

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALD M. SMITH and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION, Quantico, VA

*Docket No. 03-850; Submitted on the Record;
Issued September 29, 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 to establish that he sustained an injury in the performance of duty on August 28, 2002.

On September 5, 2002 appellant, then a 54-year-old instructor of health and fitness, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1). Appellant stated that, on August 28, 2002, while doing push ups with his physical training class, he felt a pain in his left shoulder blade area. He stated that, since that time, he had tingling and headaches and numbness in the left arm and pain in the back.¹

In a September 17, 2002 Form CA-16, Dr. Brian J. Buckley, Board-certified in internal medicine, indicated that appellant's date of injury was September 3, 2002 and that, on September 12, 2002, appellant reported pain in the left upper back. Dr. Buckley checked a box "yes" that inquired as to whether or not he believed the condition was caused or aggravated by an employment activity and diagnosed left upper extremity radiculopathy. He indicated that appellant had no disability and could return to regular work on September 17, 2002.

In an October 9, 2002 report, Dr. Richard P. Erwin, a Board-certified neurologist, indicated that appellant came in for left arm pain, paresthesias and evaluation. He noted that appellant was doing push ups on August 28, 2002 when he noted left neck and shoulder discomfort. Dr. Erwin indicated that appellant had paresthesias radiating down into his left arm and index finger and thumb which was not excruciating in quality but quite annoying and occasionally would feel as if he had worked out too much. He diagnosed left C6 radiculopathy likely from a C5-6 posterolateral herniated nucleus pulposus.

¹ The record is unclear as to whether appellant lost time from work as it reflects that he stopped and returned on the same date.

In a letter dated November 14, 2002, the Office of Workers' Compensation Programs advised appellant of the additional factual and medical evidence needed to establish his claim and requested that he submit such. Appellant was advised that submitting a rationalized statement from his physician addressing any causal relationship between his claimed injury and factors of his federal employment was crucial. Appellant was allotted 30 days to submit the requested evidence.

On December 13, 2002 the Office received a November 27, 2002 report from Dr. Erwin.

By decision dated December 14, 2002, the Office denied appellant's claim for compensation as he did not establish the fact of injury. The Office stated that appellant was afforded the opportunity to provide supportive evidence, but "[n]o additional evidence was received."

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

In the instant case, the record reflects that, on December 13, 2002, the Office received a November 27, 2002 report from Dr. Erwin, wherein he appears to address causal relation between the diagnosed condition and the employment. The Office did not refer to this evidence in its December 14, 2002 decision. Because the Office specifically stated that "no additional evidence was received," it is clear that the Office did not consider the newly submitted evidence in reaching its decision. In situations such as this, Board precedent holds that the case must be remanded to the Office for a proper review of all the evidence and for an appropriate final decision on appellant's entitlement to compensation.²

² *Linda Johnson*, 45 ECAB 439 (1994); *William A. Couch*, 41 ECAB 548 (1990).

Consequently, the December 14, 2002 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further development in accordance with this decision of the Board.

Dated, Washington, DC
September 29, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member