

**United States Department of Labor
Employees' Compensation Appeals Board**

JEROME B. SWEGERT, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Hamilton, OH, Employer**

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**Docket No. 06-831
Issued: July 7, 2006**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 3, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 15, 2006 merit decision denying his occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty.

FACTUAL HISTORY

On April 26, 2004 appellant, then a 49-year-old letter carrier, filed an occupational disease claim alleging that he sustained injury to his neck, back and left upper extremity due to his job duties. These duties, which were performed for a total of seven to eight hours per day, included repetitively moving his left arm, fingering mail, holding mail in his left arm while casing, twisting to the left to retrieve mail, twisting to the right to put mail in mailboxes, and

carrying a mailbag weighing about 35 pounds. Appellant began working in a limited-duty position for the employing establishment.

Appellant submitted an April 21, 2004 note in which Dr. Julie B. Hilbert, an attending chiropractor, recommended that he not work more than 40 hours per week for a month.

In a decision dated July 13, 2004, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained an injury in the performance of duty.

By letter dated May 5, 2004, the Office requested that appellant submit additional factual and medical evidence in support of his claim.

In a report dated August 10, 2004, Dr. Bryan K. Hosler reported the findings of x-ray testing obtained on July 23, 2004.¹ He diagnosed moderate C5-6 discogenic spondylosis accompanied by uncovertebral arthrosis and mild multisegmental degenerative facet arthropathy, retrolisthesis of C5 upon C6 (subluxation), moderate L5-S1 discogenic spondylosis accompanied by mild degenerative facet arthropathy involving L4-5 and L5-S1, mild multisegmental thoracic discogenic spondylosis in the presence of dextrolevorotary thoracic spinal curvature, right inferior pelvic unleveling accompanied by a dextrorotary spinal curvature which may be related to muscle spasticity and/or intersegmental dysfunction, cervical hypolordosis, multiple thoracic intervertebral dysrelationships (subluxation), and no evidence of wrist macrofracture, instability, dislocation or arthropathy.

In an undated report received by the Office on July 15, 2005, Dr. Hilbert described the repetitive work duties performed by appellant, including twisting his entire spine and engaging in lateral bending and heavy lifting. She stated that appellant reported that in February 2004 he began to work increased hours and that this extra work aggravated his neck and back pain. Dr. Hilbert described the findings of the July 23, 2004 x-ray testing, reported the findings of her physical examination, and diagnosed cervical, thoracic and lumbar subluxations. She stated, "It is my professional opinion, that it is more likely than not that the repetitive rotation of his spine during his shift at work, straining the spine in largely one direction, is the mechanism of injury that is the direct cause of the subluxations."

In November 2005, the Office prepared a statement of accepted facts and asked an Office medical adviser to review the findings of the July 23, 2004 x-ray testing and advise if the findings showed a spinal subluxation as defined by the Federal Employees' Compensation Act.

In a report dated December 7, 2005, Dr. Nabil F. Angley, a Board-certified orthopedic surgeon, indicated that he did not believe that Dr. Hosler was a radiologist with a medical degree. Dr. Angley noted that the July 23, 2004 findings stated that appellant had a retrolisthesis of C5 upon C6 and indicated that if this conclusion was correct appellant might have a

¹ Dr. Hosler is not a medical doctor but is a chiropractor who is a diplomate of the American Chiropractic Board of Radiology and a fellow of the American Chiropractic College of Radiology.

subluxation at this level. He recommended that appellant be sent to a radiologist with a medical degree for further cervical, thoracic and lumbar spine x-ray testing.

In a letter dated December 13, 2005, the Office advised appellant that he was being referred to a specialist in the field of radiology. However, the letter does not indicate to whom appellant was being referred.

In a January 10, 2006 letter, the Office advised Dr. Hilbert that Dr. Angley did not believe that Dr. Hosler was a radiologist with a medical degree and that Dr. Angley had recommended that appellant be sent to a radiologist with a medical degree for further cervical, thoracic and lumbar spine x-ray testing. The Office stated, “The claimant is being requested to contact your office for a referral for these x-rays.”²

In a January 10, 2006 letter, the Office advised appellant that Dr. Angley had recommended referral to a radiologist with a medical degree and that appellant should “contact Dr. Hilbert for a referral and make an appointment as soon as possible” and that the report needed to be submitted within 30 days.

In a letter dated January 20, 2006, Dr. Hosler indicated that he did not have a medical degree but that he was trained as a radiologist in a hospital residency program. He explained some of the terms he used in his July 23, 2004 report and recommended that the July 23, 2004 report be reviewed by a radiologist with a medical degree rather than have appellant sent for new radiological testing.

By decision dated February 15, 2006, the Office affirmed its July 13, 2004 decision. The Office indicated that it did not appear that appellant was referred for further radiological testing.

LEGAL PRECEDENT

An employee who claims benefits under the Act³ has the burden of establishing the essential elements of his claim.⁴ The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment. As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.⁵

Under section 8101(2) of the Act, chiropractors are only considered physicians, and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.⁶ The Office’s regulations at 20 C.F.R. § 10.5(bb) have defined

² There is no indication that Dr. Hilbert responded to this letter.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Ruthie Evans*, 41 ECAB 416, 423-24 (1990); *Donald R. Vanlehn*, 40 ECAB 1237, 1238 (1989).

⁵ *Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

⁶ 5 U.S.C. § 8101(2); *see Jack B. Wood*, 40 ECAB 95, 109 (1988).

subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebra which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.⁷

The Office is not a disinterested arbiter but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on the Office to see that its administrative processes are impartially and fairly conducted.⁸ Although the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence.⁹ Once the Office starts to procure medical opinion, it must do a complete job.¹⁰ The Office has the responsibility to obtain an evaluation that will resolve the issue involved in the case.¹¹

ANALYSIS

Appellant alleged that he sustained injury to his neck, back and left upper extremity due to his repetitive work duties. The Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence in support thereof.

Beginning in late 2005, the Office undertook to develop appellant's claim to better evaluate whether he had sustained an injury in the performance of duty as alleged. First, the Office referred the case record to an Office medical adviser for an evaluation of the x-ray testing performed on July 23, 2004 by Dr. Hosler.¹² After the Office medical adviser recommended that appellant be sent to a radiologist with a medical degree for further cervical, thoracic, and lumbar spine x-ray testing, the Office attempted to have appellant obtain a referral for such testing by contacting the office of Dr. Hilbert, an attending chiropractor.

As noted, once the Office starts to procure medical opinion, it must do a complete job and the Office has the responsibility to obtain an evaluation that will resolve the issue involved in the case. The Board finds that the Office did not fully complete the development of the evidence in a manner which would resolve the main issue of the present case, *i.e.*, whether the evidence shows that appellant sustained an injury in the performance of duty. It is unclear why the Office chose to attempt to refer appellant for new radiologic testing more than one year and a half after he filed his claim for an employment-related occupational disease. Arranging for the July 23,

⁷ 20 C.F.R. § 10.5(bb); *see also Bruce Chameroy*, 42 ECAB 121, 126 (1990).

⁸ *Thomas M. Lee*, 10 ECAB 175 (1958).

⁹ *William J. Cantrell*, 34 ECAB 1233 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

¹⁰ *William N. Saathoff*, 8 ECAB 769 (1956).

¹¹ *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983); *Richard W. Kinder*, 32 ECAB 863, 866 (1981).

¹² Dr. Hosler is not a medical doctor but is a chiropractor who is a diplomate of the American Chiropractic Board of Radiology and a fellow of the American Chiropractic College of Radiology.

2004 x-ray testing to be reviewed by a radiologist with a medical degree could provide a much more useful picture of appellant's medical condition around the time he filed his claim.¹³

Accordingly, the case will be remanded to the Office for further evidentiary development regarding the issue of whether appellant sustained an employment-related injury due to his work duties over a period of time. The Office's further development of the evidence should include evaluation of the July 23, 2004 x-ray testing by a radiologist with a medical degree. After such development of the case record as the Office deems necessary, an appropriate decision shall be issued.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' February 15, 2006 decision is set aside and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: July 7, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹³ The radiologist with a medical degree could provide an opinion regarding whether the July 23, 2004 x-ray testing was obtained under the appropriate standards for performing x-ray testing. The radiologist could then provide an opinion of whether the x-rays show a spinal subluxation within the meaning of the Act. *See supra* notes 6 and 7 and accompanying text. The Board notes that it remains unclear whether Dr. Hilbert's July 15, 2005 report constitutes medical evidence because it is unclear whether the July 23, 2004 x-ray testing was obtained under the appropriate standards for performing x-ray testing and whether it might be used to evaluate the existence of spinal subluxations. *See id.*