

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN G. BAUMAN and U.S. POSTAL SERVICE,
SEATTLE BULK MAIL CENTER, Federal Way, WA

*Docket No. 03-621; Submitted on the Record;
Issued June 26, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he is entitled to a schedule award due to his accepted cervical spine injury.

Appellant, a 54-year-old mailhandler, filed a notice of occupational disease on September 8, 2000 alleging that he developed a sore and stiff left shoulder due to factors of his federal employment. The Office of Workers' Compensation Programs accepted appellant's claim for cervical strain on October 30, 2000 and expanded appellant's claim on April 2, 2001 to include cervical radiculopathy and cervical fusion.

Appellant requested a schedule award. By decision dated September 13, 2001, the Office denied appellant's request finding that the spine was not a schedule member under the Federal Employees' Compensation Act. Appellant requested an oral hearing on October 11, 2001. By decision dated August 12, 2002, the hearing representative affirmed the Office's September 13, 2001 decision.

Appellant requested reconsideration on November 27, 2002 and submitted new medical evidence. In a letter dated December 13, 2002, the Office requested that appellant's physician respond to specific questions within 20 days and provided both appellant and his attorney with a copy of this request. By decision dated January 8, 2003, the Office denied modification of its prior decision finding that appellant failed to submit the additional medical evidence requested.

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

Section 10.121¹ of the Office's regulations provides:

"If the claimant submits factual evidence, medical evidence or both, but the [Office] determines that this evidence is not sufficient to meet the burden of proof, [the Office] will inform the claimant of the additional evidence needed. The claimant

¹ 20 C.F.R. § 10.121.

will be allowed at least 30 days to submit the evidence required. [The Office] is not required to notify the claimant a second time if the evidence submitted in response to its first request is not sufficient to meet the burden of proof.”

At 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. Proceedings before the Office are not adversarial in nature and the Office is not a disinterested arbiter; therefore, in a case where the Office “proceeds to develop the evidence and to procure medical evidence, it must do so in a fair and impartial manner.”² The Office has an obligation to see that justice is done.³

In this case, the Office failed to allow appellant the specified 30 days within which to submit responsive evidence. As noted above, in a letter dated December 13, 2002, the Office requested that appellant’s physician respond to specific questions within 20 days and provided both appellant and his attorney with a copy of this request. By this letter, the Office advised appellant of the deficiencies in his claim but only allowed 20 days for appellant to submit supportive medical evidence. The Office’s failure to provide appellant with “at least 30 days” to submit the requested information is in direct violation of section 10.121 of its published regulations.

The Board will therefore set aside the Office’s January 8, 2003 decision and remand the case for further appropriate development. On remand, the Office shall again advise appellant of the defects in this claim and allow him at least 30 days in which to submit responsive evidence. Following this and such other development as the Office deems necessary, it shall issue an appropriate decision.

The January 8, 2003 decision of the Office of Workers’ Compensation Programs is hereby set aside and remanded for further development consistent with this opinion of the Board.

Dated, Washington, DC
June 26, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

² *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

³ *John J. Carlone*, 41 ECAB 354, 360 (1989).