

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAMELA J. CURVEY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS AFFAIRS MEDICAL CENTER, Houston, Tex.

*Docket No. 97-388; Submitted on the Record;
Issued October 15, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established that she sustained an injury in the performance of duty on September 11, 1995; (2) whether appellant has established that she sustained an injury in the performance of duty on October 8, 1995; and (3) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

Appellant, a nurse, filed a traumatic injury claim on September 15, 1995 alleging that on September 11, 1995 she injured her lower back while helping to subdue a patient. The Office assigned the claim office file number A16-0269540. By decision dated December 13, 1995, the Office denied appellant's claim on the grounds that the evidence did not establish fact of injury.

On October 8, 1995 appellant filed a claim for a back injury occurring on that date when she "had to assist [with] taking [a patient] down to [the] floor forcefully." The Office assigned the claim office file number A16-0269545 and, by decision dated December 13, 1995, denied appellant's claim on the grounds that she did not establish that an injury occurred as alleged.

Appellant requested reconsideration of both claims and submitted additional medical evidence. By decision dated October 11, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification of the December 13, 1995 decision.

By letter dated November 26, 1996, appellant, through her representative, requested reconsideration. In a decision dated December 20, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant review of the prior decision.

The Board has duly reviewed the case record and finds that the case is not in posture for a decision on the issues of whether appellant sustained injuries in the performance of duty on September 11 and October 8, 1995.

An employee seeking benefits under the Federal Employees' Compensation Act¹ 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 and/or specific condition for which compensation is claimed are causally related to the employment injury.²

However, proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.³

In the instant case, the Office accepted that the incidents on September 11 and October 8, 1995 occurred as alleged but found that the medical evidence was insufficient to establish an injury occurred as a result of the incidents. In support of her claim, appellant submitted medical reports from Dr. Steven I. Esses, a Board-certified orthopedic surgeon and her attending physician.

In a report dated October 12, 1995, Dr. Esses noted that appellant "sustained an injury to her back on September 11, 1995, while moving a patient who was struggling with the staff." Dr. Esses further indicated that appellant's condition improved until October 8, 1995 when she "sustained a second low back injury while moving a patient." Dr. Esses diagnosed improving mild low back pain and found that she could return to work.

In a work restriction evaluation dated October 26, 1995, Dr. Esses found that appellant could return to full-time employment with listed restrictions and checked "yes" that the restrictions were due to the employment injury.

In a report dated August 29, 1996, Dr. Esses stated that appellant related a history of injuries to her low back on September 11 and October 8, 1995 while moving patients. On examination he diagnosed mild low back pain with some radiation to the left hip. He further found that a magnetic resonance imaging (MRI) study obtained on November 13, 1995 revealed stenosis. He opined that appellant could return to work without restrictions. In a supplemental report dated October 8, 1996, Dr. Esses related that "the injuries that [appellant] has sustained [are] a direct result of the accidents of September 11, 1995 and October 8, 1995" and noted that he had referred appellant to a pain specialist. In a further supplemental report dated September 20, 1996, Dr. Esses related that appellant had preexisting spinal stenosis which "was

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *William J. Cantrell*, 34 ECAB 1223 (1983).

greatly aggravated by the injuries that she sustained on September 11, 1995 and October 8, 1995.” Dr. Esses further completed a form report in which he diagnosed lumbar sprain and checked “yes” that the condition was due to an employment activity.

In his reports, the Board notes that Dr. Esses provided a consistent history of injury and diagnosed causal relationship. Although none of the reports from Dr. Esses contain sufficient rationale to discharge appellant’s burden of proving by the weight of the reliable, substantial evidence that she sustained an injury in the performance of duty on September 11 or October 8, 1995, it raises an inference of causal relationship sufficient to require further development by the Office.⁴ Additionally, there is no opposing medical evidence in the record.

On remand, the Office should refer appellant, the case record, and a statement of accepted facts to an appropriate medical specialist for an evaluation and a rationalized medical opinion on whether appellant sustained an injury in the performance of duty causally related to factors of her federal employment on either September 11 or October 8, 1995. After such development of her case record as the Office deems necessary, a *de novo* decision shall be issued.⁵

The decisions of the Office of Workers’ Compensation Programs dated December 30 and October 11, 1996 and December 13, 1995 are set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
October 15, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas

⁴ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

⁵ In view of the Board’s disposition of the merits, the issue of whether the Office properly denied appellant’s requests for reconsideration under section 8128 is moot.

Alternate Member