

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

J.H., Appellant)
and) Docket No. 10-1388
DEPARTMENT OF THE TREASURY,) Issued: January 6, 2011
INTERNAL REVENUE SERVICE,)
Richmond, VA, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 26, 2010 appellant filed a timely appeal of a March 15, 2010 merit decision of the Office of Workers' Compensation Programs which denied her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a traumatic injury in the performance of duty on August 25, 2009.

FACTUAL HISTORY

On September 17, 2009 appellant, then a 24-year-old clerk, filed a traumatic injury claim alleging that on August 25, 2009, she sustained an injury to her back when she pulled a rack of undeliverable mail while in the performance of duty. She stopped work on August 31, 2009. The employing establishment controverted the claim.

In a statement dated September 14, 2009, appellant indicated that, on August 25 or 26, 2009, she was “pushing a full rack of undeliverable mail. I pulled my whole back out.” Appellant experienced pain that started from the top of the spine to the bottom and mostly on the left side. It caused her left arm, hand, leg and foot to go numb. She did not go to a physician until September 11, 2009 because she hoped the pain would go away.

In reports dated September 11, 2009, Dr Mark A. Shapiro, a Board-certified family practitioner, diagnosed back pain and acute sinusitis. He recommended that appellant return to full duty on September 21, 2009.

In disability slips dated September 18 and October 2, 2009, Dr. David Gozinsky, a chiropractor, advised that appellant was being treated for neck and back injuries. Dr. Gozinsky stated that appellant had “work-related cervical, thoracic and lumbar subluxation injuries.” He found that she was disabled since the date of the accident. Dr. Gozinsky initially advised that appellant could return to work on October 5, 2009 but subsequently noted that her return to work was “to be determined.”

In a September 19, 2009 report, Dr. Frank Telang, a Board-certified neurologist, reported that appellant was “pushing the cart when unfortunately she fell and the cart fell … on top of her. This happened on August 25, 2009.” He diagnosed cervical, thoracic and lumbar spine subluxations and cervical and lumbar radiculopathic injuries. Dr. Telang opined that the injuries were directly related to the fall at work in August and recommended chiropractic treatment. He provided a duty status report dated September 23, 2009 advising that she could not return to work.¹

By letter dated October 15, 2009, the Office advised appellant that additional factual and medical evidence was needed to support her claim. It allotted her 30 days to submit the requested information.

In a report dated October 10, 2009, Dr Gozinsky noted that appellant was seen on September 15, 2009 with “[b]ack injures that consisted of pain in the cervical thoracic and lumbar spines.” He obtained a history that she moved a large heavy cart and felt immediate pain down the left arm that became severe the following day, with left leg and foot numbness. Dr. Gozinsky noted that appellant indicated that she was asymptomatic prior to the accident. On examination, he noted subluxation of the cervical, thoracic and lumbar spine as confirmed by x-rays taken in his office. Dr Gozinsky diagnosed lumbar subluxation, cervical subluxation and thoracic subluxation. In an undated report, he indicated that x-rays were taken of the cervical spine on September 18, 2009. The report was comprised of checking boxes which revealed normal vertebrae, no signs of osseous pathology and varying degrees of vertebral body rotation. Dr. Gozinsky made an annotation that there were subluxations at C5, 5 and 6. The x-rays of the thoracic and lumbar spine were taken on October 5, 2009. Dr. Gozinsky advised that appellant had a mild right curvature of the spine, normal vertebra, no signs of osseous pathology and varying degrees of vertebral body rotation. He diagnosed subluxation at T4, T5 and T6. In disability certificates dated October 20 and 26, 2009, Dr. Gozinsky advised that appellant was totally disabled.

¹ The report was partially illegible.

An October 28, 2009 diagnostic ultrasound read by Dr. Alexandra B. Perkins, a Board-certified diagnostic radiologist, revealed an abnormal study. She noted that appellant had physiologic dysfunction of tissues supporting normal spinal articular function and were consistent with the chiropractic diagnosis of vertebral subluxation complex.

On October 31, 2009 appellant described the events leading to her injury on August 25, 2009. She was pushing a full rack of undeliverable mail and hurt her neck and tailbone. Appellant did not immediately report her injury to her supervisor because she was hoping the pain would cease.

By decision dated November 23, 2009, the Office accepted that the August 25, 2009 incident at work occurred as alleged. It found that appellant did not provide sufficient medical evidence to establish injury to her spine due to the August 25, 2009 incident.

Appellant requested reconsideration on December 20, 2009. In a November 6, 2009 report, Dr. Telang noted that she was injured while at work on August 25, 2009. He found that appellant presented with evidence of some cervical and lumbar radiculopathic injuries related to the fall in August 2009. Dr. Telang advised that she had ataxia. In a December 4, 2009 report, he explained that his September 19, 2009 report on appellant's work-related accident was transcribed erroneously. Appellant reported that she injured her spine as a result of pushing a heavy mail cart. Dr. Telang indicated that she did "not have a mail cart and another person fell on her which was what was mistakenly transcribed."

In a letter dated January 27, 2010, the Office advised appellant that it had received her request for reconsideration. It also advised her that the term "subluxation" was defined as "an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically, which must be demonstrable on any x-ray film to individuals trained in the reading of x-rays." Furthermore, to be of any value, x-rays were to be taken within a reasonable time following the injury and within a few days of the initial examination. The Office informed appellant that, while the x-ray report submitted contained an indication that she had subluxations, the report was comprised of a check box only and did not provide any discussion of the x-ray findings. Appellant was advised that it was necessary to review the actual x-ray films obtained. The Office requested that she submit the x-ray films to it within 30 days.

Appellant provided the Office with copies of her x-ray files, which were received on February 17, 2010. On March 1, 2010 the Office requested that an Office medical adviser review the x-rays and provide an opinion regarding whether they supported the diagnosis of subluxation.

In a March 1, 2010 report, the Office medical adviser noted that Dr. Gozinsky took x-rays on September 15, 2009 and reported multiple subluxations of the spine; however, he did not specify what these findings were. The medical adviser previously reviewed x-rays on February 3, 2010 and noted that all but one was labeled as a lateral view of the cervical spine on September 15, 2009, were taken on February 3, 2010. He noted that all of the x-rays were of poor quality and somewhat underexposed. The medical adviser noted that they revealed degenerative changes in the facets, some spurring of the vertebral bodies, some degenerative disc

disease and lumbar scoliosis, which was barely visible in the thoracic spine. He opined that there were “no true subluxations from the orthopedic standpoint.” The Office medical adviser recommended that appellant have better quality films taken by a Board-certified radiologist, plus a report submitted by the radiologist, as well as an examination and possibly even treatment by an orthopedic surgeon, if she was still having symptoms. He indicated that it “would be interesting also to see a copy of the neurologist’s consultation on September 19, 2009.” However, the Office medical adviser explained that the x-ray taken on September 15, 2009 “was a lateral of the cervical spine, which appears pretty much normal.” He determined that no subluxations were noted.

In a March 15, 2010 decision, the Office found that causal relationship between the diagnosed conditions and the August 25, 2009 incident was not established. It found that, based on the Office medical adviser’s report, the reports of Dr Gozinsky were not considered as he was not a physician.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees’ Compensation Act² has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an “employee of the United States” within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act³ and that an injury was sustained in the performance of duty.⁴ These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a “fact of injury” has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.⁶ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷

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 (known as a referee physician or impartial medical specialist) who shall make an examination.⁸ A

² 5 U.S.C. §§ 8101-8193.

³ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *James E. Chadden Sr.*, 40 ECAB 312 (1988).

⁵ *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁶ *John J. Caralone*, 41 ECAB 354 (1989).

⁷ *Id.*

⁸ 5 U.S.C. § 8123(a). See also *R.H.*, 59 ECAB 720 (2008).

difference in medical opinion sufficient to be considered a conflict occurs when two reports of virtually equal weight and rationale reach opposing conclusions.⁹

ANALYSIS

Appellant alleged that she sustained injuries to her spine, left side, arm, hand leg and foot while pulling a rack of undeliverable mail while in the performance of duty. The Office accepted that she was pulling a rack of undeliverable mail while in the performance of duty. The Board finds that the claimed incident, pulling a rack of undeliverable mail on August 25, 2009, occurred as alleged.

The Board finds that the case is not in posture for decision with regard to whether the incident resulted in injury. The Board finds that there is a conflict in medical opinion between Dr. Gozinsky, a chiropractor, who found that appellant had work-related lumbar, cervical and thoracic subluxations based upon x-rays and the Office medical adviser, who opined that there were no true subluxations. Based on the medical adviser's opinion, the Office found that Dr. Gozinsky was not a physician under the Act and that his reports could not be considered as medical evidence.¹⁰ Under the implementing regulations, however, a chiropractor may interpret his or her x-rays to the same extent as any other physician.¹¹

The opinions of the Office medical adviser and Dr. Gozinsky are of virtually equal weight and rationale but reach opposing conclusions.¹² The Board has held that, where there is a conflict between a chiropractor and a medical physician with respect to the presence or the absence of a subluxation, the case file and x-rays should be referred to a Board-certified radiologist for resolution of the conflict.¹³ The Office should refer the case to Board-certified radiologist to resolve the conflict regarding whether appellant sustained a spinal subluxation as demonstrated by x-ray.¹⁴ Following this and such development as deemed necessary, the Office shall issue an appropriate decision in the case.

On appeal, appellant questioned the basis of the Office's denial of her claim. However, as noted above, the case is not in posture for decision due to a conflict in the medical evidence.

⁹ See 20 C.F.R. § 10.321(b). See also *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁰ 5 U.S.C. § 8101(2) provides that 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.” Office regulations provide that a chiropractor may interpret his x-rays to the same extent as any other physician. 20 C.F.R. 10.311(c).

¹¹ See 20 C.F.R. § 10.311(c).

¹² *Id.* at 10.321(b). See *James P. Roberts*, *supra* note 9.

¹³ See *George E. Reilly*, 44 ECAB 458, 463 (1993). *Bruce Chameroy*, 42 ECAB 121 (1990).

¹⁴ Subluxation is defined as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae on x-ray. See 20 C.F.R. § 10.5(bb).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2010 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: January 6, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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