. At the hearing appellant indicated that his job involved construction inspection and included significant climbing; the record does not contain a detailed job description and it is not clear, for example, what specific lifting requirements were involved. The record indicated that appellant returned to work in October 1998 and following cervical surgery in August 2000 appellant underwent lumbar surgeries in November 2001. The Office has not accepted a lumbar condition. His current claim for compensation pertains to the causal relationship of a lumbar condition to the employment injury, authorization for the lumbar surgeries on November 5 and 9, 2001, continuing medical benefits and disability for work after the lumbar surgeries. Appellant did not appear to work after the surgeries, although his claims for compensation were limited to a period commencing February 13, 2002. The Office decisions in this case do not explicitly deny a claim for a lumbar condition or authorization for surgery, but the findings with respect to a claim for disability appear to be based on the lack of causal relationship between the employment injury and a lumbar condition.

The hearing representative found that Dr. Hynes' June 27, 2002 report was deficient in part because he did not discuss all of the medical records regarding appellant's low back. The hearing representative noted, for example, a September 15, 1998 x-ray indicated a chronic process rather than an acute injury, and in November 1998 Dr. Newman noted increased low back pain consistent with the employment accident, but did not provide findings on examination or diagnose a back condition. Dr. Hynes, however, acknowledged that appellant had a preexisting lumbar condition and noted the x-ray report referring to a chronic process. Dr. Newman reported low back pain but treated appellant primarily for a cervical condition, and Dr. Hynes reviewed medical evidence regarding the lumbar condition. He provided a detailed report that reviewed medical reports, including reports contemporaneous to the injury, and demonstrated his familiarity with the injury and appellant's subsequent treatment. Dr. Hynes provided an unequivocal opinion that the September 14, 1998 injury contributed to a lumbar injury and the need for surgeries. He also reported that appellant was disabled for work in his January 29 and July 15, 2002 reports.

The Board finds that the reports of Dr. Hynes are of sufficient probative value to require further development of the medical evidence. Although appellant has the burden of proof to establish the essential elements of his claim, the Office shares responsibility in the development of the evidence.⁴ Dr. Hynes supported causal relationship and there is no probative contrary evidence. An Office medical adviser had briefly stated that he saw no connection between the lumbar surgeries and the accepted condition, but he incorrectly identified the accepted cervical condition and did not provide additional explanation.

On remand, the Office should prepare a statement of accepted facts that includes a description of the date-of-injury job and other relevant details. The Office should secure medical evidence that addresses all of the relevant issues and provides a reasoned medical opinion with

⁴ See *Udella Billups*, 41 ECAB 260, 269 (1989).

respect to whether a lumbar condition is causally related to the September 14, 1998 employment injury, and if so, what medical treatment was appropriate and an opinion as to the specific period of disability for the date-of-injury position. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that the evidence is sufficient to require further development of the medical evidence and the case will be remanded to the Office.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 28, 2003 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: March 15, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member