United States Department of Labor
Employees' Compensation Appeals Board

FRANCES C. MIKILITUS, Appellant	)	
and	)	**Docket No. 04-1817**
	)	**Issued: October 27, 2004**
DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, Albany, GA, Employer	)	

Appearances:
Frances C. Mikilitus, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 7, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated April 1, 2004, which found that she had not established that she sustained an injury 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 claim.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on February 5, 2004, as alleged.

FACTUAL HISTORY

On February 5, 2004 appellant, a 64-year-old meat cutting helper, filed a traumatic injury claim alleging that she injured her back when she pulled meat boxes onto a cart.

In a February 10, 2004 authorization for examination and/or treatment (Form CA-16), the employing establishment authorized treatment by Dr. Joseph M. Jackson, III, a treating Board-

certified family practitioner. In a report dated February 11, 2004, Dr. Jackson reported the history of the injury as occurring when appellant "pulled something in back at work." He indicated a preexisting condition of lumbar spine degenerative disc disease and diagnosed a muscular strain, which he attributed to appellant's pushing, pulling and lifting at work.

On March 3, 2004 the Office advised appellant of the need for additional factual and medical evidence. The Office afforded appellant 30 days within which to submit the requested factual and medical information.

In a response dated March 9, 2004, received March 18, 2004, appellant noted that she had been in the meat cooler lifting boxes of meat weighing 40, 60 and 80 pounds.

By decision dated April 1, 2004, the Office denied appellant's claim on the grounds that she failed to establish a compensable injury as defined under the Federal Employees' Compensation Act.[1]

LEGAL PRECEDENT

Section 10.121[2] 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 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 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."[3] The Office has an obligation to see that justice is done.[4]

ANALYSIS

In this case, the Office failed to allow appellant the specified 30 days within which to submit additional evidence. As noted above, the Office advised appellant of the deficiencies in

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[1] Subsequent to the Office's decision, appellant submitted medical evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sherry L. McFall*, 51 ECAB 436 (2000).

[2] 20 C.F.R. § 10.121.

[3] *Vanessa Young*, 55 ECAB ____ (Docket No. 04-562, issued June 22, 2004).

[4] *Richard E. Simpson*, 55 ECAB ___ (Docket No. 04-14, issued May 3, 2004); *John J. Carlone*, 41 ECAB 354, 360 (1989).

her claim on March 3, 2004 and properly stated that she would be allowed 30 days to submit supportive factual or medical evidence. However, on April 1, 2004, 29 days later, less than the 30 days specified by the implementing federal regulations, the Office issued its decision denying appellant's claim for benefits.

CONCLUSION

The Board will set aside the Office's April 1, 2004 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 her at least 30 days in which to submit responsive evidence. Following this and such other development as the Office deems necessary, it shall issue a *de novo* decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 1, 2004 is set aside and the case remanded for further development consistent with this opinion of the Board.

Issued: October 27, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member