

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

C.S., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION)
MEDICAL CENTER, Tomah, WI, Employer)

Docket No. 14-269
Issued: May 12, 2014

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 18, 2013 appellant, through her attorney, filed a timely appeal from an October 3, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her traumatic injury claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 sustained an injury on April 8, 2010 in the performance of duty.

FACTUAL HISTORY

On November 26, 2010 appellant, then a 44-year-old nurse, filed a traumatic injury claim alleging that on April 8, 2010 she sustained a spinal subluxation pushing a patient in a wheelchair who weighed over 450 pounds. She did not stop work.

¹ 5 U.S.C. § 8101 *et seq.*

By letter dated December 6, 2010, OWCP requested that appellant submit additional factual and medical information in support of her claim. It further advised her that a chiropractor was a physician under FECA only to the extent that he or she diagnosed a spinal subluxation by x-ray.

In a letter dated December 10, 2010, appellant related that she experienced a sharp pain after pushing a patient. She notified her supervisor within 24 hours of the incident. Appellant's pain increased over the course of a few months and she sought treatment.

Appellant submitted chart notes dated November 17 through December 20, 2010 from Dr. Travis Tann, a chiropractor, who treated her for pain at the midback and indicated that the pain began seven months ago after she pushed a patient in a wheelchair.

By decision dated January 11, 2011, OWCP denied appellant's claim after finding that she had not submitted any medical evidence supporting that she sustained an injury causally related to the accepted April 8, 2010 employment incident. It determined that the chiropractor did not diagnose a subluxation by x-ray and, consequently, was not a physician under FECA.

On January 18, 2010 counsel requested reconsideration. She related that she had never experienced thoracic pain in her back before the April 8, 2010 incident

In an x-ray report dated November 18, 2010, Dr. Tann found arthrosis of the thoracic spine particularly at T8-L1. He further diagnosed subluxations at T2-6, T9-12 and L1-2.

Appellant submitted chart notes documenting her chiropractic treatment from December 29, 2010 through February 1, 2011.

By decision dated March 28, 2011, OWCP denied modification of its January 11, 2011 decision.

On March 26, 2012 appellant, through her attorney, requested reconsideration. In a statement dated March 3, 2012, she related that she did not seek treatment for her injury before November 17, 2010 because she believed that it would resolve with conservative care.²

By letter dated March 28, 2012, counsel asserted that she had established that she timely reported the April 8, 2010 incident to the employing establishment and that Dr. Tann diagnosed a subluxation by x-ray. He stated, "The fact that the subluxation in her back was not diagnosed until November 2010 does not mean that it was not work related and did not arise out of the April 8, 2010 incident." Counsel asserted that appellant, as a nurse, tried to treat her back with conservative care.

In a decision dated August 30, 2012, OWCP denied modification of its March 28, 2011 decision. It found that the medical evidence was insufficient to show that appellant sustained a

² In an April 9, 2010 incident report, appellant related that on April 8, 2010 she sustained upper back pain after pushing a patient weighing over 400 pounds to the parking lot. In an April 30, 2010 employing establishment clinic note, signed by Dr. Katherine L. Kostamo, a Board-certified internist, a nurse noted that appellant related that she injured her back on April 8, 2010 pushing a patient. The nurse recommended that appellant make a medical appointment for an evaluation with either Dr. Kostamo or her private physician.

medical condition due to the April 8, 2010 work incident. OWCP noted that her x-rays were not contemporaneous with the employment incident.

On March 1, 2013 appellant, through her attorney, requested reconsideration.

In a report dated January 25, 2013, Dr. Tann related that appellant described the injury as occurring when she turned a corner while moving a patient and “felt a sharp pain in her thoracic and thoracolumbar spine.” He provided examination findings and diagnosed “subluxations on multiple levels in her thoracic, lumbar and pelvic regions of her spine as well as thoracic and lumbar pain and disc degeneration as outlined by her radiological report.” Dr. Tann stated, “In my medical opinion, the facts of the injury are the direct and proximate cause of the diagnoses that I cited above. This is based on reasonable medical probability. There may be other causes for this medical problem, but one of the causes is clearly the activities of work described by [appellant] and described above.”

By decision dated October 3, 2013, OWCP denied modification of its August 30, 2012 decision. It found that the medical evidence was insufficiently rationalized to show that appellant sustained a medical condition as a result of the April 8, 2010 employment incident. OWCP further found that the x-rays obtained were not contemporaneous with the incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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 FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while 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.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether “fact of injury” is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁶ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.⁷ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.⁸

³ 5 U.S.C. § 8101 *et seq.*

⁴ *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

⁵ *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁶ *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

⁷ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

⁸ *Id.*

Section 8101(2) of FECA provides that the “term ‘physician’ includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist....”⁹

ANALYSIS

Appellant alleged that she injured her back on April 8, 2010 pushing a heavy patient in a wheelchair. She has established that the April 8, 2010 incident occurred at the time, place and in the manner alleged. The issue, consequently, is whether the medical evidence establishes that appellant sustained an injury as a result of this incident.

The Board finds that appellant has not established that the April 8, 2010 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.¹⁰

On January 25, 2013 Dr. Tann, a chiropractor, noted that appellant related a history of pain in her thoracic and thoracolumbar spine after moving a patient. He diagnosed multiple subluxations by x-ray. Dr. Tann attributed the diagnosed conditions to the work injury. As noted, under section 8101(2) of FECA, chiropractors are only considered physicians and their reports considered medical evidence to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.¹¹ OWCP’s regulations at 20 C.F.R. § 10.5(b)(b) define subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.¹² As Dr. Tann diagnosed spinal subluxations by x-ray, his report is that of a physician under FECA.

OWCP found that Dr. Tann’s reports were insufficient to meet appellant’s burden of proof as he did not obtain x-rays within a reasonable amount of time after the injury and as he failed to support his opinion with rationale. While diagnostic testing performed immediately after an alleged injury tends to increase the reliability of a medical opinion regarding the relationship between any condition documented by the testing and the employment injury, the Board has held that the timing of diagnostic testing alone should not be given dispositive weight to the exclusion of other circumstances.¹³ Therefore, the fact that Dr. Tann did not obtain x-rays until November 18, 2010 does not preclude him from being a physician under FECA.¹⁴ To discharge a claimant’s burden of proof, however, he must provide sufficient medical rationale to support the affirmative opinion offered regarding the cause of the diagnosed subluxations.¹⁵ Dr. Tann did not explain how the April 8, 2010 employment incident resulted in spinal

⁹ 5 U.S.C. § 8101(2); *see also Michelle Salazar*, 54 ECAB 523 (2003).

¹⁰ *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

¹¹ 5 U.S.C. § 8101(2); *Paul Foster*, 56 ECAB 208 (2004).

¹² 20 C.F.R. § 10.5(b)(b).

¹³ *See Linda L. Mendenhall*, 41 ECAB 532 (1990).

¹⁴ *See Lauramae Heard*, 42 ECAB 688 (1991).

¹⁵ *See supra* note 13.

subluxations. A mere conclusion without the necessary rationale explaining how and why a physician believes that a claimant's accepted exposure could result in a diagnosed condition is not sufficient to meet a claimant's burden of proof.¹⁶ Such rationale is particularly necessary in this case given the length of time between the April 8, 2010 work incident and November 2010, when appellant sought medical treatment.

Appellant also submitted numerous progress reports from Dr. Tann describing her chiropractic treatment. These reports, however, do not contain a diagnosis or causation finding and thus are of little probative value. As appellant has failed to submitted reasoned medical evidence based on a complete factual history addressing whether she sustained an injury on April 8, 2010, she has not met her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that she sustained an injury on April 8, 2010 in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 12, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ See *J.C.*, Docket No. 13-1945 (issued February 24, 2014); *Beverly A. Spencer*, 55 ECAB 501 (2004).