U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KELLY L. OWENS and U.S. POSTAL SERVICE,
POST OFFICE, Little Rock, Ark.

Docket No. 97-2445; Submitted on the Record;
Issued June 16, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he sustained an employment-related aggravation to his back in the performance of duty on April 28, 1997.

On May 1, 1997 appellant, then a 33-year-old letter carrier, filed a claim alleging that his back was aggravated by his federal employment on April 28, 1997. Appellant indicated that he had an old athletic injury to his back in 1981. He noted that he felt pain and aggravation in his lower back while bending over a mail tub, in the performance of duty, on April 28, 1997. The record shows that appellant stopped work; sought medical treatment for his back condition and was placed on a flexible and rehabilitated light/limited-duty status from April 28 until May 16, 1997. Appellant resumed his regular duties on May 17, 1997.

The employing establishment has controverted this claim noting that the claimant had injured his back prior to the date of injury while weight lifting. The employing establishment, therefore, does not feel responsible for the preexisting back condition appellant sustained while lifting weights.

Appellant submitted in support of his claim four duty status reports, Form CA-17, from Dr. Gregory Scott Smart, an attending family practitioner, dated April 28, May 5, 9 and 16, 1997. In the April 28, 1997 duty status report, Dr. Smart noted the date of injury as April 28, 1997; described how the injury occurred as an "old injury to lower back -- aggravated April 28, 1997;" checked a "YES" box indicating that the history of the injury given corresponded to that presented in this case that appellant sustained back pain and limited range of motion; diagnosed back pain due to the injury and noted that appellant was off work until released; and wanted to know if light duty was available. In the duty status report dated May 5, 1997, Dr. Smart reiterated the statements made in his April 28, 1997 duty status report, but modified how the injury occurred only to the extent that he stated "reoccurrence (sic) at athletic injury to lower back occurred when employee put tray in cart, returned appellant to work on a

light-duty status with no lifting of more than 10 pounds for 4 hours a day." In the duty status report dated May 9, 1997, Dr. Smart placed appellant on light-duty status for six hours a day for one week. In his May 16, 1997 duty status report, Dr. Smart returned appellant to his regular duty status beginning May 17, 1997.

In a letter dated May 23, 1997, the Office of Workers' Compensation Programs advised appellant of the type of factual and medical evidence needed to establish his claim and requested that he submit such evidence. The Office particularly requested that appellant provide a physician's opinion supported by medical rationale as to the causal relationship between appellant's claimed disability, the injury as reported and specific employment factors. Appellant was allotted only 20 days within which to submit the requested evidence.

By decision dated June 16, 1997, the Office denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to support the fact of an injury in this case. In an accompanying memorandum, the Office noted that appellant was advised of the deficiency in his claim on May 23, 1997 and afforded 20 days to provide supportive evidence; however, no medical evidence of any kind was submitted to support the fact that appellant sustained an employment-related aggravation to his back in the performance of duty on April 28, 1997.[1]

The Board finds that this case is not in posture for decision.

Section 20 C.F.R. § 10.110(b) of the Code of Federal Regulations of the Office provides:

> "If a claimant initially submits supportive factual and/or medical evidence which is not sufficient to carry the burden of proof, the Office will inform the claimant of the defects in proof and grant at least 30 calendar days for the claimant to submit the evidence required to meet the burden of proof."

As of this point, the burden of proof is still on the claimant, but the Office has a duty to assist in some measure in the development of the claim. Furthermore, it is well established that proceedings under the Federal Employees' Compensation Act[2] are not adversarial in nature nor is the Office a disinterested arbiter.[3] While appellant has the burden to establish entitlement to compensation when adjudicating a claim,[4] the Office shares responsibility in the development of the evidence. The Office has an obligation to see that justice is done.[5] Office regulations provide that if a claimant initially submits supportive evidence that is not sufficient to meet the

[1] Following the Office's June 16, 1997 decision, appellant submitted additional evidence. The Board may not consider such evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

[2] 5 U.S.C. §§ 8101-8193.

[3] *See Elaine K. Kreymborg,* 41 ECAB 256 (1989); *William J. Cantrell,* 34 ECAB 1233 (1983).

[4] *See Elaine Pendleton,* 41 ECAB 1143 (1989); *see also* 20 C.F.R. § 10.110.

[5] *See John J. Carlone,* 41 ECAB 354 (1989).

burden of proof, the Office will inform the claimant of the defects in the claim and grant at least 30 days for the claimant to submit responsive evidence.[6]

In the instant case, the Office failed to allow appellant the specified 30 days within which to submit responsive evidence. As noted above, the Office advised appellant of the deficiencies in his claim on May 23, 1997 and indicated that appellant would be allowed 20 days within which to submit the supported factual and/or medical evidence. On June 16, 1997 only 24 days later and less than the 30 calendar days specified by section 10.110(b) of the regulations, which required the Office to grant appellant at least 30 days in which to submit responsive evidence, the Office issued its decision denying appellant's claim for benefits.

The Board will, therefore, set aside the Office's June 16, 1997 decision and remand the case for further appropriate development. On remand, the Office shall again advise appellant of the defects of his claim and properly grant and allow him at least 30 days in which to submit responsive evidence.[7] Following this and after such further development as it deems necessary, the Office shall issue a *de novo* decision.[8]

The decision of the Office of Workers' Compensation Programs dated June 16, 1997 is hereby set aside and the case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
June 16, 1999

George E. Rivers
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] 20 C.F.R. § 10.110(b).

[7] *Id.*

[8] *See supra* note 1.