

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

J.M., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Holtsville, NY, Employer**

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**Docket No. 15-0398
Issued: July 24, 2015**

Appearances:

Thomas R. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 10, 2014 appellant, through counsel, filed a timely appeal of a July 11, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has met her burden of proof to establish that she sustained a back injury in the performance of duty on January 4, 2013.

On appeal counsel argued that appellant has established fact of injury on January 4, 2013.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 4, 2013 appellant, then a 67-year-old contact representative, filed a traumatic injury claim alleging on that date she fell at the edge between a rug pathway to a tiled floor at 11:35 am. She stated that her feet slipped out from under her and she fell with force to the ground. Appellant reported that she was experiencing pain in her right knee, hip, side and back. On the reverse of the form, appellant's supervisor indicated that she was in the performance of duty at the time the incident occurred.

Dr. Kimberly A. Romaine, a chiropractor, examined appellant on January 10, 2013 and noted that she had sustained a work injury on January 4, 2013 when she slipped and fell on her right side walking from a rug onto a tiled floor. She stated that appellant's feet went out from under her. On January 17, 2013 Dr. Romaine diagnosed low back pain and right mid-back and neck pain. She completed a form report on January 17, 2013 and documented that appellant stepped off a rug onto the floor. Appellant's feet went behind her and she fell forward, twisting to avoid hitting her face. Dr. Romaine indicated with a checkmark "yes" that appellant's condition was due to her employment activity. She stated that appellant was totally disabled. Dr. Romaine diagnosed sprain/strain of the full spine, lumbar, thoracic, and neck with muscle spasms.

Dr. Romaine referred appellant to Dr. Richard Rosenberg, a Board-certified radiologist, for x-rays. On January 29, 2013 Dr. Rosenberg conducted x-rays including three views of appellant's ribs, lateral, anterior, and posterior views of the lumbosacral, thoracic, and cervical spine. He found appellant's lumbar spine x-ray demonstrated degenerative disc disease at L2-3 with levoscoliosis and a slightly exaggerated lordotic curve. Dr. Rosenberg stated that x-rays of appellant's thoracic spine demonstrated degenerative changes and disc space narrowing throughout. Appellant's cervical spine demonstrated C5-7 spondylosis as well as arthritis of Luschka's joints, but no fracture or spondylolisthesis.

Dr. Romaine examined appellant on March 14, 2013 and diagnosed sprain/strain of the full spine and muscle spasm. She stated that x-rays demonstrated degenerative disc disease L2-3 with levoscoliosis, and spondylosis C5 to C7. Dr. Romaine stated that appellant's condition was employment related as she was walking at work and fell.

In a letter dated April 11, 2013, OWCP requested additional factual and medical information in support of appellant's claim. It stated that Dr. Romaine was not considered a physician under FECA unless there was a diagnosed spinal subluxation demonstrated by x-ray. OWCP defined a subluxation 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."

Dr. Romaine completed a report dated April 30, 2013 and noted appellant's history of injury on January 4, 2013 as stepping off a rug onto the floor. Appellant's feet fell behind her and she fell forward, twisting to avoid hitting her face. She sought treatment on January 10, 2013 due to pain in her lower back, mid-back, and ribs. Dr. Romaine reviewed the x-rays taken on January 29, 2013 and diagnosed subluxation complexes at C1-2, C4-5, C5-6, and C6-7. She found a rotational subluxation at T4 and subluxation complexes at L1-2, L2-3, L3-4, and L4-5 with left body rotation. Dr. Romaine diagnosed sprain/strain of the lumbar spine, sprain/strain of

the thoracic spine, and muscle spasm. She opined that appellant was totally disabled and could not perform a lot of sitting required by her usual work duties.

By decision dated May 16, 2013, OWCP denied appellant's claim finding that she had not submitted medical evidence containing a medical diagnosis. It stated that the x-rays in the record did not support Dr. Romaine's diagnoses of spinal subluxations and that she was not a physician for the purposes of FECA.

Appellant requested a review of the written record on June 7, 2013 before an OWCP hearing representative. Dr. Romaine completed a report dated May 28, 2013 and stated that appellant's January 29, 2013 rib and spine x-rays were taken at her request. She stated that the x-rays were initially read by a radiologist and that often radiologists do not mention chiropractic subluxations on their reports. Dr. Romaine stated, "Spondylosis is a general term for degenerative joint disease which affects the vertebrae, intervertebral discs and the surrounding ligaments and connective tissue. Subluxations involve the same tissues as spondylosis but on a more precise scale." Dr. Romaine stated that appellant's levoscoliosis was a subluxation as defined by OWCP as this condition is defined as a lateral deviation in the normally straight vertical line of the spine.

In a note dated June 24, 2013, Dr. Romaine stated that appellant sustained an additional fall up the front steps and hurt her lower back.

In a decision dated September 10, 2013, an OWCP hearing representative found that as Dr. Romaine diagnosed a subluxation by x-rays she was considered a physician under FECA. She found, however, that Dr. Romaine had not provided the medical reasoning necessary to establish that the diagnosed subluxations were related to appellant's employment incident and noted that appellant had preexisting spondylosis and degeneration.

Counsel requested reconsideration on May 9, 2014 and argued that appellant had submitted sufficient medical opinion evidence to establish her traumatic injury claim. Dr. Romaine completed a report dated May 27, 2014 and described appellant's employment incident of a fall on a tiled floor. She noted that appellant underwent x-rays and stated, "Without the trauma of her work-related injury, the symptoms she experienced due to the degenerative changes and spondylosis would not be evident at this time." Dr. Romaine stated that, prior to her fall at work, appellant did not experience back pain. Appellant currently utilized a cane. Dr. Romaine stated that appellant had incurred a permanent partial disability as a result of her employment injury and experienced frequent back pain as a result of chronic subluxation complexes in her lumbar and sacroiliac spine.

By decision dated July 11, 2014, OWCP found that Dr. Romaine had not reviewed her own x-rays or interpreted them to find spinal subluxations. It concluded, therefore, that Dr. Romaine was not a physician for the purpose of FECA and that her reports did not constitute medical evidence.

LEGAL PRECEDENT

An employee seeking benefits under FECA² has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including the fact that the individual is an “employee of the United States” within the meaning of FECA and that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.³ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

OWCP defines a traumatic injury as, “[A] condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain which is identifiable as to time and place of occurrence and member or function of the body affected.”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

Under FECA a chiropractor is a physician only to the extent that the reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.⁸ OWCP regulations define a subluxation as an

² 5 U.S.C. §§ 8101-1893.

³ *Kathryn Haggerty*, 45 ECAB 383, 388 (1994); *Elaine Pendleton*, 41 ECAB 1143 (1989).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ 20 C.F.R. § 10.5(ee).

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

⁷ *J.Z.*, 58 ECAB 529 (2007).

⁸ Section 8101(2) of FECA provide as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners with the scope of their practice as defined by State law. 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 regulation by the Secretary. See *Merton J. Sills*, 39 ECAB 572, 575 (1988); *P.R.*, Docket No 14-1007 (issued August 13, 2014).

incomplete dislocation, off centering, misalignment, fixation, or abnormal spacing of the vertebrae which must be demonstrable on an x-ray file to an individual trained in the reading of x-rays.⁹ Section 10.311(c) states:

“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 findings 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.”¹⁰

ANALYSIS

Appellant, a contact representative, fell on January 4, 2013 during the transition from a rug pathway to a tiled floor. There is no dispute that this incident occurred as alleged. OWCP denied the claim, finding that appellant had failed to provide a physician’s opinion establishing causal relationship between the accepted incident and an injury. In the July 11, 2014 decision, it found that Dr. Romaine, a chiropractor, was not a physician under FECA as she had not examined “her” x-rays. The Board finds that the case is not in posture for decision.

The Board finds that the record establishes that Dr. Romaine was the referral physician for the x-rays taken by Dr. Rosenberg on January 29, 2013. All of the January 29, 2013 x-ray reports list Dr. Romaine as the referring physician. In her May 28, 2013 report, Dr. Romaine stated that appellant had x-rays taken on January 29, 2013 “at her request.” A review of prior Board decisions does not support OWCP’s interpretation of FECA or section 10.311(c)¹¹ of OWCP’s regulations to require that the chiropractor physically perform the x-rays in order for the x-rays to be “his or her x-rays.” The Board found in *Sean O’Connell*¹² and *B.O.*,¹³ that in order to serve as a physician for the purposes of FECA, a chiropractor must interpret “his x-ray” or “one obtained in conjunction with his treatment of appellant.” In *K.L.*,¹⁴ the Board found the chiropractor to be a physician for the purposes of FECA as he diagnosed a subluxation of the spine when reviewing x-rays “taken on his behalf.” In *J.K.*,¹⁵ the Board found that a chiropractor was a physician for the purposes of FECA when he “obtained x-rays” which he found exhibited a subluxation of the spine.

Based on these decisions, the Board finds that Dr. Romaine reviewed her x-rays, within the meaning of FECA because, the January 29, 2013 x-rays were obtained in conjunction with her treatment of appellant and taken on her behalf by Dr. Rosenberg. Dr. Romaine reviewed her

⁹ 20 C.F.R. § 10.5(bb).

¹⁰ *Id.* at § 10.311(c).

¹¹ *Id.* at § 10.311(c).

¹² 56 ECAB 195 (2004).

¹³ Docket No. 14-1877 (issued January 13, 2015).

¹⁴ Docket No. 11-995 (issued October 18, 2011).

¹⁵ Docket No. 14-1545 (issued December 1, 2014).

x-rays and diagnosed degenerative disc disease L2-3, and subluxation complexes at L1-2, L2-3, L3-4, and L4-5 with left body rotation as well as subluxation complexes at C1-2, C4-5, C5-6, and C6-7. She further explained that a levoscoliosis was a subluxation under OWCP's definition. The Board finds that Dr. Romaine, a chiropractor, is a physician for the purpose of FECA as she diagnosed subluxation of the spine as demonstrated on her x-rays.

On remand OWCP should fully consider the medical evidence submitted by Dr. Romaine, appellant's attending physician, and determine whether this medical evidence is sufficient to establish appellant's claim. After this and such other development as it deems necessary, OWCP should issue a *de novo* decision on the merits of appellant's claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2014 Office of Workers' Compensation Programs is set aside and the case is remanded for further consideration consistent with this opinion.

Issued: July 24, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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