

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHELLE MATTSSEN and U.S. POSTAL SERVICE,
POST OFFICE, Minneapolis, Minn

*Docket No. 96-2380; Submitted on the Record;
Issued August 4, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden to terminate chiropractic services authorized by hearing representative decision with a specific finding of an injury and subluxation demonstrated by x-ray evidence.

Appellant, a 34-year-old letter carrier, experienced pain in her lower back on August 10, 1993, which she believed was due to excessive lifting. Appellant filed a Form CA-1, claim for traumatic injury, on August 12, 1993.

In a Form CA-17, duty status report, dated August 27, 1993, Dr. Lori Marek, appellant's treating chiropractor, indicated that appellant's x-rays revealed appellant had a subluxation at L2 and L5. In a Form CA-20, attending physician's report, dated September 20, 1993, Dr. Marek stated appellant's x-rays showed appellant had a subluxation at L2, L5 and the pelvis, and released appellant to return to work as of September 21, 1993 with restrictions on lifting over 30 pounds.

In a decision dated September 30, 1993, the Office denied appellant's claim, finding that she failed to submit sufficient factual and medical evidence to establish that she sustained an injury in the performance of duty on August 10, 1993.

By letter dated October 23, 1993, appellant requested an oral hearing before an Office hearing representative.¹

Appellant submitted a November 13, 1993 medical report from Dr. Marek and her chiropractic associate, Dr. Robert L. Thatcher, who stated that x-rays of appellant, taken on August 11, 1993, showed a subluxation at T1 through T4, T6 through T8, T12, L2, L5, C1-2,

¹ In a letter dated March 23, 1994, appellant withdrew her request for a hearing; nevertheless, the case was reviewed by an Office hearing representative.

C5-6. Dr. Thatcher concluded that a thorough review of appellant's history of sustaining an injury at work on August 10, 1993, in addition to her subjective complaints, was highly consistent with his objective findings,² which enabled him to conclude with "a very strong degree of medical certainty" that appellant's current spinal condition was a direct result of her August 10, 1993 employment injury.³

By decision dated April 7, 1994, an Office hearing representative set aside the Office's previous decision denying benefits, finding that appellant had discharged her burden to submit sufficient factual and medical evidence to establish that she sustained an injury on August 10, 1993. The hearing representative stated that the Office accepted the claim for subluxation at L2 and L5.

In a June 15, 1994 memorandum of an Office telephone call to the office of Dr. Thatcher, the Office stated that it had spoken to Dr. Thatcher's secretary regarding appellant's current need for chiropractic care. The memorandum indicated that Dr. Thatcher's secretary had allegedly responded that appellant had reached maximum medical improvement and that her condition had resolved.

In a June 20, 1995 memorandum of an Office telephone call with appellant's union representative, who had called the district office to inquire why the Office had not authorized payment for appellant's chiropractic bills, the Office stated that it had informed the union representative that it had spoken with Dr. Thatcher's secretary on June 15, 1994, who had told the Office that appellant's condition had resolved and that, therefore, no further chiropractic treatment was necessary after June 15, 1994.

In a letter to the Office dated June 28, 1995, Dr. Thatcher's secretary conceded that she had spoken to the Office on June 15, 1994, but stated that her notes indicated she had stated appellant must be doing better because she had not been seen in the clinic for six weeks, but that "in no way" had she stated that appellant was "fine" or that she needed no further chiropractic care. Dr. Thatcher's secretary stated that she was not a physician, nor was she authorized to provide such an opinion and advised that "all treatment to date has been both reasonable and necessary."

In a memorandum dated September 12, 1995, the Office referred appellant's medical file, including x-rays taken of appellant's spine on June 13, 1988, August 11, 1993 and June 29, 1994, to Dr. Dan McFarland, Board-certified in radiology and nuclear medicine, and requested that Dr. McFarland determine whether any of these x-rays evidenced a subluxation of the spine and to specify the x-rays in which a subluxation was indicated.

In a report dated September 20, 1995, Dr. McFarland stated that there was a transitional vertebra, a partially secularized L5, with prominent traverse processes, and that on the left, the transverse process articulated with the sacrum with some sclerosis at the articulation.

² Dr. Thatcher listed these objective findings as decreased lumbar range of motion, kinesiological evaluation (weak muscle strength), neurological testing, positive orthopedic tests, and palpation and radiographic analysis.

³ The report was signed by Dr. Thatcher and co-signed by Dr. Marek.

Dr. McFarland noted that this sclerosis had been present on all studies since 1988. Dr. McFarland also reported that there was a slight dorolumbar scoliosis convex to the right that was minimally increased on the most recent study of June 29, 1994, in comparison with the first two prior x-rays of June 13, 1988 and August 11, 1993, which was centered at T-12 and could be considered a subluxation due to the apparent misalignment. Dr. McFarland stated that there were no other changes to suggest subluxation or other abnormality in the x-rays.

By decision dated October 24, 1995, the Office terminated all reimbursement payments for chiropractic care, finding that the medical evidence of record established that appellant's vertebrae problem at L5 was present prior to her claimed date of injury on August 10, 1993 and that no subluxation of her spine had been demonstrated by x-ray to exist.

In a memorandum accompanying the decision, the Office noted that there was evidence in the record indicating that appellant, although denying in the instant claim that she had ever had any similar disability or symptoms before her claimed injury of August 10, 1993, had previously stated that she injured the same area about four to five years ago and had filed another claim of injury for July 28, 1993. The Office further stated that it had received copies of x-rays of appellant's spine taken on June 13, 1988, which indicated that she had back problems prior to her claimed injury of August 10, 1993. The Office stated that Dr. Marek's August 27, 1993 duty status report and September 20, 1993 attending physician's report, which indicated that appellant's x-rays showed appellant had a subluxation at L2, L5 and pelvis, were inconsistent with the November 13, 1993 report of Drs. Marek and Thatcher stating that x-rays of appellant taken on August 11, 1993 showed a subluxation at T1 through T4, T6 through T8, T12, L2, L5, C1 to C2 and C5 to C6.

The Office also stated that Dr. McFarland, the second opinion medical examiner, had reviewed x-rays taken of appellant's spine on June 13, 1988, August 11, 1993 and June 29, 1994 and had indicated, that based on these x-rays, only the scoliosis centered on T-12 could be considered a subluxation. The Office stated that although Dr. Thatcher's progress notes, dated June 29 and August 22, 1994, indicated that appellant had x-rays on June 29, 1994 and had a subluxation at L2 and L5, Dr. McFarland had advised that no subluxation at L2 was evidenced by the x-rays of June 29, 1994 and that the partially secularized L5 had been present on all x-ray studies since 1988.

In addition, the Office noted that when it contacted Dr. Thatcher's secretary on June 15, 1994, she had informed the Office that appellant's condition had resolved and that, therefore, no further chiropractic treatment was necessary after June 15, 1994.⁴

By letter dated March 25, 1996, appellant, through her representative, requested reconsideration of the Office's most recent decision. Accompanying the request was a February 7, 1996 chiropractic report, from Dr. Marek, who stated that as a chiropractor reading

⁴ The Office stated that a September 8, 1994 progress note Dr. Thatcher submitted to the Office indicated that appellant had been treated for lumbosacral pain due to housework, which according to the Office, indicated that appellant was then seeing her chiropractor for back problems unrelated to any employment incident. The Office further noted that it had been billed for this office visit.

Dr. McFarland's statement that "the convex scull to the right increased on the most recent study of June 29, 1994 compared to the prior x-rays," she felt this constituted evidence of a change. Dr. Marek also stated that, as a chiropractor, she concurred with the subluxation levels of C1 to C2, C5 to C6, T1 to T4, T6 to T8, T12 and L2 and L5 that were on Dr. Thatcher's November 13, 1993 report. Dr. Marek further stated that, on the August 27, 1993 attending physician's report, she only listed the subluxations that were directly related to appellant's low back pain. Further, Dr. Marek stated that, in her secretary's June 28, 1995 letter, the secretary clarified that there had been miscommunication between herself and the Office. Dr. Marek found that as a result of muscle palpitation, range of motion testing with a goniometer/inclinometer, radiographic analysis and her experience of treating patients in the past eight years with similar conditions, her definitive "diagnosis was": lumbar subluxation; muscle spasm lumbar region; and restriction of motion. Dr. Marek concluded that it was her "definitive medical opinion" that appellant's diagnosis was temporarily aggravated by the conditions of her employment from the period of August 1993 until August 1995.

By decision dated June 24, 1996, the Office affirmed its previous decision, finding that the medical evidence appellant submitted in support of her request for reconsideration was not sufficient to warrant modification. In a memorandum accompanying the decision, the Office initially credited appellant's undated statement explaining her previous responses, which implied that she had neglected to report she had sustained a prior back injury. The Office found that "on review of the medical evidence in the file, the previous injury and history of ongoing back pain were reported to the treating chiropractor contemporaneously to the injury" and concluded that the medical evidence was based on an accurate history.

The Office further found that its October 24, 1995 decision to terminate chiropractic care was based on the weight of the medical evidence, which established no subluxation at L2-3 or L5-S1 and stated the medical evidence appellant submitted with the instant request for reconsideration was reviewed in the context of this decision. The Office stated that Dr. Marek's February 7, 1996 report, was not sufficient to shift the weight of the medical evidence, which rested with Dr. McFarland, the second opinion medical examiner. The Office stated that Dr. McFarland had reviewed the medical reports and found no subluxation at L2 or L5 pursuant to section 8101(2) of the Federal Employees' Compensation Act.⁵ The Office noted that although Dr. McFarland indicated that appellant had a subluxation at T12, this condition was not employment related.

In the instant case, the Office initially accepted in its April 7, 1994 decision that appellant had a subluxation at L2 and L5 and was entitled to reimbursement for chiropractic services based on the opinions of Drs. Marek and Thatcher. The Board notes that the Office subsequently stated, in its June 24, 1996 decision, that the decision to terminate chiropractic care had been based on the weight of the medical evidence, which established no subluxation at either L2-3 or L5-S1. However, a review of the instant record reveals that the Office initiated its reevaluation of appellant's entitlement to compensation following the June 15, 1994 oral telephone conversation between the Office and Dr. Thatcher's secretary. During this oral conversation, the secretary allegedly told the Office appellant's condition had resolved, that appellant had reached

⁵ 5 U.S.C. § 8101(2).

maximum medical improvement and that no further chiropractic treatment was necessary after June 15, 1994. These statements, characterized as a “miscommunication” in a subsequent letter to the Office by Dr. Thatcher’s secretary, were cited by the Office in its October 24, 1995 decision to terminate chiropractic care. In the aftermath of this oral telephone conversation, the Office referred appellant’s x-rays to Dr. McFarland to determine whether the x-rays indicated the presence of a subluxation and whether appellant had an employment-related back condition entitling her to reimbursement for chiropractic care, despite the fact that in its April 7, 1994 decision, an Office hearing representative had already found that appellant had discharged her burden to submit sufficient factual and medical evidence to establish that she sustained an employment-related injury on August 10, 1993 and that the Office had accepted the claim for subluxation at L2 and L5.

The Board finds that the Office, in its decision dated October 24, 1995, did not meet its burden of proof to terminate chiropractic care since it had resolved the issue of subluxation by hearing representative decision dated April 7, 1994. The subsequent reopening and further development of the x-ray evidence reveals some questions remain as to whether some or all of the x-ray films reveal subluxations that are employment related. Because the subsequent development of the medical evidence does not clearly show the initial acceptance of the claim by the hearing representative was erroneous, the Board finds the Office did not meet its burden of proof to terminate chiropractic care.

The decision of the Office of Workers’ Compensation Programs dated June 24, 1996 is hereby reversed.

Dated, Washington, D.C.
August 4, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member