

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LETICIA TORRES and DEPARTMENT OF JUSTICE,  
IMMIGRATION & NATURALIZATION SERVICE, Dallas, Tex.

*Docket No. 97-1519; Submitted on the Record;  
Issued January 27, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant established that she sustained an injury in the performance of duty.

On September 20, 1996 appellant, then a 41-year-old immigration inspector, filed a notice of traumatic injury, claiming that she experienced pain in her elbow after repeatedly firing a Beretta during week-long training exercises in August 1996.

In support of her claim, appellant submitted an October 22, 1996 form report from Dr. Humberto J. Varela, Board-certified in family practice, who diagnosed lateral humeral epicondylitis and referred appellant for physical therapy. Dr. Varela indicated on an undated form that his diagnosis -- known popularly as tennis elbow -- was related to appellant's training with a new gun over four days and that appellant could return to work on October 8, 1996.

On January 30, 1997 the Office of Workers' Compensation Programs denied the claim on the grounds that the evidence failed to establish that appellant sustained any injury in August 1996.

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

Proceedings under the Federal Employees' Compensation Act<sup>1</sup> are not adversarial in nature and the Office is not a disinterested arbiter.<sup>2</sup> While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing

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<sup>1</sup> 5 U.S.C. §§ 8101-8193 (1974).

<sup>2</sup> *Richard Kendall*, 43 ECAB 790, 799 (1992) and cases cited therein.

establishment or other government source.<sup>3</sup> The Board has stated that once the Office has begun investigation of a claim, it must pursue the evidence as far as reasonably possible.<sup>4</sup>

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.<sup>5</sup> The Act requires the employing establishment to report to the Office any injury resulting in death or probable disability and to submit any further information requested by the Office.<sup>6</sup> In addition to supplying evidence in its own behalf, the employing establishment is expected to aid the claimant in assembling and submitting evidence.

In administering the Act, the Office must obtain any evidence necessary for the adjudication of the case, which is not received when the notice or 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.<sup>7</sup>

In this case, the Office failed to advise appellant of the factual and medical evidence necessary to establish her claim. The record contains no correspondence from the Office to appellant pointing out the deficiencies in the evidence submitted in support of her claim. Further, the employing establishment has provided no comment on appellant's claim that she injured her elbow in the performance of duty.

The record does contain a March 9, 1997 letter, from appellant explaining in detail how the diagnosed condition of epicondylitis arose from the firearms training she underwent in August 1996; appellant also submitted photocopied pictures of the new gun and her hand. However, this evidence was not considered by the Office because appellant had failed to request reconsideration and thus cannot be reviewed by the Board.<sup>8</sup>

While Dr. Varela's CA-16 form report is not rationalized, it does raise an uncontroverted inference that appellant's elbow condition was related to the August 1996 training period.<sup>9</sup> Inasmuch as the Office failed to follow its mandated procedures in developing a claim, the Board

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<sup>3</sup> *Id.*

<sup>4</sup> *Leon C. Collier*, 37 ECAB 378, 379 (1986).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2, Claims -- *Development of Claims*, Chapter 2.800.3(a) (April 1993).

<sup>6</sup> Chapter 2.800.3(b).

<sup>7</sup> Chapter 2.800.3(c)(1)-(2).

<sup>8</sup> *See* 20 C.F.R. § 501.2(c) (stating that the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision).

<sup>9</sup> *See John J. Carlone*, 41 ECAB 354, 358 (1989) (finding that medical evidence submitted by appellant is sufficient, absent any opposing medical evidence, to require further development of the record).

will remand this case for further evidentiary development. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.<sup>10</sup>

The January 30, 1997 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.  
January 27, 1999

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>10</sup> See *Raymond H. VanNett*, 44 ECAB 480, 483 (1993) (finding that the Office failed to complete evidentiary development in accord with its own procedures and Board precedent).