

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

B.O., Appellant)	
)	
and)	Docket No. 14-1877
)	Issued: January 13, 2015
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, East Boston, MA,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On August 26, 2014 appellant, through his attorney, filed a timely appeal from a July 16, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 met his burden of proof to establish a traumatic injury in the performance of duty on September 27, 2012.

On appeal, appellant's attorney asserts that the July 16, 2014 decision is contrary to law and fact.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On October 11, 2012 appellant, then a 34-year-old lead transportation security officer, filed a traumatic injury claim alleging that on September 27, 2012 he sustained a herniated disc at L5 while lifting large bags from the floor to a belt to a table. The employing establishment indicated that he had not lost time or incurred a medical expense.

In support of his claim, appellant submitted an October 24, 2012 report in which Dr. Robert Bates, a chiropractor, indicated that he had been treating appellant for injuries sustained at work since October 1, 2012. He telephoned OWCP on November 7, 2012 and was informed that in order to obtain treatment authorization for a chiropractor, the claim had to be accepted and a spinal subluxation had to be shown by x-ray. In treatment notes dated October 24 and 30 and November 1, 2012, Dr. Bates described appellant's complaints of low back and leg pain, provided physical examination findings, and diagnosed probable disc herniation. He indicated that appellant was undergoing aggressive chiropractic rehabilitation. Appellant also submitted (Form CA-7) claims for intermittent compensation from October 24 to November 16, 2012. In letters dated November 16 and 28, 2012, Dr. Bates indicated that he had treated appellant "for injuries sustained at work."

By letter dated December 3, 2012, OWCP informed appellant that his claim had originally been processed up as a minor injury with no lost time, but it had been reopened for review and adjudication. Appellant was informed that no action could be taken on Form CA-7 claims, pending adjudication of his initial traumatic injury claim. In a December 4, 2012 letter, OWCP again informed him of the evidence needed to support his claim. It specifically advised that a chiropractor did not qualify as a physician under FECA unless there was a diagnosed spinal subluxation that was confirmed by an x-ray.

On December 10, 2012 Dr. Bates indicated that appellant was seen for treatment on December 3, 5, and 10, 2012. Appellant telephoned OWCP on December 18, 2012 and was told that an x-ray report had not been received. He submitted an additional Form CA-7 claim for intermittent compensation from October 24 to December 10, 2012.

By decision dated January 4, 2013, OWCP found that the September 27, 2012 lifting incident occurred as described. However, it denied the claim because appellant had not submitted sufficient medical evidence to meet his burden of proof. OWCP noted that Dr. Bates did not qualify as a physician under FECA and there was no medical evidence of record that established a medical condition causally related to the September 27, 2012 incident.

Appellant telephoned OWCP on January 9, 2013. He was told that the record did not contain a report diagnosing subluxation by x-ray. On January 23, 2013 appellant requested reconsideration and submitted January 16, 2013 correspondence in which Dr. Bates indicated that he had been treating appellant since October 1, 2012 for work-related low back sprain strain, radiculopathy, and a probable disc herniation. He indicated that the billing diagnosis was lumbar subluxation. Appellant also submitted a seven-page report describing his initial visit with Dr. Bates that included physical examination findings and appellant's description of the September 27, 2012 incident. On a disability slip dated October 11, 2012, Dr. Bates indicated that appellant could only perform light work until further notice. In multiple treatment notes from October 1 to December 3, 2012, he noted appellant complaints of neck, low back, and leg

pain, described physical examination findings, and diagnosed improving probable disc herniation. Dr. Bates indicated that appellant was undergoing aggressive chiropractic rehabilitation.

In a merit decision dated July 11, 2013, OWCP denied modification of the prior decision. It noted that none of the medical reports submitted on reconsideration indicated that x-rays were performed upon which a diagnosis of spinal subluxation was based.

On June 26, 2014 appellant, through his attorney, requested reconsideration. He submitted a February 26, 2014 report, in which Dr. Bates indicated that he first evaluated appellant on October 1, 2012 for subjective complaints of moderately severe low back pain, left leg numbness, and cramping that radiated to the foot. Dr. Bates stated that appellant reported that he was involved in an incident on September 27, 2012 when he lifted several heavy bags at work. He described October 1, 2012 physical examination findings. Dr. Bates also stated:

“X-rays were performed on November 7, 2012 consisting of a lumbar series with obliques. There was a noted subluxation at the L5-S1 level with a forward flexion distortion in standing at L5-S1. A diagnosis was formulated which consisted of a subluxation of L5, sprain strain of the lumbosacral junction, probable radiculopathy with apparent neuropathy. It is my considered opinion to a reasonable degree of medical/chiropractic certainty that there is a direct causal relationship between the symptoms manifested and the disability demonstrated by the patient as well as the subluxation of L5 documented and the work-related accident of September 27, 2012.”

In a merit decision dated July 16, 2014, OWCP denied modification of the prior decisions. It found that Dr. Bates was not considered a physician under FECA, noting that, while he stated in his February 26, 2014 report that subluxation was diagnosed by x-ray, he did not identify who took the films, and an interpretation of x-rays taken on November 7, 2012 did not accompany his report.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 timely filed within the applicable time limitation period of FECA, 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. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.²

OWCP regulations, at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.³ To determine whether an employee sustained a traumatic injury in the

² Gary J. Watling, 52 ECAB 278 (2001).

³ 20 C.F.R. § 10.5(ee); Ellen L. Noble, 55 ECAB 530 (2004).

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. 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. 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.⁴

Under section 8101(2) of FECA, 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 and subject to regulation by the Secretary.⁵ Implementing regulations indicate that the diagnosis of spinal subluxation must appear in the chiropractor’s report, and a chiropractor may interpret his or her x-rays to the same extent as any other physician.⁶

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁷ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁸ Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.⁹

ANALYSIS

As noted above, a chiropractor is not considered a physician under FECA without an x-ray diagnosing subluxation.¹⁰

Dr. Bates, the attending chiropractor, indicated on February 26, 2014 that a lumbar spine x-ray had been completed on November 7, 2012 and that the x-ray demonstrated a subluxation at L5-S1. He advised that this was caused by the September 27, 2012 work incident. The Board notes, however, that a copy of the x-ray report is not in the record, and in his treatment note dated November 7, 2012, Dr. Bates did not indicate that an x-ray was completed. Thus, the record does not show that Dr. Bates was interpreting his x-ray or one obtained in conjunction

⁴ *Supra* note 2.

⁵ 5 U.S.C. § 8102(2); *see D.S.*, Docket No. 09-860 (issued November 2, 2009).

⁶ 20 C.F.R. § 10.311(b)(c).

⁷ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁸ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

⁹ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹⁰ *Supra* note 5.

with his treatment of appellant, as required under the implementing federal regulations.¹¹ The record contains no medical evidence other than Dr. Bates' reports.

The Board therefore concludes that Dr. Bates is not a physician as defined under FECA, and his services do not constitute authorized medical treatment.¹² Accordingly, appellant failed to establish a traumatic injury due to the September 27, 2012 employment injury.

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(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a traumatic injury in the performance of duty on September 27, 2012.

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 13, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

¹¹ *Supra* note 6; see *Sean O'Connell*, 56 ECAB 195 (2004).

¹² *Id.*