United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
	)	**Docket No. 12-528**
and	)	**Issued: October 11, 2012**
DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING CENTER, Bronx, NY, 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
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On January 11, 2012 appellant filed a timely appeal of the November 16, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying authorization and payment of chiropractic services. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the medical treatment issue of this case.[2]

ISSUE

The issue is whether OWCP properly exercised its discretion in denying authorization and payment for chiropractic services from October 13, 2010 through January 13, 2011.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant submitted new medical evidence with her appeal. The Board has no jurisdiction to review evidence for the first time on appeal which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, appellant contends that an attending chiropractor diagnosed a subluxation and, thus, he is entitled to payment for services rendered pursuant to section 8103(a) of FECA.

FACTUAL HISTORY

On October 14, 2010 appellant, then a 63-year-old agricultural commodities grader, filed a traumatic injury claim alleging that on October 13, 2010 she bruised her right side and elbow when a forklift ran into her and propelled her into a wall.

In medical reports dated October 13, 18 and 27, and November 12, 2010, Dr. Robert H. Rubino, Jr., an attending chiropractor, listed findings on examination and diagnosed neck and thoracic pain, cervical, thoracic and lumbar sprain/strain and lumbalgia. He addressed appellant's physical restrictions and advised that she was totally disabled for work from October 13 through November 12, 2010.

By letter dated November 18, 2010, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It advised her of the circumstances under which a chiropractor is considered a physician under FECA.

In a November 16, 2010 report, daily notes dated October 13, 2010 through January 13, 2011 and undated daily notes, Dr. Rubino obtained a history of the October 13, 2010 employment injuries and appellant's medical treatment. He noted her complaints of neck and back pain. Dr. Rubino reported examination findings which indicated that appellant's C6, T7 and L5 structures were in an abnormal position and/or moved in an aberrant fashion during palpation. He advised that her condition was improving. Regarding her treatment, Dr. Rubino stated that appellant's C6, T7 and L5 structures were provided specific adjustments to correct malalignments and restore normal mobility. In a January 4, 2011 report, he advised that she had a lumbar sprain/strain. By letter dated January 6, 2011, Dr. Rubino stated that appellant had returned to full-time work with no restrictions. He submitted duplicate copies of his daily notes dated October 13, 2010 through January 3, 2011 and stated that this evidence provided a diagnosis of subluxation which was required for authorization of payment and reimbursement of his services.

An October 13, 2010 hospital report which contained the typed name of David Fernandez, a physician's assistant, listed physical examination findings and stated that appellant had a head injury and back pain. Another hospital report dated October 13, 2010 contained the typed name of Dr. Alexander N. Rafailov, an emergency medicine physician, and stated that appellant had muscle and cervical strain, headache, right shoulder sprain and back pain.

By letter dated March 2, 2011, OWCP accepted appellant's claim for cervical and right shoulder strain.

In a March 7, 2011 decision, OWCP denied authorization and payment for chiropractic services rendered from October 13, 2010 through January 13, 2011, finding that Dr. Rubino was not a physician as defined under FECA because he did not diagnose subluxation by x-ray. It stated that his diagnosis of subluxation was based solely on palpatory findings.

By letter dated March 31, 2011, appellant requested an oral hearing before an OWCP hearing representative.

In an October 13, 2010 report, Dr. Scott C. Hollander, a Board-certified radiologist, advised that an x-ray of the lumbar spine showed no acute fracture or subluxation. There was multilevel degenerative disease that was worse at L5-S1.

In a November 16, 2011 decision, an OWCP hearing representative affirmed the March 31, 2011 decision denying authorization for chiropractic treatment rendered by Dr. Rubino from October 13, 2010 through January 13, 2011.

LEGAL PRECEDENT

Section 8103(a) of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty the services, appliances and supplies prescribed or recommended by a qualified physician that the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation.[3] OWCP must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to effect the purposes specified in FECA.[4] The only limitation on OWCP's authority is that of reasonableness.[5]

In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under section 8101(2) of FECA. A chiropractor is not considered a physician under FECA unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.[6] Services rendered by chiropractors are generally not reimbursable by OWCP except 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.[7]

Section 10.5(bb) of OWCP's implementing federal regulations define subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray.[8]

[3] *Id.* at § 8103(a).

[4] *See Marjorie S. Geer*, 39 ECAB 1099 (1988) (OWCP has broad discretionary authority in the administration of FECA and must exercise that discretion to achieve the objectives of section 8103).

[5] *Daniel J. Perea*, 42 ECAB 214 (1990).

[6] 5 U.S.C. § 8102(2); *see Mary A. Ceglia*, 55 ECAB 626 (2004); *Sean O'Connell*, 56 ECAB 195 (2004).

[7] *Sean O'Connell*, *supra* note 6.

[8] *See* 20 C.F.R. § 10.5(bb).

ANALYSIS

The Board finds that OWCP properly denied authorization for payment of chiropractic treatment. Appellant sustained an injury on October 13, 2010 which was accepted by OWCP for cervical and right shoulder strain. She subsequently sought treatment from October 13, 2010 through January 13, 2011 for neck and back pain from Dr. Rubino, a chiropractor. After being advised as to the limitations of treatment by chiropractors under FECA, Dr. Rubino reported that on palpation, C6, T7 and L5 were in an abnormal position and/or moved in an aberrant fashion. He provided specific adjustments to correct malalignments and restore normal mobility at C6, T7 and L5. There is no indication that the assessment of malalignments at these levels was based on a review of x-rays. The record does not show that Dr. Rubino conducted an x-ray of appellant's cervical, thoracic and lumbar spine or that he reviewed Dr. Hollander's October 13, 2010 x-ray report which found no acute fracture or subluxation of the lumbar spine.[9] As Dr. Rubino did not diagnose a subluxation from x-ray, the Board finds that the chiropractic expense is not reimbursable under the terms of FECA.

On appeal, appellant contended that Dr. Rubino diagnosed a subluxation, thereby entitling him to payment for services rendered under section 8103(a) of FECA. As stated, Dr. Rubino is not considered to be a physician under FECA, as he did not diagnose a subluxation as demonstrated by x-ray and, thus, OWCP properly denied authorization for payment of his chiropractic services.

CONCLUSION

The Board finds that OWCP properly exercised its discretion in denying authorization and payment for chiropractic services from October 13, 2010 through January 13, 2011.

[9] The Board notes that appellant's claim has not been accepted for any employment-related lumbar condition.

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 11, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board