U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCE O. LONG and DEPARTMENT OF AGRICULTURE, RURAL DEVELOPMENT, Tavares, FL

Docket No. 99-582; Submitted on the Record;
Issued June 16, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether appellant sustained an injury in the form of subluxation of the spine in the performance of duty on June 12, 1997, as alleged; and (2) whether appellant is entitled to reimbursement of expenses incurred for chiropractic treatment rendered.

On June 20, 1997 appellant, then a 62-year-old rural development technician, filed a traumatic injury claim (Form CA-1), alleging that on June 12, 1997 she sustained an injury in the form of torn muscles and bruised right shoulder and neck ligaments in an automobile accident.[1] On the claim form, she noted that an oncoming car collided with her car because her view was blocked by a "large panel truck." On the reverse side of the claim form, appellant's supervisor noted that appellant was first examined on June 12, 1997 by Dr. James A. Glisson, a chiropractor. She stopped work on June 12, 1997.

By letter dated July 11, 1997, the Office of Workers' Compensation Programs informed appellant that the evidence of record was insufficient to establish that she had sustained an injury in the performance of duty and allowed her 30 days to respond. The Office requested that appellant submit medical records and reports, including dates of examination and treatment, history of injury, medical findings, x-ray and laboratory test results, diagnosis and course of treatment, and a physician's opinion explaining how the reported work incident caused or aggravated the claimed injury.

In response, appellant submitted progress notes and bills from Dr. Glisson dated June 14 to July 16, 1997. In his June 18, 1997 progress notes, he stated that appellant was unable to work due to extreme pain, muscle spasm and guarding, and "NU ROM" loss. In his June 23, 1997 notes, Dr. Glisson noted that appellant experienced initial pain in her right shoulder, swelling and a "knot-type lesion" in her right hand and the presence of a "tiny bone island." He further noted that appellant's cervical spine showed degenerative changes and posterior osteophtes at C4-5 and C6-7. By letter dated September 30, 1997, Dr. Glisson diagnosed "C4-5, C6-7 joint dysfunction which would be subluxation with narrowing of the intervertebral

[1] Appellant later amended her claim to include a back injury.

foramina and torsion of the C4 and C5-6," based on x-rays taken June 14, 1997. He further diagnosed "posterior osteophytes at C4-5 and C6-7 with a subluxation fixation of these vertebrae." In his report, Dr. Glisson stated that "[i]t is not uncommon for soft tissue injury pain and subluxation fixations to show up some 72 hours or earlier after incident of trauma." Finally, he noted appellant's symptoms and suggested treatment plan.

Appellant also submitted x-ray reports dated June 12, 1997 from Dr. Rudy Holton, a Board-certified radiologist. In his report relating to appellant's hand x-ray, Dr. Holton concluded that he did not observe fractures, listhesis or differential foreign bodies. He further noted the presence of "a tiny bone island" in the navicular scaphoid. In his report relating to appellant's right shoulder x-ray, Dr. Holton concluded that no fracture, derangement or differential foreign body was identified.

By letter dated July 11, 1997, the Office informed appellant that the evidence of record may have placed liability for damages upon a party other than the United States. The Office noted that the Federal Employees' Compensation Act[2] requires workers' compensation beneficiaries to seek damages in his or her own name where a third party may be legally liable. The Office requested that appellant complete and return a form regarding such a claim against a third party. On the completed form, received by the Office on July 31, 1997, appellant denied filing a claim for damages against any third party or retaining an attorney because she had "no reason to do so."

By decision dated August 13, 1997, the Office denied appellant's claim on the grounds that the medical evidence of record was insufficient to establish fact of injury. The Office noted that appellant failed to submit accident and police reports or reports relating to her emergency room visit. The Office further noted that Dr. Glisson's cervical dislocation diagnosis, while compensable, was not accepted because his report did not describe the injury or relate it to the employment.[3]

By letter dated August 21, 1997, appellant requested reconsideration of the Office's August 13, 1997 decision denying her traumatic injury claim. In support of her request for reconsideration, appellant submitted a police report and diagram by Officer William Wade dated June 12, 1997. The report noted that the automobile accident occurred on June 12, 1997 at 8:44 a.m. in Mount Dora, Florida. The Officer noted that the contributing cause of the accident was appellant's failure to yield right-of-way. Appellant also submitted medical report forms from Waterman Florida Hospital dated June 12, 1997, signed by a physician whose signature and notations are essentially illegible. He noted that appellant's injuries involved her right shoulder and right hand. Appellant also submitted various medical reports and progress notes by Dr. Glisson. An attending physician's report form by Dr. Glisson, dated July 23, 1997, indicated that he diagnosed cervical radiculopathy, thoracic strain and injury to the right shoulder. Dr. Glisson's progress notes dated June 13, 1997 noted limited range of motion in appellant's shoulder, joint dysfunction and bruising of the right hand. He diagnosed "an antalgic and/or torticollis type of syndrome from flexion extension or extension type of injury." In his June 27, 1997 progress notes, Dr. Glisson noted dysfunction "on motion palpation at 4/6, C7-T1, 9/10D

[2] 5 U.S.C. §§ 8131-8193.

[3] The Board notes that there is no evidence in the case record showing that Dr. Glisson diagnosed appellant with cervical dislocation.

and 12D." His July 11, 1997 progress notes stated that appellant returned to work on June 30, 1997, but she continued to experience "pressure under the occiput down through 4, 5 and 6."

By decision dated September 17, 1997, the Office vacated its August 13, 1997 decision and accepted appellant's claim as to her right shoulder strain and contusions to the right hand and knee, but it denied her claim for other injuries on the grounds that the evidence of file failed to establish that appellant's shoulder and neck injuries were causally related to the June 12, 1997 employment incident. The Office found that the evidence of file established that appellant's shoulder strain and contusions to the right hand and knee were consistent with her documented medical history, and were, therefore, compensable. The Office further found that, although the motor vehicle accident of June 12, 1997 occurred in the performance of duty, no medical opinion evidence was submitted to establish a causal relationship between appellant's other conditions and the employment incident. The Office noted that reimbursable chiropractic expenses are limited to treatment for "manual manipulation of the spine, to correct a subluxation as demonstrated by an x-ray to exist,"[4] and it found that the chiropractic evidence submitted failed to establish causal relationship between subluxation of the spine and the employment incident.

By letter dated September 29, 1997, appellant requested an oral hearing.

By letter dated September 29, 1997, the employing establishment contacted the Office on appellant's behalf, stating that appellant's claim was "a genuine request for compensation for the treatment of an injury resulting from an accident in the performance of her official duties." By letter dated October 6, 1997, the employing establishment asked the Office to provide appellant with an oral hearing per her request and to reconsider its September 17, 1997 decision.

By letter dated November 20, 1997, appellant described her June 12, 1997 motor vehicle accident and injuries. Appellant expressed fear that the denial of her claim would ruin her credit, and that she would have "no choice but to contact an attorney" if the Office did not respond to her letter within seven days. Appellant also submitted a report from Dr. Edward Hunter, an osteopath, dated November 6, 1997. The report diagnosed traumatic cervical myositis resulting from the June 12, 1997 employment incident.

By letter to United States Representative Cliff Stearns dated February 3, 1998, appellant requested assistance with her claim. By letter to the Office dated February 12, 1998, Representative Stearns requested consideration of appellant's claim. By letter dated March 24, 1998, the Office responded to Representative Stearns. The Office stated that, because appellant's oral hearing would not take place before July 1998, she should consider requesting a review of the written record in lieu of an oral hearing. The Office noted that appellant's ambulance service and hospital bill were erroneously excluded for payment by the Office's September 17, 1997 decision and that those expenses were approved for payment.

On March 13, 1998 the Office received the following documents from the employing establishment: (1) emergency medical reports signed by two paramedics who treated appellant; (2) a physician certification for ambulance transport form signed by appellant's attending physician at Waterman Florida Hospital; (3) an illegible document from Florida Regional

[4] 5 U.S.C. § 8101(2)-(3).

Emergency Medical Services; (4) a duplicate of Dr. Hunter's November 6, 1997 report; and (5) a duplicate bill from Waterman Florida Hospital.

By decision dated June 5, 1998, an Office hearing representative vacated the Office's September 17, 1997 decision on the grounds that appellant's case was not in posture for hearing. The hearing representative found that, before denying her claim, the Office must determine whether appellant sustained a subluxation causally related to the June 12, 1997 employment incident. The hearing representative noted that, on remand, the Office should seek an opinion from an appropriate specialist on whether appellant suffered a subluxation causally related to the employment incident.

By letter dated June 22, 1998, the Office requested x-rays of appellant's spine in order to refer the records to a specialist for review. By letter dated August 12, 1998, the Office referred appellant's medical records and x-rays to Dr. Humberto Revollo, a Board-certified radiologist, for review. The Office also sent questions to be answered by Dr. Revollo and a statement of facts.

The Office received Dr. Revollo's report, dated August 30, 1998, on October 15, 1998. Regarding appellant's cervical spine, he noted straightening suggesting muscle spasm and significant narrowing of the intervertebral disc spaces at C5-6 and C6-7 with marginal spurs and some distortion of the neuroforamen. Regarding the thoracic spine, Dr. Revollo noted a slight curve indicative of scoliosis. In his report, Dr. Revollo made the following conclusions based on appellant's x-rays:

> "Cervical spondylosis with degenerative disc disease at C5-6 and C6-7, no evidence of subluxation, spondylosis with marginal spurring at the same levels. Dextro-scoliosis, otherwise normal thoracic spine. Normal right shoulder. No evidence of acute pathology, except for some straitening (sic) of the cervical spine that may indicate spasm.

By decision dated October 19, 1998, the Office denied appellant's claim on the grounds that subluxation was not found. The Office noted that, in order to accept appellant's claim for chiropractic care provided by Dr. Glisson, subluxation must be shown to exist. The Office found that, although Dr. Glisson diagnosed subluxation, he did not provide a rationale relating the subluxation diagnosis to the employment incident. It further found that Dr. Revollo's report, which denied subluxation, was entitled to greater weight because he provided a rationale on the causal relationship issue and he was a Board-certified radiologist specializing in x-ray interpretation.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[5] As appellant filed her appeal with the Board on November 9, 1998, the only decision properly before the Board is the October 19, 1998 Office decision denying appellant's claim.

The Board finds that there is a conflict in the medical opinion evidence as to whether a subluxation as demonstrated by an x-ray exists.

[5] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

An employee seeking benefits under the Federal Employees' Compensation Act[6] 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 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.[7] Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[8]

In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician under 5 U.S.C. § 8101(2). 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 an x-ray to exist.[9] The Office's regulations have defined subluxation as "an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstratable on any x-ray film to individuals trained in the reading of x-rays."[10] The Office's regulations further state that a chiropractor may interpret his or her x-rays to the same extent as any other physician.[11]

In this case, the medical evidence conflicts as to whether appellant sustained a subluxation relating to the June 12, 1997 employment incident. Dr. Glisson, appellant's treating chiropractor, diagnosed subluxation, noting "C4-5, C6-7 joint dysfunction which would be subluxation with narrowing of the intervertebral foramina and torsion of the C4 and C5." He added that "[i]t is not uncommon for soft tissue injury pain and subluxation fixations to show up some 72 hours or earlier after incident of trauma." However, Dr. Revollo's report specifically negated a subluxation diagnosis, noting that the alignment of the thoracic spine segments was normal. He further stated, *inter alia*, that there was evidence of cervical spondylosis with degenerative disc disease at C5-6 and C6-7. Thus, a conflict in medical opinion evidence developed between Dr. Glisson, a chiropractor and Dr. Revollo, a Board-certified radiologist for the Office, requiring resolution by an impartial medical specialist.[12] In situations where there is a conflict between a chiropractor and a medical doctor with respect to the presence or absence of a subluxation, the case file and x-rays should be referred to a Board-certified radiologist for resolution of the conflict.[13] The authority for referee medical examinations is found at 5 U.S.C. § 8123(a), which states in pertinent part that, "if there is a disagreement between the physician

[6] 5 U.S.C. §§ 8101-8193.

[7] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[8] *See Ronald K. White*, 37 ECAB 176, 178 (1985).

[9] 20 C.F.R. § 10.400(a).

[10] 20 C.F.R. § 10.400(e).

[11] *Id.*

[12] *George E. Reilly*, 44 ECAB 458, 463 (1993); *Bruce Chameroy*, 42 ECAB 121, 126 (1990).

[13] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Referee Examinations*, Chapter 3.500.4 (May 1994).

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."[14]

The Office shall refer appellant's x-ray films, the case record, a statement of accepted facts and the current definition of spinal subluxation as stated in the Office's regulations to a Board-certified radiologist for complete review. The Office shall request that the radiologist provide a rationalized medical opinion on whether the x-ray films reveal subluxation of appellant's spine. After such further development as it may deem necessary, the Office shall issue a *de novo* decision.

The October 19, 1998 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development in accordance with this decision.[15]

Dated, Washington, D.C.
June 16, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[14] 5 U.S.C. § 8123(a).

[15] In view of the Board's disposition of the first issue, it would be premature to adjudicate the second issue.