

**United States Department of Labor
Employees' Compensation Appeals Board**

WARREN B. DISTL, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Flushing, NY, Employer**

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**Docket No. 03-611
Issued: July 14, 2004**

Appearances:
Linda DeCarlo, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On January 6, 2003 appellant, filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 29, 2002 finding that he failed to establish that his January 19, 2002 injury occurred in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained an injury on January 19, 2002 in the performance of duty, as alleged.

FACTUAL HISTORY

Appellant, then a 53-year-old letter carrier, filed a traumatic injury claim on January 19, 2002 alleging that on that date at 6:30 a.m. he slipped and fell injuring his left thigh. On the reverse of the form, appellant's supervisor stated that appellant was not on the clock at the time the injury occurred at 6:13 a.m. as his tour of duty began at 7:00 a.m. Appellant submitted medical evidence in support of his claim.

Appellant's supervisor completed a statement noting that on January 19, 2002 at 6:13 a.m. appellant reported injuring his leg on the steps to the back entrance of the employing establishment. The employing establishment controverted appellant's claim on February 4, 2002, noting that he was not due at work until 7:00 a.m. and that the injury occurred at 6:13, when appellant was off the clock and 45 minutes prior to the start of his tour of duty.

On April 8, 2002 the Office denied appellant's request for authorization for a magnetic resonance imaging (MRI) scan, noting that his claim was under adjudication and stating, "[w]e are trying to determine if the injury occurred while in the performance of duty."

In a conference memorandum dated October 21, 2002, the Office noted contacting the employing establishment to determine whether appellant was in the performance of duty at the time of his injury. The employing establishment stated that appellant arrived early every morning so as to have breakfast with several other employees rather than to carry out work-related activities. The Office provided appellant with a copy of the memorandum as well as the accompanying letter addressed to the employing establishment and allowed him 15 days to submit comments. The Office stated, "If after reviewing the summary of our discussion you find that the summary does not report accurately what you said, please write me, specifically addressing the inaccuracies, within 15 days of the date of this letter."

By decision dated November 29, 2002, the Office denied appellant's claim finding that he failed to establish that his injury occurred in the performance of duty concluding that his early arrival at the employing establishment was not related to his job duties, but instead was to allow him to join his coworkers at breakfast.

Appellant appealed this decision to the Board and requested an oral argument. This appeal was docketed on January 6, 2003. Appellant withdrew his request for an oral argument on February 19, 2004 and designated the National Association of Letter Carriers as his representative before the Board. The Director of the Office filed a motion to dismiss the appeal on February 23, 2004. Appellant's representative responded on February 27, 2004 and requested that the Board address the merits of appellant's claim on appeal. In an order denying motion to dismiss dated April 20, 2004, the Board considered the arguments of the parties and determined to proceed with the appeal.¹

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of the Act and that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of

¹ Docket No. 03-611 (issued April 20, 2004).

² 5 U.S.C. §§ 8101-8193.

duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.³

It is well established that proceedings before the Office are not adversarial in nature. While the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.⁴ When a claimant initially submits supportive factual or medical evidence which the Office determines is not sufficient to meet the burden of proof, the Office must inform the claimant of the additional evidence needed and allow at least 30 days for the submission of such evidence.⁵

ANALYSIS

In this case, on January 10, 2002 appellant filed a claim and submitted the information requested on the notice of traumatic injury, alleging that his injury occurred at 6:30 a.m. when his shift began at 7:00 a.m. He also submitted medical evidence regarding the nature and extent of the alleged employment injury.

The Office did not request additional information from appellant regarding his claim nor did the Office provide appellant with any information regarding his claim. The April 8, 2002 letter denied an MRI scan and merely noted that the Office was in the process of determining whether appellant's injury occurred in the performance of duty. The Office's next communication with appellant was to provide him with a copy of the memorandum of conference between the claims examiner and the employing establishment injury compensation specialist regarding the allegation that appellant was not in the performance of duty at the time of his January 19, 2002 injury as he was not carrying out his job duties and the injury did not occur during his work hours. The Office allowed appellant 15 days to respond to the employing establishment's allegations. The Office issued the November 29, 2002 decision denying his claim finding that he failed to establish that his injury occurred in the performance of duty.

The Office did not comply with Board precedent⁶ and the applicable regulation⁷ in the development of appellant's claim. Appellant submitted factual and medical evidence that he sustained an injury on January 19, 2002 at 6:30 a.m. at the employing establishment. The

³ *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

⁴ *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

⁵ 20 C.F.R. § 121. The Office's procedure manual also provides that the Office "has the obligation to aid in this process by giving detailed instructions for development of the required evidence," and that the Office "is responsible for notifying the claimant of unresolved issues which, if not satisfied, will lead to denial of the claim." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3a and c(5) (April 1993).

⁶ *John G. Bauman*, Docket No. 03-621 (issued June 26, 2003); *Johnny Jonborg*, Docket No. 02-1376 (issued December 13, 2002).

⁷ 20 C.F.R. § 10.121. This section provides in pertinent part: "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 will be allowed at least 30 days to submit the evidence required..."

employing establishment disagreed with the time of appellant's injury. The employing establishment alleged that the injury occurred at 6:13 a.m. rather than 6:30 a.m. and that appellant was not on the employing establishment premises in the furtherance of his job duties, but rather for personal reasons to have breakfast with his coworkers. The Office did not inform appellant that he needed to provide additional evidence to establish his injury did occur at an appropriate time and while he was in the furtherance of his job duties nor provide him with 30 days to submit the necessary information. The April 8, 2002 letter is not sufficient to comply with the Office's regulatory requirements as it did not describe any additional evidence needed to establish that appellant's claim occurred in the performance of duty. The October 21, 2002 conference memorandum and accompanying letter did not describe the deficiencies in appellant's claim nor allow appellant the required amount of time to respond. The October 21, 2002 letter and conference memorandum, merely included the allegations of the employing establishment and both documents were addressed to the employing establishment injury compensation specialist with a duplicate mailed to appellant. The letter stated, "If after reviewing the summary of our discussion you find that the summary does not report accurately what you said, please write me, specifically addressing the inaccuracies, within 15 days of the date of this letter." The Board notes that appellant was not a party to the conference and this letter does not inform appellant of the additional evidence needed to meet his claim.

Due to the Office's failure to comply with its regulations, the case will be remanded for additional development consistent with this opinion.

CONCLUSION

The Board finds that this case is not in posture for decision as the Office failed to comply with the procedural requirements of its regulations by informing appellant of the additional evidence needed to meet his burden of proof and allowing him the requisite amount of time to reply in an informed manner.

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2002 decision of the Office of Workers' Compensation Programs is set aside and remanded for additional development consistent with this decision of the Board.

Issued: July 14, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member