U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUBY L. FIGUEROA-ERVIN and DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, Hopewell, Va.

Docket No. 97-945; Submitted on the Record;
Issued December 7, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has met her burden of proof to establish that she sustained an injury in the performance of duty on October 2, 1996.

On October 17, 1996 appellant, then a 44-year-old lead accounting technician, filed a notice of traumatic injury (Form CA-1) alleging that on October 2, 1996 as she was leaving the entrance of a restaurant where she had dinner, while on a temporary-duty assignment, a car backed into her vehicle while crossing the intersection. Appellant claimed that she injured her spine, neck, pelvic bone and right knee and had three broken teeth as a result of the car accident. On the Form CA-1, a witness noted that when appellant returned from dinner on October 2, 1996, she was very upset, stated that she had been in an accident, and complained about her mouth and neck. Appellant stopped work on October 7, 1996 and returned to work on October 9, 1996.

On November 25, 1995 the Office of Workers' Compensation Programs advised appellant that she needed to submit rationalized medical evidence in support of her claim.

On December 12, 1996 appellant submitted an attending physician's report (Form CA-20) signed by Dr. Glenn S. Muller, a chiropractor, on December 3, 1996. Dr. Muller indicated that he had first treated appellant on October 7, 1996 and noted she had been involved in a car accident in which another vehicle had backed into her vehicle. He diagnosed "sprain/strain injury" of "E 812.0, 847.0, 847.2, 721.9, 737.3 and 737.2." Dr. Muller performed spinal manipulation and prescribed physical therapy.

In a December 3, 1996 letter, appellant advised the Office that she had submitted all the paper work necessary to make a decision in her case. She indicated that she could not make a claim against her insurance company until the Office refused to pay her claim. Appellant also expressed concern that her medical bills were not being paid.

In a December 4, 1996 letter, the Office informed appellant of the circumstances, in which a chiropractor may be considered a physician under the Federal Employees' Compensation Act.

In a December 24, 1996 compensation decision, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office accepted that appellant was involved in the employment-related car accident on October 2, 1996 while on a temporary-duty assignment. The Office, however, found that the medical evidence did not establish that the accepted incident caused a medical condition. The Office found that Dr. Muller was not a physician as defined by the Act.

The Board finds that the Office properly denied appellant's claim on the grounds that she failed to establish that she sustained an injury in the performance of duty on October 2, 1996.

An employee seeking benefits under the Act[1] has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[2] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

In order to determine whether an employee has sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether a "fact of injury" has been established. There are two components involved in establishing fact of injury which must be considered. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[4] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused personal injury.[5] The medical evidence required to establish causal relationship, generally, is rationalized medical opinion.

In the instant case, it is accepted that the claimed employment incident occurred as alleged. Following the October 2, 1996 car accident, appellant was treated by a chiropractor for a sprain injury of the spine.

With respect to appellant's chiropractic treatment, the Office properly found that Dr. Muller did not diagnose a spinal subluxation. Section 8101(2) of the Act provides that chiropractors are considered physicians "only to the extent that their reimbursable services are

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton* 40 ECAB 1143 (1989).

[3] *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] *Elaine Pendleton*, *supra* note 2.

[5] *Id*.

limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary."[6] Section 10.400(e) of the implementing federal regulations provides:

> "The term 'subluxation' means an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstrable on any x-ray film to individuals trained in the reading of x-rays. A chiropractor may interpret his or her x-rays to the same extent as any other physician defined in this section."[7]

Thus, where x-rays do not demonstrate a subluxation (a diagnosis of a subluxation based on x-rays has not been made), a chiropractor is not considered a "physician," and his or her reports cannot be considered as competent medical evidence under the Act.[8]

In the instant case, because Dr. Muller did not diagnose a subluxation, his opinion is not considered medical evidence.[9] Although appellant was specifically advised by the Office of the circumstances under which a chiropractor may be considered a physician and of the need to submit a medical opinion from a physician, she failed to provide any medical evidence diagnosing an injury causally related to the employment incident. Thus, as there is no medical evidence of record to establish that appellant sustained an injury in the performance of on October 2, 1996, appellant is not entitled to compensation.

[6] 5 U.S.C. § 8101(2).

[7] *See* 20 C.F.R. § 10.400(e).

[8] *See Susan M. Herman*, 35 ECAB 669 (1984).

[9] *Id*.

The decision of the Office of Workers' Compensation Programs dated December 24, 1996 is affirmed.

Dated, Washington, D.C.
December 7, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member