

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARL M. WEBER and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Washington, D.C.

*Docket No. 98-258; Submitted on the Record;
Issued July 6, 1999*

DECISION and ORDER

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

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on September 9, 1993, as alleged.

On September 9, 1993 appellant, then a 37-year-old air traffic controller, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on September 9, 1993 he wrenched his upper back when he "was walking back into control room and tripped over a raised tile." Appellant stopped work on September 10, 1993 and returned to work on September 13, 1993.

Accompanying his claim were a September 18, 1993 attending physician's report by Dr. Gary Spero, a chiropractor; and a September 10, 1993 authorization for examination and/or treatment completed by Dr. Spero. Both included a diagnosis of cervical sprain/strain and described treatment rendered as chiropractic spinal adjustment.

On November 24, 1993 the record was supplemented with an October 4, 1993 attending physician's report by Dr. Spero. On December 9, 1993 the record was supplemented with two attending physician's reports dated November 15 and December 5, 1993, by Dr. Spero. On January 26, 1994 the record was supplemented with a January 3, 1994 attending physician's report by Dr. Spero. All included a diagnosis of cervical sprain/strain and described treatment rendered as chiropractic spinal adjustment.

On January 27, 1997 appellant filed a claim for a recurrence of disability (Form CA-2a) alleging that he sustained a recurrence of disability on January 5, 1997 causally related to the September 9, 1993 alleged incident.

By letters dated February 12 and March 26, 1997, the Office of Workers' Compensation Programs requested additional information from appellant and the employing establishment.

On April 25, 1997 the record was supplemented with an April 21, 1997 report by Dr. Spero. Dr. Spero provided his definition of a subluxation and stated that he has x-rays which support his diagnosis and they are available for review by the Office.

By letter dated May 2, 1997, the Office requested information directly from Dr. Spero. The letter also advised appellant of the regulations governing chiropractors. On May 22, 1997 the Office received an undated report from Dr. Spero.

The record contains a May 27, 1997 statement by the Office wherein it accepts that the incident occurred on September 9, 1993 as alleged. The record supports that the Office obtained the x-rays from Dr. Spero¹ and requested review by a district medical adviser regarding whether the x-rays revealed a spinal subluxation. On May 30, 1997 after reviewing the x-rays from Dr. Spero, the district medical adviser stated, "No evidence of subluxation, as this condition is defined for purposes of [Federal Employees' Compensation Act], is seen on these x-rays."

By letter dated June 2, 1997, the Office advised appellant that the current evidence of record was insufficient to establish his claim and granted him 30 days to submit additional evidence.

On July 26, 1997 after receiving no additional evidence from appellant, the Office issued a decision denying appellant's claim on the grounds that he failed to establish that the employment-related incident resulted in an injury.

The Board has reviewed the record and finds that this case is not in posture for decision due to a conflict in the medical evidence.

Section 8123(a) of the Act provides that where there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.² Due to the conflict between Dr. Spero's and a district medical adviser's opinion as to whether x-rays taken by Dr. Spero revealed a subluxation, as defined by the Act, the case must be remanded for referral of Dr. Spero's x-rays, the case record, and a statement of accepted facts to an impartial medical specialist to resolve this conflict.³ The Office should then develop the evidence as it deems necessary and issue an appropriate decision.

¹ The Board notes that the x-rays are not present in the record.

² 5 U.S.C. § 8123(a).

³ A resolution of this conflict will also determine whether Dr. Spero, a chiropractor, is a physician under the Act in the instant case.

The decision of the Office of Workers' Compensation Programs dated July 26, 1997 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
July 6, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member