

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN P. PASTORINO and DEPARTMENT OF ENERGY,
SAN FRANCISCO OPERATIONS, Oakland, CA

*Docket No. 00-562; Submitted on the Record;
Issued May 16, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied reimbursement for services provided by a chiropractor.

On December 4, 1993 appellant, then a 44-year-old space management specialist, strained back muscles and left shoulder muscles while moving chairs within a workstation. The Office accepted the claim for shoulder strain and back strain which was later extended to include chronic thoracic strain, chronic impingement syndrome of the left shoulder, temporary aggravation of chronic reflux esophagitis and bilateral carpal tunnel syndrome.

In a letter dated January 14, 1994, the Office notified appellant that they recognized Dr. Judith Martin, a family practitioner, as appellant's treating physician. The Office further indicated that Dr. Martin referred appellant for physical therapy to Dr. Donna S. Joseph, a chiropractor, for a period of six to eight weeks beginning December 7, 1993 and that Dr. Joseph was not authorized to provide services beyond the two-month period.

In a report dated January 27, 1994, Dr. Martin indicated that appellant was not making progress under the treatment of Dr. Joseph and, therefore, referred her to an orthopedic surgeon, Dr. Arun M. Mehta. Appellant was released from Dr. Joseph's care on January 20, 1994.

By decision dated March 30, 1994, the Office denied appellant's claim and determined that the weight of the medical evidence established that the accepted work injury resolved no later than March 8, 1994.

By letter dated April 8, 1994, appellant requested a hearing before an Office hearing representative. The hearing was held on October 25, 1994.

By decision dated February 2, 1995, the hearing representative affirmed the decision of the Office dated March 30, 1994. The hearing representative indicated that appellant failed to establish that she continued to suffer residuals of the work injury beyond March 8, 1994.

On November 3, 1995 appellant sought treatment from Dr. William J. Ruch, a chiropractor. In a report dated January 31, 1996, he indicated that appellant sustained unresolved separations of the left costo sternal joints, sacroiliac joint subluxation and left tibial fibular subluxation. Dr. Ruch did not indicate that he reviewed existing x-ray or magnetic resonance imaging (MRI) reports when diagnosing appellant with a subluxation.

By letter dated January 31, 1996, appellant requested reconsideration of the February 2, 1995 decision of the Office. She submitted additional medical evidence.

By merit decision dated April 29, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification of its prior decision.

By letter dated April 21, 1997, appellant requested reconsideration of the April 29, 1996 decision of the Office. She submitted additional medical evidence from Dr. Robert F. Goodwin, a Board-certified neurologist, who supported that appellant had a continuing work-related condition.

The Office referred appellant to a second opinion specialists in the areas of orthopedics, neurology, endocrinology and gastroenterology. Dr. Michael Charles, a Board-certified orthopedic surgeon, submitted a report dated July 14, 1997; Dr. Oscar E. Espinas, a Board-certified neurologist, submitted reports dated September 1 and October 29, 1997; Dr. Harvey Olsen, a Board-certified internist, submitted a report dated September 12, 1997 and Dr. J.J. Prendergast, a Board-certified endocrinologist, submitted a report dated September 22, 1997.

The Office noted a conflict in opinion between appellant's treating neurologist, Dr. Goodwin and second opinion neurologist, Dr. Espinas regarding whether the bilateral carpal tunnel syndrome was causally related to the December 4, 1993 work duties or repetitive hand movements while performing her employment duties. On November 5, 1997 appellant was referred to an impartial medical examiner, Dr. Kenneth S. Zelinger, a Board-certified neurologist, to resolve the conflict of opinion.

In a report dated December 2, 1997, Dr. Zelinger diagnosed appellant with bilateral carpal tunnel syndrome. He indicated that appellant had permanent disability starting from January 3, 1997 as a result of her employment-related injury of December 4, 1993 and the repetitive hand use in the performance of her job duties.

By merit decision dated December 9, 1997, the Office modified the prior decision dated April 29, 1997. The Office accepted the conditions of chronic thoracic strain, chronic impingement syndrome of the left shoulder, temporary aggravation of chronic reflux esophagitis and bilateral carpal tunnel syndrome as a result of appellant's employment activities on December 4, 1993 and repetitive hand activities during appellant's employment before and after December 4, 1993.

On January 21, 1998 Dr. Ruch submitted a progress report indicating that he had been treating appellant since November 3, 1995. In this report, he diagnosed appellant with chronic thoracic strain, subluxations of the costosternal joints, subluxation of the sternoclavicular joint, subluxation of the radiohumeral and radioulnar joints proximal and distal bilaterally.

By letter dated February 27, 1998, the Office notified Dr. Ruch that the chiropractic care provided was denied because the Office never accepted subluxations as an injury related to appellant's accepted employment injury and that the evidence failed to support that the x-rays were taken within a reasonable time following the initial date of the injury.

Appellant submitted a radiographic report from Dr. Ruch dated May 20, 1998, which interpreted an x-ray dated January 25, 1994. Dr. Ruch noted reviewing the anterior to posterior and lateral x-rays and made the following findings: T1 is anterior to T2 and was subluxated; T2 was rotated and anterior to T3 and subluxated; T8 was subluxated anteriorly to T9 and rotated and T12 was subluxated anteriorly to T11 and rotated. He noted multiple consovertebral and costotransverse subluxations bilaterally. Dr. Ruch also noted reviewing an MRI performed February 25, 1994 whereby T8 had a rotation subluxation.

By letter dated October 6, 1998, the Office denied appellant's claim for chiropractic care on the grounds that the Office never accepted subluxations as an injury related to appellant's accepted employment injury and that the evidence fails to support the x-rays that were taken within a reasonable time following the initial date of the injury.

By letter dated October 30, 1998, appellant requested reconsideration of the October 6, 1998 decision of the Office. She submitted additional medical evidence from Dr. Espinas dated February 21, 1995; Dr. Norman L. Cheung, an orthopedic surgeon, dated November 20, 1996; Dr. Goodwin dated February 27, 1998; Dr. Martin, dated October 12, 1998 and an undated report from Dr. David Padgett, an osteopath. Dr. Espinas report from February 21, 1995 indicated that he referred appellant for evaluation for her midthoracic pain for facet joint injections. He also noted referring her to another physical therapist since appellant's present one has been unsuccessful. Dr. Cheung, in his report of November 20, 1996, indicated he recommended appellant for physical therapy for internal/external rotators with threaband for three weeks. Dr. Goodwin noted in his report of February 27, 1998 that appellant stated she received benefits from chiropractic treatments, therefore, appellant should continue as long as it was beneficial. Dr. Martin's note of October 12, 1998 indicated that she ordered physical therapy for appellant on December 7, 1993 and October 18, 1995. Dr. Padgett, in an undated note indicated appellant had been diligently working with her physical therapist without success. He referred her for prolotherapy.

By merit decision dated February 25, 1999, the Office denied appellant's request for reconsideration on the grounds that the chiropractic care by Dr. Ruch was not obtained as a form of physical therapy under the direction and supervision of an authorized treating physician.

By letter dated May 20, 1999, appellant requested reconsideration of the February 25, 1999 decision of the Office.

By merit decision dated August 25, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of its prior decision.

The Board finds that the Office properly terminated medical benefits for physical therapy and chiropractic treatment.

Section 8103 of the Federal Employees' Compensation Act states in pertinent part, "the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation."¹ Section 8101(3) of the Act, defining services and supplies" states: "Reimbursable chiropractic services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary."²

In the present case, prior to his May 20, 1998 report, Dr. Ruch did not diagnose a subluxation as demonstrated by x-ray to exist³ and, therefore, his reports are not those of a physician. On May 20, 1998 Dr. Ruch diagnosed a spinal subluxation based on his review of x-rays taken January 25, 1994.

The diagnosis of a subluxation must, however, also be established as employment related in order for chiropractic treatment to be reimbursable. As the record contains no rationalized medical evidence relating to the May 20, 1998 diagnosis of subluxation to appellant's December 4, 1993 employment injury, Dr. Ruch's chiropractic services are not reimbursable based on his diagnosis of a subluxation.⁴

The Board notes that it has created exceptions to the general rule that services rendered by a chiropractor are not payable when they do not consist of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.⁵ These exceptions are for physical therapy rendered by a chiropractor under the direction of an authorized physician⁶ and for chiropractic treatment authorized without limitations by the Office or the employing establishment.⁷

The Board finds, however, that the evidence in this case fails to establish that the treatment provided by Dr. Ruch was under the direction of Dr. Martin or any other authorized physician. In her October 12, 1998 report, Dr. Martin indicated that she referred appellant for physical therapy on October 18, 1995. While a referral by an authorized physician is sufficient to obligate the Office to pay for reasonable and necessary treatment for an employment-related

¹ 5 U.S.C. § 8103(a).

² 5 U.S.C. § 8101(3).

³ In his medical report dated January 31, 1996, Dr. Ruch diagnosed appellant by physical examination with sacroiliac joint subluxation and left tibial fibular subluxation but did not indicate that this was based on a review of x-rays. However, under the Act reimbursable chiropractic services are limited to treatment to correct a subluxation as demonstrated by x-ray.

⁴ *Theresa M. Fitzgerald*, 47 ECAB 689 (1996); *see also Thomas W. Stevens*, 97-1452 (1999) (a diagnosis of subluxation must be established as employment related to be reimburseable).

⁵ *Edward Schoening*, 41 ECAB 977 (1990).

⁶ *Eleanor B. Loomis*, 37 ECAB 792 (1986).

⁷ *Beverly A. Scott*, 37 ECAB 838 (1986).

condition by another physician,⁸ in the instant case, where a physician refers a claimant to a nonphysician for treatment, more control and direction by the referring physician must be shown.⁹ None of the reports submitted by Dr. Espinas dated February 21, 1995; Dr. Cheung, dated November 20, 1996; Dr. Goodwin dated February 27, 1998; Dr. Martin, dated October 12, 1998 and David Padgett, discussed the nature and extent of the chiropractic treatment contemplated and the record contains no communication from Drs. Espinas, Cheung, Goodwin, Martin, Padgett to Dr. Ruch prescribing or recommending physical therapy. Although Dr. Goodwin in his report dated February 27, 1998 suggested that appellant continue with the chiropractic treatment as long as it was beneficial, his report does not discuss the nature of the chiropractic treatment contemplated nor does it indicate that he was monitoring appellant's progress with Dr. Ruch or recommending physical therapy. The Board, therefore, finds that the evidence of record fails to establish that a qualified physician prescribed, recommended or directed physical therapy or any other services by Dr. Ruch as required under section 8103 of the Act.

The decisions of the Office of Workers' Compensation Programs dated August 25 and February 25, 1999 are affirmed.

Dated, Washington, DC
May 16, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

⁸ *David L. Sala*, 38 ECAB 419 (1987).

⁹ *See Rebecca Ortiz*, 42 ECAB 134, 138 (1990); *David Deloatch*, 41 ECAB 212, 215 (1989). (Reimbursement denied on the basis that was "not rendered upon the direction of any authorized physician.")