

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RICHARD A. SROKA and DEPARTMENT OF AGRICULTURE,  
SOIL CONSERVATION SERVICE, Washington, D.C.

*Docket No. 95-1774; Submitted on the Record;  
Issued February 19, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof to establish that he sustained an injury in the performance of duty on March 13, 1994.

On March 15, 1994 appellant, then a 54-year-old employee relations specialist, filed a notice of traumatic injury (Form CA-1) alleging that on March 13, 1994, "after returning home on March 11, 1994 from TDY [temporary duty] to Denver and Albuquerque concerning the Arterburn complaint, I put the case file in my car's trunk" and "experienced a sharp pain in my lower back and left buttock while lifting the briefcase the file was stored in." Appellant did not stop work. Appellant retired on April 2, 1994. Appellant's claim was accompanied by an authorization for examination and/or treatment (Form CA-16) dated March 16, 1994, from Dr. David V. Miljour, an attending chiropractor, which revealed that appellant had a lumbar disc disease. Dr. Miljour stated that he first treated appellant on March 15, 1994, obtained x-rays and that treatment consisted of manipulation of the spine.

By letter dated September 20, 1994, the Office of Workers' Compensation Programs advised appellant that the evidence of record was insufficient to establish that he sustained an injury on March 13, 1994 and requested that he submit additional medical evidence supportive of his claim. By letter of the same date, the Office requested that appellant answer questions regarding his injury and any prior similar injury or symptoms.

By letter dated September 22, 1994, the Office advised appellant that it was returning his medical bills because the evidence submitted did not establish a diagnosis of subluxation of the spine. The Office, however, advised appellant that services rendered through September 22, 1994 were authorized, that prior authorization was revoked and that he could submit additional medical evidence supportive of his claim within 30 days. By letter of the same date, the Office requested that the employing establishment answer questions regarding appellant's injury.

In a September 28, 1994 response, appellant, stated that the only treatment he received for his injury was rendered by Dr. Miljour, on March 15, 16, 19, 21, 24, 28 and 31, 1994 and possibly on April 14, 1994. Appellant further stated that his pain had ceased and that it had not returned as of the date of his letter. Appellant described the occurrence of his injury, the immediate effects of his injury and what he did immediately after sustaining the injury and stated that he had not experienced a similar disability, or symptoms prior to the March 13, 1994 incident in another letter dated September 28, 1994.

By decision dated October 28, 1994, the Office found the evidence of record insufficient to establish that appellant sustained an injury in the performance of duty. The Office found that the evidence of record supported a finding that the claimed event occurred at the time, place and in the manner alleged. The Office, however, found that the reports and medical records of Dr. Miljour which revealed that appellant had lumbar disc disease, failed to diagnose subluxation of the spine by x-ray. The Office noted that appellant did not respond to its September 20, 1994 letter, requesting factual evidence regarding his injury.

By letter dated November 16, 1994, appellant requested reconsideration of the Office's decision. Appellant's request was accompanied by four x-rays dated March 16, 1994<sup>1</sup> and Dr. Miljour's November 7, 1994 report, indicating that a "[r]adiologic examination revealed a subluxation of the fifth lumbar vertebra evidenced, by a Grade 1 spondylolisthesis of L5 over the sacrum," and that appellant had a "lumbar disc disorder with neuritis complicated by L5 spondylolisthesis (subluxation)."

By letter dated January 6, 1995, the Office referred the March 16, 1994 x-rays and Dr. Miljour's November 7, 1994 report, to an Office medical adviser. The Office requested that the Office medical adviser refer to its definition of subluxation in rendering his opinion. The Office medical adviser reviewed the evidence, and opined that "[t]he lumbrosacral spine x-rays dated March 16, 1994 and properly labelled with the patient's [appellant's] name are entirely normal" and "that they do not reveal evidence of subluxation or of spondylolisthesis. There is no disruption of the anterior margins of the bony column and there is no defect of the pars interarticulaires." The Office medical adviser further opined that "[t]he definition of subluxation accepted by [Federal Employees' Compensation Act] does not specify the cause of the 'off-centering' or 'misalignment' seen on x-rays. Therefore, a Grade I spondylolisthesis would be evidence of a subluxation."

By decision dated February 3, 1995, the Office denied modification of its October 28, 1994 decision.

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

An employee seeking benefits under the Act<sup>2</sup> 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

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<sup>1</sup> The record reveals that the x-rays were returned to appellant.

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

limitation period 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.<sup>3</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>4</sup>

In order to determine whether an employee actually sustained an injury, in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.<sup>5</sup> In this case, the Office accepted that the claimed event occurred at the time, place, and in the manner alleged. The Board finds that the evidence of record supports this incident.

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.<sup>6</sup>

In this case, the March 15, 16, 24 and 31, 1994 reports of Dr. Miljour, an attending chiropractor, diagnosed lumbar disc disease. Chiropractors are defined as “physicians” under section 8101(2) of the Act only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation of the spine as demonstrated by x-ray to exist and subject to regulation of the Secretary.<sup>7</sup>

In its decision dated February 3, 1995, the Office found that the radiological classification of spinal subluxations submitted by Dr. Miljour, which listed spondylolisthesis as a form of static intersegmental subluxation, did not conform to the accepted definition of subluxation under the Act. The Office accorded greater weight to the Office medical adviser’s opinion finding that Dr. Miljour failed to provide an explanation as to his diagnosis of subluxation of the spine.

In his November 7, 1994 report, Dr. Miljour stated, that a “[r]adiologic examination revealed a subluxation of the fifth lumbar vertebra evidenced by a Grade 1 spondylolisthesis of L5 over the sacrum,” and that appellant had a “lumbar disc disorder with neuritis complicated by L5 spondylolisthesis (subluxation).” Spondylolisthesis is defined as “forward displacement of

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<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> *Daniel J. Overfield*, 42 ECAB 718 (1991).

<sup>5</sup> *Elaine Pendleton*, *supra* note 3.

<sup>6</sup> *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

<sup>7</sup> 5 U.S.C. § 8101(2); *see also* 20 C.F.R. § 10.400(a); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Robert J. McLennan*, 41 ECAB 599 (1990); *Robert F. Hamilton*, 41 ECAB 431 (1990).

one vertebra over another, usually of the fifth lumbar over the body of the sacrum, or of the fourth lumbar over the fifth, usually due to a developmental defect in the pars interarticularis.”<sup>8</sup> The Office has defined 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 individuals trained in the reading of x-rays.”<sup>9</sup> A chiropractor may interpret his or her x-rays to the same extent as any other physician defined in the section.”<sup>10</sup> Inasmuch as Dr. Miljour diagnosed subluxation of the spine as demonstrated by x-ray, he is a physician under the Act, and therefore his opinion constitutes competent medical evidence.

The Office medical adviser reviewed the March 16, 1994, x-rays and Dr. Miljour’s November 7, 1994 report and opined that they did not reveal the existence of any subluxation or spondylolisthesis. In view of the contrary opinions of Dr. Miljour and the Office medical adviser, the Board finds that there is a conflict in the medical opinion evidence as to whether appellant sustained a subluxation of the lumbar spine in the performance of duty on March 13, 1994.

Section 8123(a) of the Act provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>11</sup>

To resolve the conflict in medical opinion between Dr. Miljour and the Office medical adviser on remand, the Office should obtain the March 16, 1994 x-rays, of appellant’s lumbar spine. These x-rays and a copy of the Office’s definition of subluxation should be referred to a Board-certified radiologist for an opinion of whether appellant had a spinal subluxation. Following this and such further development as the Office deems necessary, a *de novo* decision should be issued on appellant’s claim.<sup>12</sup>

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<sup>8</sup> *DORLAND’S ILLUSTRATED Medical Dictionary*, (27th ed. 1988).

<sup>9</sup> The Office medical adviser opined that “[t]he definition of subluxation accepted by [the Act] does not specify the cause of the ‘off-centering’ or ‘misalignment’ seen on x-rays. Therefore, a Grade I spondylolisthesis would be evidence of a subluxation.”

<sup>10</sup> See 20 C.F.R. § 10.400(e); *Bruce Chameroy*, 42 ECAB 121, 126 (1990).

<sup>11</sup> 5 U.S.C. § 8123(a); see also *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

<sup>12</sup> The Board notes that on return of the case record, the Office should address the issue of appellant’s entitlement to reimbursement of expenses authorized under the CA-16; see *Danita E. Lindsey*, 40 ECAB 450 (1989).

The decision of the Office of Workers' Compensation Programs dated October 28, 1994 is affirmed and the Office's February 3, 1995 decision is set aside; the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.  
February 19, 1998

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member