

U.S. Department of Labor

Employment Standards Administration
Office of Workers' Compensation Program-N00
Division of Federal Employees' Compensation
P.O. Box 8300
London, Kentucky 40742-8300



MAY 14 2007

File Number: 06-2102525

Jerry Garner
1040 Perdido Road
Cantonment, FL 32533

Dear Mr. Garner:

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on March 15, 2007. As a result of such hearing, it has been determined that the decision issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Future correspondence should be addressed to: U.S. Department of Labor, Office of Workers' Compensation Programs, DFEC Central Mailroom, P.O. Box 8300, London, KY 40742.

Sincerely,

Thomas Van Tien
Hearing Representative

Enclosure

cc: Department of Defense
DECA Southern Region
Attn: HRR (OWCP)
1300 E Street
Ft. Lee, VA 23801

Paul Felser
Attorney at Law
P.O. Box 10267
Savannah, GA 31412

U.S. Department of Labor
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et seq. of Jerry Garner, claimant; employed by Department of Defense. Case No.: 06-2102525. Hearing was held on March 15, 2007 in Atlanta, Georgia.

The issue is whether the claimant was totally disabled beginning October 15, 2005 due to the November 29, 2003 injury.

The claimant, born on August 26, 1946 (presently 60 years old) was employed as a meat cutter on November 29, 2003 when he submitted Notice of Traumatic Injury and Claim for Compensation on Form CA-1, claiming that the pain in his low back was due to an injury in the performance of duty that day. He stated that he was lifting ribeye steaks out of a box when the box flipped and he twisted to catch it.

The record reflects that the claimant underwent surgery in 1989 for complaints of left sided radiculopathy consisting of a lumbar discectomy at L5-S1. There is no indication in the record that this surgery was work related. On November 4, 2000 while in the performance of duty as a meat cutter, the claimant bent over to stock meats into a case and had severe pain in his back. Timely notice of traumatic injury and claim for compensation was submitted and the Office accepted the claim for low back strain under file no. 06-2022925. On February 1, 2001 the Office authorized low back surgery which was performed on March 6, 2001 consisting of a right L4-5 microdiscectomy. The claimant was paid compensation for total wage loss from January 14, 2001 through May 26, 2001. He returned to work thereafter until the November 29, 2003 injury.

On December 4, 2003 the claimant was seen by Dr. James Mayr (occupational medicine). He reviewed the claimant's history and noted that he had been having marked low lumbar pain, bilateral upper leg paresthesias and right lateral lower leg pain since the November 4, 2000 injury and was continuing under the care of Dr. Timmons (pain management) and had undergone three lumbar epidural steroid injections. He also reviewed the history of the November 29, 2003 work incident and diagnosed the claimant's

condition as lumbar muscle sprain and bilateral L4-5 and L5-S1 radiculopathy. He prescribed physical therapy.

On January 5, 2004 the Office accepted that the November 29, 2003 incident caused a lumbar sprain.

On February 17, 2004 the claimant was examined by Dr. David LeMay, a physiatrist. He reviewed the claimant's history dating back to the back surgery in 1989 and noted that he had done well until November 2000 when he required the discectomy. He stated that the claimant had been doing extremely well after that until November 29, 2003 when he reagravated his back. He diagnosed the claimant's condition as mechanical low back pain and administered an injection of Toradol. He recommended epidural steroid injections.

On March 10, 2004 an MRI scan of the lumbar spine showed L3-L4 disc dessication with central protrusion, not described on the prior study dated February 17, 2002. It also showed degenerative changes with post-operative findings of a right laminectomy at L4-5 and a left laminectomy at L5-S1.

The record reflects that the claimant stopped working after November 29, 2003 and returned to work on February 18, 2004. He began working four hours per day effective March 13, 2004 on light duty. He was paid compensation for wage loss (leave repurchase) from January 13, 2004 through April 14, 2004. He claimed and was paid compensation for four hours of wage loss per day (50% loss of wage earning capacity) beginning May 2, 2004. He was placed on the automatic roll on January 4, 2005 and has been paid compensation for loss of wage earning capacity to the present time.

On January 10, 2005 the claimant was seen in consultation by Dr. Marcus Schmitz, a neurosurgeon. He reviewed the claimant's history and his prior back surgery, noted that he was working four hours per day and that he had been receiving injections with Dr. Timmons. He stated that a laminectomy and decompression at L3-4 would not relieve the claimant's back pain.

On August 5, 2005 Dr. LeMay re-examined the claimant and noted that he was still having difficulty tolerating part-time work. He noted that Dr. Timmons was discussing a spinal cord stimulator. He noted that the claimant complained of pain radiating into both legs and a burning sensation in the feet and thighs. On physical examination, he reported a negative

straight leg raising test, diminished pinprick sensation lateral and posterior aspect of both legs, reflexes 1/4 at the ankles, 5/5 motor strength (EHL and foot dorsiflexion). He recommended that the claimant continue part-time sedentary work.

On October 13, 2005 Dr. LeMay re-examined the claimant who complained of increased left-sided low back pain which began one month previously and was now radiating into the left buttocks, posterior thigh, and occasionally into the calf and ankle region. On physical examination, he described tenderness to palpation over the left SI joint region and gluteal region, a negative straight leg raising test, difficulty transitioning from sitting to standing and difficulty with extension, diminished pinprick sensation in the lateral and posterior aspect of both legs, reflexes 1/4 at the ankles, and 5/5 motor strength throughout. He recommended that the claimant remain off work for the next week.

On November 2, 2005 Dr. LeMay re-examined the claimant who complained of low back pain radiating to the left lower extremity. He prescribed no work, medication and an epidural steroid injection. He also recommended an MRI scan of the lumbar spine.

On December 21, 2005 an MRI scan of the lumbar spine showed a central disc protrusion with annular rent or tear at L3-L4, a recurrent disc herniation with large extruded fragment at L4-L5, and severe degenerative disc disease at L5-S1 with no definite evidence of recurrent disc herniation.

On March 27, 2006 Dr. Schmitz re-examined the claimant and stated that surgery would consist of a laminectomy with discectomy at L3-4 and L4-5.

On April 1, 2006 the claimant submitted Form CA-2a, claiming a recurrence of his November 29, 2003 injury on September 6, 2005. He indicated that he stopped work on October 15, 2005. He indicated that he started having pinching and cramping in the left leg on September 6, 2005 and it continually got worse and he saw Dr. LeMay on October 13, 2005. The employing agency indicated that the claimant, when he returned to work, was allowed to work at his own pace and perform duties within the restrictions allowed by his doctor.

On April 19, 2006 Dr. LeMay indicated that the claimant was awaiting authorization for surgery and that he would be off work until surgery.

By correspondence dated June 9, 2006 the Office requested the claimant to provide a report from his physician concerning the relationship between his current back condition and the injuries of November 4, 2000 and November 29, 2003. The Office advised the claimant that it was his burden to submit medical evidence establishing that he was unable to perform the light duty job part-time due to his work related back condition.

On June 13, 2006 OPM approved the claimant's claim for disability retirement. On July 12, 2006 the claimant requested that his compensation benefits be stopped, noting that he was applying for disability retirement.

On July 5, 2006 Dr. Schmitz indicated that he wanted to review the films of the recent MRI scan of the lumbar spine dated December 21, 2005 before making recommendations concerning surgery.

On October 4, 2006 the Office requested the District Medical Advisor to review the request for surgery at L3-4 and L4-5 and state whether he concurred that the proposed procedure was indicated in the treatment of the injury of November 29, 2003 which had been accepted for lumbar strain. On October 4, 2006 the District Medical Advisor stated that "the requested surgical procedure is approved." On October 13, 2006 ACS authorized the surgery. On November 30, 2006 Dr. Schmitz performed surgery consisting of lumbar laminectomy from L3 to L5 with redo discectomies at L4-5 and new discectomy at L3-4.

By Order dated November 14, 2006 the Office denied the claim for recurrence of total disability beginning October 15, 2005 on the basis that the medical evidence did not provide proof of an increase in disability based on objective findings or explain how the increase was due to the November 29, 2003 injury. The claimant disagreed with this decision and requested a hearing which was held on March 15, 2007 in Atlanta, Georgia. The claimant did not appear at the hearing but was represented by attorney Paul Felser.

Counsel contended that the medical evidence was sufficient to establish total disability causally related to the work injury effective October 15, 2005. Counsel contended that, at the very least, the claimant was entitled to compensation for total wage loss effective November 30, 2006 since he underwent back surgery that day authorized by the Office. Counsel also contended that the evidence showed that the part-time light duty work the

claimant performed until October 15, 2005 was not medically suitable and exceeded the claimant's restrictions. Counsel requested and was granted 30 days to submit additional medical evidence as well as a statement from the claimant describing the duties which exceeded his physical restrictions and identifying who required him to perform those duties.

The employing agency was allowed an opportunity to comment on the transcript of the hearing. No comments were submitted.

By correspondence dated April 27, 2007 counsel submitted duplicate copies of reports from Dr. LeMay and Dr. Schmitz. Counsel contended that the claim for the November 29, 2003 injury should be expanded since it was doubtful the Office would authorize lumbar surgery for a mere sprain. Counsel contended that the medical evidence established that the claimant was entitled to compensation for total wage loss effective October 15, 2005. No additional evidence was submitted.

A partially disabled claimant who returns to a light duty job has the burden of proving that he cannot perform the light duty if a recurrence of total disability is claimed. The claimant must show a change in the nature and extent of the injury related condition or a change in the nature and extent of the light duty job requirements.¹ Having considered the evidence of record, I find that the claimant has failed to meet his burden of proof.

Although counsel contends that the claimant was required to perform tasks in the light duty job which exceeded his physical restrictions, no evidence has been submitted establishing this and same is therefore not accepted as factual. Accordingly, I find that the evidence fails to establish that there was a change in the nature and extent of the light duty job requirements.

On the issue of whether the claimant's injury related condition worsened to the extent that the claimant was disabled from performing the light duty job effective October 15, 2005, it is noted that the physical findings on examination described by Dr. LeMay on October 13, 2005 do not differ substantially from those reported on August 5, 2005. He does describe an increase in subjective complaints of pain. The subsequent MRI scan of the lumbar spine performed on December 21, 2005 showed a recurrent herniated disc at L4-5, the same level where surgery was

¹ Terry Hedman, 38 ECAB 222.

performed on March 6, 2001 (authorized under file no. 06-2022925). However, the record contains no rationalized opinion from any physician relating this recurrent herniated disc at L4-5 to either the November 4, 2000 work injury or the November 29, 2003 work injury. Although the District Medical Advisor approved the surgical procedure recommended by Dr. Schmitz as causally related to the November 29, 2003 injury, he provided no explanation for this. In sum, the file contains no rationalized opinion that the claimant was totally disabled beginning October 15, 2005 due to the herniated disc at L4-5 shown on the December 21, 2005 MRI scan and that this recurrent herniated disc was causally related to either the November 4, 2000 work injury (and authorized surgery on March 6, 2001 at L4-5) or the November 29, 2003 work injury.

Disability resulting from surgery or treatment authorized by the Office is compensable, even when the surgery or treatment is not for an employment related condition.² Accordingly, the claimant is entitled to compensation for total wage loss effective November 30, 2006 and he may submit Form CA-7 in order to claim such compensation.

When the Office takes the initiative to secure medical opinion on causal relation, the Office assumes the responsibility to secure such opinion in a fair and impartial manner, with such opinion based upon a proper factual and medical background.³ When the Office referred the request for back surgery to the District Medical Advisor on October 4, 2006 there is no indication that any information was provided concerning the November 4, 2000 injury and authorized back surgery performed on March 6, 2001. In view of the fact that the proposed back surgery was authorized and performed on November 30, 2006 based on the unrationalized opinion of the District Medical Advisor, I find that further development of the medical evidence by the Office is warranted and necessary, to include the issue of whether the claimant was totally disabled beginning October 15, 2005 due to a worsening of his back condition causally related to either the November 4, 2000 or November 29, 2003 work injuries. Accordingly, the Order dated November 14, 2006 is hereby set aside.

Upon remand, the Office should direct the claimant to submit a statement (through the employing agency for concurrence) describing the duties of the job he performed four hours per day from March 13, 2004 to October 15, 2005. The Office should

² See Carmen Dickerson, 36 ECAB 409.


³ William Saathoff, 8 ECAB 769.

prepare a statement of accepted facts which includes pertinent details concerning both the November 4, 2000 and November 29, 2003 injuries, including a description of the duties and physical requirements of the light duty job the claimant performed from March 13, 2004 to October 15, 2005. Thereafter, the Office should refer the medical evidence of record and the statement of accepted facts for review by the District Medical Advisor for a reasoned opinion as to whether the claimant was disabled from performing the light duty part-time job effective October 15, 2005 due to a worsening of his back condition, and if so, whether such worsening back condition was causally related to either the November 4, 2000 or November 29, 2003 work injury. Additionally, the District Medical Advisor should be requested to provide a reasoned opinion as to whether the need for the surgery performed on November 30, 2006 was causally related to either the November 4, 2000 or November 29, 2003 work injuries.

Following receipt of the report from the District Medical Advisor and after any additional development deemed necessary, the Office should make a de novo decision concerning the claimant's entitlement to compensation for total wage loss beginning October 15, 2005 and whether the need for the surgery performed on November 30, 2006 was due to either the November 4, 2000 or November 29, 2003 work injuries.

The Office should consider whether the file relating to the November 4, 2000 injury (file no. 06-2022925) should be "doubled" with the instant file under one master file number.

DATED: MAY 14 2007
WASHINGTON, D.C.



Thomas Van Tien
Hearing Representative
For
Director, Office of Workers'
Compensation Programs