

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

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**P.T., Appellant**

**and**

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

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**Docket No. 09-68  
Issued: September 2, 2009**

*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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 9, 2008 appellant, through her representative, filed a timely appeal from the September 12, 2008 merit decision of the Office of Workers' Compensation Programs' hearing representative, which affirmed the termination of her compensation for lack of injury-related residuals. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

**ISSUE**

The issue is whether the Office met its burden to justify the termination of appellant's compensation for the accepted subluxations.

**FACTUAL HISTORY**

On September 28, 2004 appellant, then a 39-year-old mail processing clerk, filed a claim alleging that her work duties aggravated the pain in her neck and back. She indicated that she first became aware of her injury on or about August 10, 2004.

Appellant began treatment with Dr. Kenneth J. Osborn, a chiropractor, on September 10, 2004. Dr. Osborn obtained cervical, thoracic and lumbar x-rays on September 13, 2004. He reviewed the radiographs and diagnosed, among other things, a left rotational subluxation of C2, a right lateral flexion subluxation of T3 on T4 and subluxation of L1-3. The Office accepted her claim for subluxations at C2, T3-4 and L1-3.<sup>1</sup> Appellant received compensation for medical treatment and for periods of disability.<sup>2</sup>

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. William Smith, a neurosurgeon, for a second opinion evaluation to determine if she had any residuals of the accepted work-related conditions of cervical, thoracic and lumbar subluxations at C2, T3-4 and L1-3. Dr. Smith examined her on December 29, 2006. He related appellant's history and his findings on physical examination. Dr. Smith reviewed "some loose x-rays of her cervical spine, thoracic spine, lumbar spine in her folder which were undated and of rather poor quality," but he could not appreciate any significant abnormality, "especially no subluxation." He also reviewed an April 6, 2006 magnetic resonance imaging (MRI) scan obtained by Dr. Osborn. Dr. Smith reported no subluxation on the MRI scan. He diagnosed degenerative disc disease at C5-6, at T10-11 and T11-12 (without neural compression) and at L3-4 and L4-5 (without neural compression). Dr. Smith also diagnosed myofascial pain. He stated that he found no evidence of subluxation or dislocation in the cervical, thoracic or lumbar spine.

On June 14, 2007 Dr. Osborn advised that he reviewed Dr. Smith's report and respectfully disagreed with his opinion that the radiographs did not reveal the presence of subluxations:

"The chiropractic subluxation is a nonallopathic lesion that is not a dislocation. A dislocation is known as a luxation. A subluxation is a misalignment of a joint that is less than a dislocation. The diagnosis of the nonallopathic lesion of subluxation is a chiropractic diagnosis. The determination of the presence or absence of a chiropractic subluxation by a medical physician is inappropriate since the medical physician is not trained in the detection or determination of chiropractic subluxations. The presence of a subluxation cannot be refuted by a medical [physician]. In addition, the presence of subluxation on the x-rays reviewed by Dr. Smith has already been established by the U.S. Department of Labor Office of Workers' Compensation [Programs] dated November 14, 2005. In addition, in a consultation and examination report with Dr. Gordon J. Korby DO, DC (osteopathic & chiropractic licensed physician) dated January 17, 2005, he confirms the subluxations/segmental vertebral dysfunctions in the cervical, dorsal and lumbar spine regions."

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<sup>1</sup> Dr. Gordon J. Korby, a psychiatrist and consultant to Dr. Osborn, noted that x-rays showed a segmental dysfunction at C1-2 on the left and at multiple levels in the thoracic spine with some degenerative disc and joint disease. He noted facet arthropathy in the lumbar spine.

<sup>2</sup> Appellant had a previous employment injury on February 21, 2003, when she slipped and fell on ice. The Office accepted a left elbow contusion and a neck and lumbar sprain/strain. Appellant was released to full duty effective September 18, 2003. File No. xxxxxx929.

On August 6, 2007 Dr. Smith explained that there was no work-related injury on or about August 10, 2004 “and the x-ray changes in the cervical, thoracic and lumbar region that were allowed I believe were faulty.” He stated that he was not privy to the x-rays done by Dr. Osborn, but the diagnosis of subluxation in the thoracic region was impossible without a significant traumatic event because of the stabilizing force of an individual’s ribs on the vertebrae.

On January 30, 2008 appellant saw Dr. Charles B. May, a family practitioner, who examined her and obtained x-rays of the cervical, thoracic and lumbar spine. Dr. May noted no evidence of traumatic osseous pathology and stated, “I could not appreciate any bone subluxations or dislocations.” He recommended continued aquatic therapy.

On February 11, 2008 Dr. Osborn diagnosed cervical, thoracic and lumbar subluxations. Objective findings included range of motion, muscle spasm and weakness of the C5-7 myotomes in the right upper extremity.

In a decision dated March 14, 2008, the Office terminated appellant’s compensation for disability and medical benefits effective March 10, 2008. It found that the weight of the medical evidence, represented by the opinion of Dr. Smith, established that she no longer demonstrated objective findings or disability due to the accepted conditions.

On September 12, 2008 an Office hearing representative affirmed. She noted that Dr. Smith reported no subluxation on the April 2006 MRI scan and saw no subluxation in the undated, poor quality loose x-rays he reviewed. She noted that Dr. May saw no subluxations in x-rays from January 2008 and that another physician, a physiatrist, did not diagnose subluxations.

### **LEGAL PRECEDENT**

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>3</sup> Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>4</sup> After it has determined that, an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>5</sup> Having accepted a claim and initiated payments, the Office may not terminate compensation without a positive demonstration by the weight of evidence that entitlement to benefits has ceased.<sup>6</sup> The inadequacy or absence of

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>5</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.0812.3 (July 1993).

a report in support of continuing benefits is not sufficient to support termination and benefits should not be suspended for that reason.<sup>7</sup>

Under the Federal Employees' Compensation Act, a "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 and subject to regulation by the Secretary.<sup>8</sup>

"Subluxation" means an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on any x-ray film to an individual trained in the reading of x-rays.<sup>9</sup>

If there is disagreement between the physician 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.<sup>10</sup>

The Office must inform claimants correctly and accurately of the grounds on which a rejection rests, so as to afford them an opportunity to meet, if they can, any defect appearing therein.<sup>11</sup>

### ANALYSIS

The Office accepted that appellant sustained subluxations at C2, T3-4 and L1-3 while in the performance of duty on or about August 10, 2004. It based this acceptance on the diagnosis made by her chiropractor, Dr. Osborn, from x-rays obtained on September 13, 2004. Having accepted appellant's claim for various subluxations and having paid compensation for medical benefits and disability for work, the Office terminated compensation effective March 10, 2008 based on the opinion of the second opinion neurosurgeon, Dr. Smith, who found no evidence of subluxation or dislocation in the cervical, thoracic or lumbar spine.

When the Office referred appellant to Dr. Smith for the purpose of determining if she had any residuals of the accepted subluxations at C2, T3-4 and L1-3, Dr. Smith should have obtained current x-rays. Office regulations define "subluxation" as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae "which must be demonstrated on any x-ray film" to an individual trained in the reading of x-rays. The Office

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<sup>7</sup> *Id.* at Chapter 2.0812.8(c)(1) (June 2003).

<sup>8</sup> 5 U.S.C. § 8101(2).

<sup>9</sup> 20 C.F.R. § 10.5(BB).

<sup>10</sup> 5 U.S.C. § 8123(a).

<sup>11</sup> *John M. Pittman*, 7 ECAB 514 (1955) (it was a denial of administrative due process requiring reversal for the Bureau, now known as the Office, to deny a claim and terminate benefits on the ostensible grounds that the claimant was not disabled for work beyond a specified date, where it appears from the record that the real reason for denial was that the Bureau, on reevaluation of the evidence, had determined that the injuries alleged had not in fact occurred and that the claimant had never been disabled but had been guilty of malingering).

required x-rays to demonstrate the subluxations before it could accept appellant's claim and therefore should have required x-rays to demonstrate no residuals when terminating her compensation for those subluxations. Dr. Smith obtained no current x-rays. He did review an April 2006 MRI scan, but he offered no explanation how such a study was at least as definitive as an x-ray in determining whether a subluxation existed, as Office regulations define that term.

Dr. Smith reviewed the x-rays Dr. Osborn obtained of the cervical, thoracic and lumbar spine. He described them as some loose x-rays in appellant's folder which were undated and of rather poor quality and he reported that he could not appreciate any significant abnormality, "especially no subluxation." Dr. Osborn took issue with Dr. Smith's opinion that these radiographs did not reveal the presence of subluxations. He questioned Dr. Smith's competency to address the issue, then pointed to the Office's acceptance of the very same subluxations. Dr. Smith responded that "the x-ray changes in the cervical, thoracic and lumbar region that were allowed [*i.e.*, accepted by the Office] I believe were faulty."

The Board finds a conflict in medical opinion between appellant's chiropractor and the Office referral neurosurgeon on whether the x-rays obtained on September 13, 2004 demonstrated any of the subluxations the Office accepted. This is a critical issue. Dr. Osborn's status as a "physician" under the Act, his competency to address appellant's claim, indeed the Office's acceptance of her claim, all depend on the resolution of this conflict. Dr. May, appellant's family practitioner, who obtained his own x-rays and could not appreciate any bone subluxations or dislocations, cannot settle the matter. Neither can a physiatrist reporting a different diagnosis. The Act requires the Office to select an impartial medical specialist to resolve the conflict.

Because there is an unresolved issue whether appellant sustained any work-related subluxation, the termination of compensation for work-related subluxations is premature for determination. The Office may not terminate compensation on the grounds that she "no longer" demonstrated objective findings of the accepted injuries or disability for work beyond a specific date, when the evidence upon which the Office based the termination suggests the injury may never have occurred. Such a finding does not accurately reflect the basis of the Office's denial and does not afford appellant a proper opportunity to meet, if she can, the actual defect appearing in her claim.

For these reasons, the Board finds that the Office's decision to terminate benefits is not supported by the evidence.<sup>12</sup> The weight of the medical evidence does not rest with Dr. Smith and does not establish that residuals of work-related subluxations resolved by March 10, 2008. There is, instead, an unresolved conflict on whether the September 13, 2004 x-rays show any of the accepted subluxations. Because it is the Office that bears the burden of proof, the Board will reverse the Office's hearing representative's September 12, 2008 decision affirming the termination of appellant's compensation benefits.

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<sup>12</sup> See 20 C.F.R. § 10.126 (the Office's decision shall contain findings of fact and a statement of reasons).

**CONCLUSION**

The Board finds that the Office did not meet its burden to justify the termination of appellant's compensation for the accepted subluxations.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 12, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 2, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board