

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN K. HAYES and U.S. POSTAL SERVICE,
MacLEE STATION, Alexandria, La.

*Docket No. 97-845; Oral Argument Held June 4, 1998;
Issued July 21, 1998*

Appearances: *Henry H. Lemoine, Jr., Esq.*, for appellant; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant had established that she sustained a recurrence of disability causally related to the accepted work injury.

Appellant filed three notices of traumatic injury, claiming that she hurt her neck and shoulder on September 10 and October 16, 1992 following a lifting incident at work and a motor vehicle accident in the performance of duty, and again on January 3, 1995 while trying to lift a tray of letters. The Office of Workers' Compensation Programs accepted these claims for cervical and shoulder strains as well as aggravation and appellant underwent surgery for a fusion at C5-6 on March 27, 1995.

On August 23, 1995 appellant accepted a limited-duty position for four hours a day with the following restrictions imposed by her attending physician, Dr. John M. Patton, a Board-certified neurosurgeon: no lifting more than 25 to 30 pounds and no excessive neck movement, flexion or extension. Dr. Patton indicated that appellant could perform repetitive motions of the wrist and elbow and could return to full-time work in two months. The date of maximum medical improvement was October 1, 1995.

On September 30, 1995 appellant filed a notice of recurrence of disability, claiming that on August 28, 1995 when she returned to work she had to quit after two and a half hours because of intolerable pain in her neck and shoulder. Appellant explained that she was working at a letter case with a leaning stool and had no support for her back and neck; she constantly extended her arms picking up letters and putting them in the proper slots. The employing establishment controverted the claim on the grounds that appellant did not intend to perform the modified assignment because she did not want to work at night.

The Office informed appellant in a letter dated November 15, 1995 that she had to submit certain evidence in support of her claim, specifically that she must establish either that the modified light-duty assignment changed, *i.e.*, became so physically demanding so that she could not work within the restrictions imposed by her physician, or that her work-related injury worsened to the extent that she had to stop work. The Office added that appellant should submit a narrative report from her physician.

On December 21, 1995 the Office denied the claim on the grounds that the evidence failed to establish a causal relationship between the August 28, 1995 work incident and the accepted injury/aggravation. The Office noted that the medical evidence -- two forms dated September 5, 1995 and a November 30, 1995 report from Dr. Patton -- were insufficient to establish that either appellant's physical condition or the modified distribution job had changed. The Office added that appellant had been advised of the deficiencies in her case but had not submitted the requisite evidence.

Appellant timely requested an oral hearing, which was held on July 24, 1996 and submitted additional medical evidence from Dr. Patton and from Dr. Miguel A. Garcia-Caro, Board-certified in internal medicine, as well as Dr. Stuart L. Kutz, a licensed clinical psychologist.

On September 27, 1996 the hearing representative denied appellant's claim for recurrence of disability on the grounds that the medical evidence failed to establish a causal connection between the claimed August 28, 1995 injury and her accepted cervical condition. The hearing representative noted that appellant was entitled to four hours of disability compensation per day from August 28, 1995 and ordered the Office to determine whether, based on Dr. Patton's reports, she was capable of working eight hours a day after two months.¹ The hearing representative also ordered the Office to develop the claim further, based on the reports of Drs. Garcia and Kutz, by referring appellant for a second opinion evaluation.

The Board finds that this case is not in posture for decision and thus must be remanded for further evidentiary development.

In administering the Federal Employees' Compensation Act, the Office must obtain any evidence necessary for the adjudication of the case which is not received when the notice of claim is submitted. Thus, the Office is responsible for advising the claimant about the procedures involved in establishing a claim and requesting all evidence necessary to adjudicate the case.²

The Board has long held that proceedings under the Act are not adversarial in nature, and the Office is not a disinterested arbiter.³ While appellant has the burden to establish entitlement

¹ Appellant appealed the hearing representative's decision to the Board, which thus received the case file. The record does not indicate whether appellant received the partial compensation to which she was entitled.

² Federal (FECA) Procedure Manual, Part 2, *Claims -- Development of Claims*, Chapter 2.800.3.c.(1)-(2) (April 1993).

³ *Richard Kendall*, 43 ECAB 790, 799 (1992) and cases cited therein.

to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.⁴

The Office's procedures provide that while an employee claiming compensation must show sufficient cause for the Office to proceed with processing and adjudicating a claim, the Office has the obligation to aid in this process by giving detailed instructions for developing the required evidence.⁵ The Office's procedure manual states that the claims examiner is responsible for notifying the claimant of unresolved issues which, if not satisfied, will lead to the denial of a claim.⁶ While the claimant must always submit enough evidence to establish a *prima facie* case⁷ "and other evidence which the Office may require,"⁸ the claimant must also be advised of the deficiencies of a claim prior to any denial.⁹

In this case, the Office informed appellant on September 19, 1995 that it had received evidence indicating the possibility of a recurrence of disability in her case and informed her that she needed to submit a form CA-1 or CA-2. Appellant submitted the proper form and other evidence regarding the August 28, 1995 incident, including reports of her emergency room visit on that day and two medical forms from Dr. Patton, stating that she was recovering from surgery and could not return to work until she had undergone six weeks of physical therapy.

On November 15, 1995 the Office informed appellant of her responsibility to prove her claim by submitting certain evidence regarding the modified job assignment and a narrative medical report from her treating physician. Appellant submitted a November 30, 1995 report from Dr. Patton who stated that during her attempt to return to work on August 28, 1995 she was assigned a job sorting mail and repetitive movements of her arm and shoulders caused an exacerbation of neck pain which worsened the condition for which she underwent fusion surgery in March 1995. Appellant also explained that she was in such pain from the assigned job that after two and a half hours she had to leave work and go to the emergency room. She added that she talked to Dr. Patton on August 30, 1995 and underwent further physical therapy to strengthen her arms and shoulders, but was not able to see her physician until October 9, 1995, her scheduled appointment.

In denying appellant's claim on December 21, 1995, the Office stated that she had been advised of the deficiencies in the medical evidence and afforded the opportunity to provide clarifying, supportive evidence. However, the record does not indicate that the Office informed

⁴ *Katharine J. Friday*, 47 ECAB ____ (Docket No. 95-646, issued May 17, 1996).

⁵ Federal (FECA) Procedure Manual, *supra* note 2, Chapter 2.800.3.a.

⁶ *Id.*, Chapter 2.800.3.c.(5).

⁷ *Id.*, Chapter 2.800.3.a.(1)-(5).

⁸ *Id.*, Chapter 2.800.6.a.

⁹ Federal (FECA) Procedure Manual, Part 2 – Claims, *Management -- Occupational Illness*, Chapter 2.806.3. (April 1992).

appellant that Dr. Patton's November 30, 1995 report was insufficient to establish that she sustained a recurrence of disability causally related to the accepted condition.

While the Office apprised appellant of the evidence she needed to submit, it did not advise her that Dr. Patton's opinion failed to meet her burden of proof in establishing a recurrence of disability.¹⁰ Thus, the Office neglected its mandated procedure which requires it to aid appellant in developing the evidentiary record once a *prima facie* case has been established. Therefore, the Board must set aside the Office decisions and remand this case for further evidentiary development.¹¹

On remand, the Office should ask Dr. Patton to clarify his opinion regarding the causal relationship between appellant's accepted neck condition and the August 28, 1995 incident. The Office should also address the issue of appellant's entitlement to partial disability compensation from August 28 to October 1, 1995 and whether, based on Dr. Patton's October 9 and November 30, 1995 reports,¹² appellant was entitled to continuing benefits. Finally, the Office should, as the hearing representative ordered, develop the record regarding the report of Dr. Kutz who indicated a psychological component of appellant's disability and the opinion of Dr. Garcia that appellant has developed fibromyalgia as a result of the accepted condition.

¹⁰ See *Shirley A. Temple*, 48 ECAB ____ (Docket No. 96-883, issued March 18, 1997) (finding that the Office must advise a claimant of the defects in her claim and, if the medical evidence establishes disability, further develop the record).

¹¹ See *Muriel M. Miller* (Frederick C. Miller), 33 ECAB 1624, 1628 (1983) (finding that although the medical reports were somewhat speculative regarding the cause of the deceased's asthma, remand was necessary for the Office to develop the record further).

¹² The Board notes that relevant reports from Dr. Patton, dated August 14 and 25, as well as the October 9, 1995 report of appellant's office visit, are not in the record.

The September 21, 1996 and December 21, 1995 decisions of the Office of Workers' Compensation Programs are set aside, and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
July 21, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member