

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

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S.W., Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
VETERANS ADMINISTRATION MEDICAL )  
CENTER, Shreveport, LA, Employer )  
\_\_\_\_\_ )

**Docket No. 10-607**  
**Issued: January 24, 2011**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 4, 2010 appellant filed a timely appeal of the July 13 and October 23, 2009 decisions of the Office of Workers' Compensation Programs denying her claim for an employment-related injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

**ISSUE**

The issue is whether appellant established that she sustained an injury in the performance of duty on April 28, 2009, as alleged.

On appeal, appellant contends that the medical evidence supports her claim.

**FACTUAL HISTORY**

On May 7, 2009 appellant, then a 46-year-old nurse, filed a traumatic injury claim alleging that as a result of assisting a patient on April 28, 2009 she sustained pain from her scapula to her buttocks and left foot.

In medical notes dated May 5 through June 10, 2009, Dr. Louie T. Ballis, a chiropractor, diagnosed bulging disc, subluxation (with alignment and movement integrity altered); sprain/strain; segment dysfunction and scoliosis. On May 22, 2009 he noted that his findings revealed subluxation of the cervical spine, thoracic spine and lumbar spine as well as anterior analgia and walking with an abnormal gait. Dr. Ballis noted that appellant was responding to treatment which consisted of adjustment/spinal manipulation to reduce swelling, muscle spasm and pain; electric stimulation; hydrocollator; and mechanical traction. In a June 26, 2009 report, Dr. Ballis indicated that x-rays were obtained on May 5, 2009 to confirm his findings. He interpreted them as showing cervical sprain/strain; lumbar sprain/strain; hip sprain/strain; and thoracic nerve root irritation and that the findings were consistent with the injury as described by appellant. Dr. Ballis found that she was able to return to work on May 25, 2009.

In an x-ray report dated April 28, 2009, Dr. Robert M. Walker, a radiologist, indicated that there was normal alignment of the lumbar sacral vertebrae and that no fracture or subluxation was seen. He noted significant degenerative changes.

By decision dated July 13, 2009, the Office denied appellant's claim. It noted that, although the evidence supported that the incident occurred as alleged, there was no medical evidence that provided a diagnosis connected to the incident.

On July 23, 2009 appellant requested review of the written record by an Office hearing representative.

By decision dated October 23, 2009, an Office hearing representative affirmed the Office's July 13, 2009 decision.

### **LEGAL PRECEDENT**

An employee seeking compensation under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,<sup>2</sup> including that she is an "employee" within the meaning of the Act<sup>3</sup> and that she filed her claim within the applicable time limitation.<sup>4</sup> 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.<sup>5</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

<sup>3</sup> *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).

<sup>4</sup> *R.C.*, 59 ECAB 427 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

<sup>5</sup> *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.<sup>6</sup> Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>7</sup>

In order to satisfy the burden of proof, an employee must submit a physician's rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.<sup>8</sup> Neither the fact that the condition became apparent during a period of employment nor appellant's belief that the employment caused or aggravated her condition is sufficient to establish causal relationship.<sup>9</sup>

Under section 8101(2) of the Act, 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 x-ray to exist and subject to regulations by the Secretary.<sup>10</sup> The Office's regulations at 20 C.F.R. § 10.5(bb) define subluxation as an incomplete dislocation, off centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on an x-ray film to an individual trained in the reading of x-rays.<sup>11</sup> Section 10.311(c) notes:

"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. [The Office] 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."<sup>12</sup>

Section 8123(a) of the Act provides that, 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>13</sup> Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>14</sup>

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<sup>6</sup> *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

<sup>7</sup> *T.H.*, 59 ECAB 388 (2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

<sup>8</sup> *Gary L. Fowler*, 45 ECAB 365 (1994).

<sup>9</sup> *Phillip L. Barnes*, 55 ECAB 426 (2004); *Jamel A. White*, 54 ECAB 224 (2002).

<sup>10</sup> 5 U.S.C. § 8101(2); *Paul Foster*, 56 ECAB 208 (2004).

<sup>11</sup> 20 C.F.R. § 10.5(bb).

<sup>12</sup> *Id.* at § 10.311(c).

<sup>13</sup> 5 U.S.C. § 8123(a).

<sup>14</sup> *D.F.*, 61 ECAB \_\_ (Docket No. 09-1463, issued August 12, 2010); *Roger Dingess*, 47 ECAB 123 (1995).

## ANALYSIS

Appellant, a nurse, alleged injury on April 28, 2009 while assisting a patient. The Board notes that there is no dispute that this incident occurred as alleged. The Office denied the claim, finding that she had failed to provide a physician's opinion that established the causal relationship between the accepted incident and an injury. It found that Dr. Ballis, a chiropractor, was not a physician under the Act. The Board finds that the case is not in posture for decision.

Dr. Walker's x-ray report of April 28, 2009 found normal alignment of the lumbar sacral vertebrae and that no fracture or subluxation was seen. Dr. Ballis, appellant's treating chiropractor, interpreted x-rays obtained on May 5, 2009. He diagnosed bulging disc, subluxation, sprain/strain, segment dysfunction and scoliosis. Dr. Ballis reiterated the diagnosis of subluxation of the cervical, thoracic and lumbar spine as well as anterior antalgia and walking with an abnormal gait. Under 20 C.F.R. § 10.311(c), a chiropractor may interpret his own x-rays to the extent as any physician. Dr. Ballis is not required to submit the x-rays or reports of the x-rays unless requested.<sup>15</sup> The case record does not disclose that the Office at any time requested the chiropractor's x-ray films or sought medical opinion to confirm the subluxation diagnosis.

In *George E. Reilly*,<sup>16</sup> the Board found an unresolved conflict between the opinion of the employee's treating chiropractor and a Board-certified radiologist which necessitated resolution by an impartial medical examiner. Here development is required to certify the diagnosis provided by the attending chiropractor.

On remand, the Office should request that Dr. Ballis forward his x-ray report to the Office for review. The Office should obtain an opinion as to whether the x-rays support the diagnosis of a spinal subluxation as made by Dr. Ballis. After such further development of the medical evidence as deemed appropriate, the Office shall issue a *de novo* decision on appellant's claim of injury.

## CONCLUSION

The Board finds that this case is not in posture for decision.

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<sup>15</sup> *Id.*; *Ronald Q. Pierce*, 53 ECAB 336, 340 (2002).

<sup>16</sup> 44 ECAB 458 (1993) (Groom, M., concurring).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 23 and July 13, 2009 are set aside and the case is remanded for further consideration consistent with this opinion.

Issued: January 24, 2011  
Washington, DC

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

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

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