

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL G. SCHULER and U.S. POSTAL SERVICE,
POST OFFICE, Pittsburgh, Pa.

*Docket No. 96-2497; Submitted on the Record;
Issued April 8, 1999*

DECISION and ORDER

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

The issue is whether appellant met his burden to establish his entitlement to reimbursement payments for chiropractic services due to his accepted January 19, 1994 employment injury.

Appellant, a 38-year-old mail carrier, injured his neck as he was exiting a postal vehicle on January 19, 1994. Appellant filed a Form CA-1, claim for traumatic injury, on January 20, 1994, which was accepted by the Office of Workers' Compensation Programs for trauma to the neck. Appellant underwent x-rays at the hospital on January 20, 1994, which revealed mild degenerative arthritis, lower thoracic spine. Appellant's diagnosis was subsequently upgraded to a cervical sprain and contusion to the thoracic spine.

On April 8, 1994 appellant was examined and treated by Dr. Brenda J. Frye, a chiropractor. In a Form CA-20 completed on April 14, 1994, Dr. Frye diagnosed post-traumatic hyperflexion injury to the cervicothoracic spine, complicated by cervical/thoracic myofascial instability and cervicobrachial radiculopathy, accompanied by cephalgia. Dr. Frye did not, however, diagnose a subluxation by x-ray.

Dr. Frye referred appellant to Dr. Bruno Cotugno, Board-certified in psychiatry and neurology, who examined appellant on April 27, 1994. In a report dated April 27, 1994, Dr. Cotugno diagnosed post-traumatic headaches with sleep disturbances, memory difficulty and constant daily headache, which he primarily related to musculoskeletal discomfort and spasm.

Dr. Frye referred appellant to undergo a magnetic resonance imaging (MRI) scan on June 14, 1994, which was administered by Dr. Kris Ellis, a Board-certified radiologist. In a report dated June 15, 1994, Dr. Ellis stated that there were findings suggesting some diffuse disc bulging at the C2-3 level, with a ventral impress upon the cal sac at the C3-4 level, which appeared to be caused by posterior vertebral body osteophytes with associated disc bulging. Dr. Ellis advised that these findings were consistent with a small central disc herniation at the

C5-6 level and noted that there were findings suspicious for a small central to right-sided disc herniation at the C6-7 level. Dr. Ellis further found that there was a ventral impress upon the thecal sac at the T2-3 level, which could be due to disc bulging or hypertrophic changes, with a narrowing of the spinal canal in the anterior-posterior (AP) dimension from the C3-4 level through the C5-6 level. Dr. Ellis concluded that there were no signal alterations identified within the spinal cord, but did present evidence of subluxation.

In a decision dated July 12, 1994, the Office denied appellant authorization for chiropractic treatment provided by Dr. Frye, as the record contained no evidence of subluxation by x-ray and, therefore, appellant was not entitled to reimbursement for treatment by Dr. Frye under section 8101(2).¹

By letter dated August 4, 1994, appellant requested an oral hearing.

Appellant submitted a July 8, 1994 medical report from Dr. Frye in which she stated that x-rays of appellant taken on April 8, 1994 revealed subluxation levels at C2 on C3 right lateral posterior superior tilt, C4 on C5 with left spinous rotation, and C7 on T1 with left SP rotation and right posterior superior shifting. Dr. Frye further stated that AP upper thoracic studies revealed a left convex thoracic scoliosis with a right low C7-T1 drop in shoulder height. Dr. Frye advised that this could be due to the thoracic vertebral subluxations at T3 through T7 and chronic antalgic vertebral posturing.

Appellant also submitted a June 23, 1994 report from Dr. Jeffrey D. Lemberg, Board-certified in physical medicine and rehabilitation, who performed electrodiagnostic testing on appellant's upper extremities. Dr. Lemberg found that the electromyographic testing did not reveal any electrical evidence of cervical radiculopathy. He also stated that appellant may have an ulnar to median anastomosis of this particular nerve in the right upper extremity, but he found that this was a congenital anomaly and was not the cause of any of his symptoms.

In addition, appellant was examined by Dr. Ashvin Ragoowansi, a Board-certified neurosurgeon, who submitted a report dated June 29, 1994. Dr. Ragoowansi reviewed appellant's MRI results and noted a questionable disc protrusion at C5-6 and C6-7 on the right. He advised that appellant was suffering from mechanical neck pain, which was reinforced by the negative electromyogram (EMG) results.

By decision dated March 20, 1995, an Office hearing representative set aside the Office's previous decision denying authorization and reimbursement for chiropractic care provided by Dr. Frye. The hearing representative noted that appellant's x-rays, MRI results and electrodiagnostic tests had been reviewed by several physicians, none of whom indicated that appellant had a subluxation,² but that subsequent to the July 12, 1994 decision, Dr. Frye had

¹ 5 U.S.C. § 8101(2).

² The record also contained a July 16, 1994 report from Dr. Ryon Hurh, Board-certified in physical medicine and rehabilitation, who noted that appellant had undergone x-rays, electromyographic testing and an MRI of his neck. Dr. Hurh stated that the MRI of his cervical spine revealed a small herniated disc at C5-6 and possible C6-7 on the right side, but did not state that appellant's spine showed evidence of subluxation.

submitted an additional report which stated that appellant had x-rays done which showed evidence of subluxation and required further development of the medical evidence by the Office. The hearing representative stated that although Dr. Frye had now indicated in her July 8, 1994 report that she did obtain x-rays of appellant's spine taken on April 8, 1994 and diagnosed multiple subluxations in the cervical and thoracic spine, the x-rays obtained at the hospital following the accident of January 19, 1994 were not interpreted as showing any subluxations in the thoracic spine. The Office concluded that, in view of this fact, further development of the medical evidence was necessary before a decision could be made concerning the request for reimbursement of chiropractic treatment. The case was remanded for referral of x-rays to a Board-certified radiologist for an opinion as to whether the films dated January 20, 1994, demonstrated a subluxation of the cervical or thoracic spine.

The Office referred appellant's x-rays to Dr. Lawrence Cooperstein, a Board-certified radiologist, for an opinion as to whether the x-rays demonstrated a subluxation of the cervical spine and provided the definition of subluxation as defined under the Office's regulations at 20 C.F.R. § 10.400(e).³

In a report dated August 8, 1995, Dr. Cooperstein reviewed studies of the thoracic spine dated January 19, 1994, x-rays of the cervical spine dated April 8, 1994 and MRI studies of the brain and cervical spine dated June 14, 1994, and found that none of the previously obtained studies demonstrated a subluxation of the cervical or thoracic spine resulting from the January 19, 1994 employment injury. Dr. Cooperstein also stated that he obtained further x-rays of appellant during his examination and found that these films also did not demonstrate subluxation. Dr. Cooperstein stated that specifically, the flexion and extension views showed normal alignment.

In a decision dated August 15, 1995, the Office denied appellant's claim for reimbursement of chiropractic care on the grounds that the medical evidence did not demonstrate a subluxation, stating that Dr. Cooperstein's opinion represented the weight of the medical evidence in the case.

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

In determining whether appellant is entitled to reimbursement and authorization for chiropractic services, the initial question is whether the chiropractor is considered a physician under the Federal Employees' Compensation Act. Section 8101(2) of the Act 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."⁴ Therefore, a chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by an x-ray.

The instant case contains two unresolved issues. First, there is a conflict in the medical evidence, as there were opposing medical opinions regarding the issue of whether the x-rays of

³ 20 C.F.R. § 10.400(e).

⁴ 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986).

appellant taken by Dr. Frye on April 8, 1994 revealed a subluxation. Although the Office referral physician, Dr. Cooperstein, found no evidence of subluxation, he is not an independent medical examiner and his opinion, therefore, does not contain the special weight of an independent medical examiner⁵ under section 8123(a).⁶ Thus, his opinion does not carry greater weight than that of Dr. Frye, the chiropractor who found subluxation on the basis of the April 8, 1994 x-rays. Accordingly, a conflict in the medical evidence exists, and the case must be referred to an independent medical examiner to resolve the conflict in medical evidence regarding whether appellant sustained a subluxation as demonstrated by x-rays. In the event the independent medical examiner determines that appellant has sustained a subluxation as shown by x-rays, then Dr. Frye may be considered a “physician” under section 8101(2) and her services are, therefore, reimbursable.⁷

In addition, if the independent medical examiner determines that appellant has a subluxation shown by x-ray, he must then make a determination as to whether appellant’s subluxations/cervical injuries were causally related to the January 19, 1994 employment injury. On remand, therefore, the Office should further develop the medical evidence by referring the case file, a statement of accepted facts, and the April 8, 1994 x-rays to an independent medical examiner for an independent medical examination to resolve the issue of whether Dr. Frye is a physician pursuant to section 8101(2); *i.e.*, whether appellant’s April 8, 1994 x-rays establish a subluxation. If the independent medical examiner does determine that appellant has a subluxation shown by x-ray, the Office should request the independent medical examiner to submit a rationalized medical opinion on whether appellant’s cervical subluxations/injuries are causally related to his accepted January 19, 1994 employment injury. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

⁵ Neither the Office’s March 20, 1995 opinion nor the referral letters indicated that Dr. Cooperstein was an independent medical examiner. The Office only indicated that appellant’s case be referred to a Board-certified radiologist.

⁶ 5 U.S.C. § 8123(a).

⁷ See *Kathryn Haggerty*, 45 ECAB 383 (1994).

The decision of the Office of Workers' Compensation Programs dated August 15, 1995 is vacated and remanded in accordance with this opinion.⁸

Dated, Washington, D.C.
April 8, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁸ In a handwritten letter accompanying his appeal to the Board, appellant stated that he wished to submit additional medical evidence in support of his claim. The Board does not have jurisdiction to consider any new evidence; however, appellant may submit such evidence in a request for review to the Office pursuant to 5 U.S.C. § 8128. 20 C.F.R. § 501.2(c).