United States Department of Labor
Employees' Compensation Appeals Board

K.D., Appellant	)	
and	)	**Docket No. 11-16**
	)	**Issued: August 16, 2011**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFOREMENT, Fort Myers, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 4, 2010 appellant filed a timely appeal from a June 21, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision which denied her claim. She also appealed an August 13, 2010 OWCP decision which denied her reconsideration request. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained a neck and head injury while in the performance of duty; and (2) whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On May 6, 2010 appellant, then a 46-year-old special agent, filed a traumatic injury claim, alleging that on May 5, 2010 she sustained an injury to her back and headaches after her vehicle was struck in the rear by another automobile while in the performance of duty. She did not stop work at that time.

By letter dated May 13, 2010, OWCP requested additional factual and medical information from appellant stating that the initial information submitted was insufficient to establish the claimed injury. It advised her of the circumstances under which a chiropractor is considered a physician under FECA.

Appellant was treated in the emergency room by Dr. Suzanne E. Felt, Board-certified in emergency medicine, on May 10, 2010, for neck pain and headaches after a motor vehicle accident. Dr. Felt noted findings upon physical examination of a supple neck with no lymphademopathy, no carotid bruits and the extremities revealed no clubbing, cyanosis or edema. She prescribed oral analgesics and discharged appellant to follow-up with her chiropractor or primary physician. A May 10, 2010 computerized tomography (CT) examination of the head and cervical spine revealed no abnormalities.

Appellant came under the treatment of Dr. Mel Youngs, a chiropractor, from May 5 to June 11, 2010, for neck pain and headaches which occurred after a work-related accident on May 5, 2010. In a May 5, 2010 Form CA-16, an attending physician's report, Dr. Youngs noted first treating appellant on that date.[2] He noted providing chiropractic care and stated that appellant could return to regular work. Dr. Youngs noted with a checkmark "yes" that appellant's condition was caused or aggravated by her employment. In reports dated May 17 and 20, 2010, he noted the spinal examination revealed a left lateral malposition at C2 with deviated thoracic segments at T1 and T2. Dr. Youngs diagnosed subluxation of the cervical region, multiple sites, strain/sprain of the neck, whiplash injury, headache and muscle spasms. He noted adjustments to the cervical spine and upper thoracic area. In Florida Workers' Compensation forms dated May 17 to June 11, 2010, Dr. Youngs noted treating appellant for a work-related injury occurring on May 5, 2010. He advised that the treatment consisted of physical reconditioning and functional restoration. In reports dated May 19 to June 11, 2010, Dr. Youngs noted an acute flare-up of a chronic condition and noted subluxations at T1, T2 and T3 vertebral segments. He diagnosed subluxation of the cervical region, multiple sites, strain/sprain of the neck, whiplash injury, headaches and muscle spasms. Dr. Youngs noted that treatment included manual adjustment and ultrasound therapy.

In a June 21, 2010 decision, OWCP denied appellant's claim on the grounds that medical evidence was insufficient to establish that her claimed conditions were caused by her employment. It advised that medical treatment was not authorized and that any prior authorization was terminated.

[2] The CA-16, signed by Brendan Quigley of the employing establishment on May 5, 2010, authorized Dr. Youngs to provide treatment to appellant for up to 60 days.

On July 2, 2010 appellant requested reconsideration. She submitted a June 29, 2010 statement and noted a history of injury which resulted in the development of headaches which affected her work and quality of life. Appellant indicated that she initially sought treatment from the emergency room and then a chiropractor because she could not find a physician who accepted workers' compensation cases. She indicated that OWCP informed her that she could seek treatment from a chiropractor for 60 days. Appellant asserted that OWCP erred when they determined that her chiropractor did not diagnose a subluxation by x-rays and indicated that he diagnosed a subluxation using a CT scan.

Appellant submitted claim documents previously of record, a May 5, 2010 traffic crash report and a July 12, 2010 letter from her congressman. She submitted Florida Workers' Compensation forms from Dr. Youngs dated June 14 to August 6, 2010, who treated her for a work-related injury occurring on May 5, 2010. Dr. Youngs' treatment consisted of physical reconditioning and functional restoration. In reports dated June 14 to 28, 2010 and July 2 to August 2, 2010, he noted an acute flare-up of a chronic condition and noted subluxations at C2, T1, T2 and T3 vertebral segments. Dr. Youngs diagnosed subluxation of the cervical region, multiple sites, strain/sprain of the neck, whiplash injury, headaches and muscle spasms.

In an August 13, 2010 decision, OWCP denied appellant's reconsideration request finding that the request was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under FECA has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,[3] including that she is an "employee" within the meaning of FECA[4] and that she filed her claim within the applicable time limitation.[5] The employee must also establish that she sustained an injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.[6]

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[7]

[3] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[4] *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); See 5 U.S.C. § 8101(1).

[5] *R.C.*, 59 ECAB 427 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

[6] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[7] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

Authorization by OWCP for medical examination or treatment constitutes a contractual agreement to pay for the services, regardless or whether a compensable injury or condition exists. Moreover, any medical condition resulting from authorized examination or treatment, such as residuals from surgery, may form the basis of a compensation claim for impairment or disability, regardless of the compensability of the original injury. *D.B.,* 58 ECAB 354 (2007).

Where an employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *Tracey P. Spillane,* 54 ECAB 608 (2003).

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained a neck and head injury when her vehicle was struck in the rear by another automobile on May 5, 2010. The Board notes that the evidence supports that the incident occurred on May 5, 2010 as alleged. The Board finds, however, that the medical evidence is insufficient to establish that appellant sustained a head and neck injury causally related to the May 5, 2010 work incident. On May 13, 2010 OWCP advised appellant of the type of medical evidence needed to establish her claim. Appellant did not submit a rationalized medical report from an attending physician in which the physician explains why the May 5, 2010 work incident caused or aggravated her claimed condition.

Appellant submitted emergency room records from Dr. Felt dated May 10, 2010 for treatment of neck pain and headaches after a motor vehicle accident. She noted an essentially normal physical examination with findings of a supple neck with no clubbing or edema of the extremities. Dr. Felt prescribed oral analgesics. However, he neither mentioned that appellant's injury was work related[8] nor did she provide a specific and rationalized opinion as to the causal relationship between appellant's employment and her diagnosed neck pain and headaches.[9] Therefore, these reports are insufficient to establish appellant's claim.

Appellant was also treated by Dr. Youngs, a chiropractor, beginning May 5, 2010, for neck pain and headaches which occurred after a car accident on May 5, 2010. Dr. Youngs noted that the spinal examination revealed a left lateral malposition at C2 with deviated thoracic segments at T1 and T2. The chiropractor diagnosed subluxation of the cervical region, multiple sites, strain/sprain of the neck, whiplash injury, headache and muscle spasms. Appellant also submitted form reports from Dr. Youngs noting appellant's treatment for neck pain and headaches.

The Board notes that section 8101(2) of FECA provides that chiropractors are considered physicians "only to the extent that their reimbursable services are limited to treatment consisting

[8] *See Frank Luis Rembisz,* 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

[9] *Franklin D. Haislah,* 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett,* 52 ECAB 332 (2001).

of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary."[10]

Thus, where x-rays do not demonstrate a subluxation (a diagnosis of a subluxation based on x-rays has not been made), a chiropractor is not considered a "physician," and his or her reports cannot be considered as competent medical evidence under FECA.[11] Although Dr. Youngs diagnosed subluxations by examination he is not considered a physician as he did not diagnose a spinal subluxation demonstrated by x-ray. The Board has held that a chiropractor may only qualify as a physician in the diagnosis and treatment of spinal subluxation, his or her opinion is not considered competent medical evidence in evaluation of other disorders, including those of the extremities, although these disorders may originate in the spine.[12] Thus, Dr. Youngs' opinion is not considered competent medical evidence under FECA.

The remainder of the medical evidence, including reports of diagnostic testing, such as a May 10, 2010 CT scan of the of the head and a CT scan of the cervical spine are insufficient as it fails to address causal relationship between appellant's diagnosed condition and the May 5, 2010 work accident.[13]

Consequently, the medical evidence is insufficient to establish that the May 5, 2010 incident caused or aggravated a diagnosed medical condition.

On appeal, appellant asserts that she should be able to have her treatment from her chiropractor reimbursed under the Form CA-16 that was issued to her. The authorization from the employing establishment created a contractual obligation to pay for the cost of necessary medical treatment and emergency surgery regardless of the action taken on the claim.[14] The record contains a May 12, 2010 telephone call memorandum in which OWCP informed the employing establishment that, since a CA-16 was given to Dr. Youngs, "the claims will be paid." However, the record does not contain evidence confirming that any of these services were reimbursed. Upon return of the case record, OWCP shall ensure that all of Dr. Youngs' services are reimbursed pursuant to the CA-16. The Board finds that, pursuant to the Form CA-16, appellant is entitled to reimbursement for treatment by Dr. Youngs from May 5, 2010 until OWCP terminated the authorization of medical treatment on June 21, 2010.

[10] 5 U.S.C. § 8101(2); *see also* section 10.311 of the implementing federal regulations provide: "(c) A chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation. OWCP will not necessarily require submittal of the x-ray, or a report of the x- ray, but the report must be available for submittal on request."

[11] *See Susan M. Herman,* 35 ECAB 669 (1984).

[12] *Pamela K. Guesford*, 53 ECAB 726 (2002).

[13] Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[14] *D.W.*, Docket No. 10-813 (issued November 3, 2010). *See Robert F. Hamilton*, 41 ECAB 431 (1990); 20 C.F.R. § 10.300.

Appellant may submit new evidence or argument with a written request for reconsideration to the Office within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,[15] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by OWCP; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[16]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[17]

ANALYSIS -- ISSUE 2

The Office denied appellant's claim for a traumatic injury on May 5, 2010 because she failed to provide the necessary reasoned medical opinion establishing that the May 5, 2010 incident caused or aggravated a diagnosed medical condition. It denied appellant's July 2, 2010 reconsideration request, without a merit review, and appellant appealed this decision to the Board. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring the Office to reopen the case for review of the merits of the claim.

In her June 29 and July 2, 2010 application for reconsideration and undated statement, appellant did not show that the Office erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. She asserted that after the May 5, 2010 automobile accident she developed headaches which affected her work and quality of life. Appellant indicated that she could not find a physician who accepted workers' compensation cases so she went to a chiropractor. She asserted that OWCP erred in its decision that her chiropractor was not a physician because he did not diagnose a subluxation by x-rays and

[15] 5 U.S.C. § 8128(a).

[16] 20 C.F.R. § 10.606(b)(2).

[17] *Id.* at § 10.608(b).

indicated that he diagnosed a subluxation using a CT scan. The underlying issue in this case was whether appellant sustained a neck and head injury causally related to the May 5, 2010 accident. That is a medical issue which must be addressed by relevant medical evidence.[18]

None of Dr. Youngs reports submitted on reconsideration diagnose a subluxation as demonstrated by x-rays. Rather, in reports issued from June 14 to August 6, 2010, Dr. Youngs diagnosed spinal subluxations by examination and this is insufficient to qualify as a physician under FECA as he did not indicate that he based the diagnosis on x-rays.[19] Consequently, these new reports are not relevant to the medical issue in the claim. Other evidence including a traffic crash report and correspondence from her congressman, are new but not relevant to the underlying medical issue. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, the Office properly denied merit review.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained a neck and head injury causally related to her May 5, 2010 employment incident. The Board further finds that the Office properly denied appellant's request for reconsideration. The case is returned to OWCP for appropriate payment of medical expenses pursuant to the CA-16 form issued to Dr. Youngs on May 5, 2010.

[18] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[19] Although appellant asserts that Dr. Youngs based his diagnosis on a CT scan, Dr. Youngs did not state this in his reports. In any event, a CT scan is not an x-ray and does not satisfy FECA's requirement that the diagnosis be demonstrated by x-ray. *Cf., Jay K. Tomokiyo*, 51 ECAB 361 (2000) (there is no provision in FECA or OWCP regulations for acceptance of a chiropractor's report as probative medical evidence where subluxation is diagnosed by MRI scan).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 13, 2010 is affirmed and the June 21, 2010 decision is affirmed in part and the case remanded in part for action consistent with this decision.

Issued: August 16, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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