

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HERSHELL N. GALL and DEPARTMENT OF THE ARMY,
ALLIED TRADES BRANCH, Fort Lewis, WA

*Docket No. 00-717; Submitted on the Record;
Issued January 4, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant met his burden of establishing that he sustained an injury in the performance of duty.

On April 13, 1999 appellant, then a 47-year-old mechanic, filed a claim for traumatic injury (Form CA-1) alleging that on that day he strained his back while lifting equipment in the performance of duty. He was off work until April 19, 1999.

The record in this case includes progress notes and reports from a physical therapist to Dr. Robert Failor, appellant's treating chiropractor. The record also includes an April 14, 1999 x-ray of appellant's pelvis and lumbar spine which was read as normal.

In a decision dated September 29, 1999, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that appellant's choice of physician was Dr. Failor, a chiropractor, who failed to submit probative medical evidence.

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 Act¹ are not adversarial in nature and the Office is not a disinterested arbiter.² 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

¹ 5 U.S.C. §§ 8101-8193.

² *Richard Kendall*, 43 ECAB 790, 799 (1992).

establishment or other government source.³ The Board has stated that once the Office has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible.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 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. In addition to supplying evidence in its own behalf, the employing establishment is expected to aid the claimant in assembling and submitting evidence.⁶

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.⁷

In this case, the employing establishment authorized medical treatment from Dr. Failor on April 16, 1999. However, the Office failed to advise appellant regarding the kinds of medical evidence that he would need to submit from either a medical doctor or a chiropractor to establish a causal relationship between his condition and his employment. Instead, the Office denied appellant's claim, noting that Dr. Failor, as a chiropractor, did not diagnose a condition based on subluxation and thus any report he may have submitted would not have any probative value.⁸ A review of the file reveals that appellant submitted progress notes and reports from a physical therapist. While these reports also have no probative value, the Office failed to advise appellant regarding the type of evidence he needed to establish his claim.

The Board finds that appellant was not provided with sufficient notice and opportunity to submit the appropriate medical evidence. Instead, the Office issued a decision more than two months after appellant submitted treatment and progress notes from his physical therapist. Further, the employing establishment noted in appellant's claim form that the facts as related by him were true.⁹ Inasmuch as the Office failed to follow its mandated procedures in developing a

³ *Id.*

⁴ *Leon C. Collier*, 37 ECAB 378, 379 (1986).

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

⁶ *Id.* at Chapter 2.800.3(b).

⁷ *Id.* at Chapter 2.800.3(c)(1)-(2).

⁸ In fact Dr. Failor did not submit a medical report.

⁹ See the reverse side of appellant's CA-1 form wherein the agency checked a box noting its agreement with appellant's claim.

claim, the Board will remand the case for further development. After such development of the record as the Office seems necessary, a *de novo* decision shall be issued.¹⁰

The September 29, 1999 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision.¹¹

Dated, Washington, DC
January 4, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

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

¹¹ The Board notes that subsequent to the Office's October 20, 1997 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).