United States Department of Labor
Employees' Compensation Appeals Board

L.G., Appellant	)	
and	)	**Docket No. 15-752**
	)	**Issued: June 15, 2015**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, Seattle, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 18, 2015 appellant filed a timely appeal from a January 13, 2015 decision of the Office of Workers' Compensation Programs (OWCP). 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 merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish an injury in the performance of duty on April 3, 2014, as alleged.

On appeal, appellant contends that she was pregnant at the time of her injury and was advised by her doctors against x-rays. She further contends that there must be some provision made for pregnant employees seeking chiropractic treatment after being injured on the job.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 4, 2014 appellant, then a 30-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury on April 3, 2014 due to a motor vehicle accident. She indicated that she was stopped at a red light in her government vehicle when she was rear-ended by another vehicle. Appellant was eight months pregnant at the time. Her seat belt pulled tight along her stomach, and her head, neck, and back hit the head rest upon impact.

An OWCP Form CA-16, authorization for examination, was issued by the employing establishment on April 3, 2014. Appellant was authorized to visit her treating obstetrician and gynecologist in Bellingham, Washington. She submitted an April 23, 2014 report from Dr. Carl Shayne Mora, a Board-certified obstetrician and gynecologist, who indicated that she was involved in a low-speed motor vehicle accident on April 3, 2014 while she was pregnant. Dr. Mora stated that appellant was 36 weeks and 3 days pregnant and found good fetal movement, no contractions, no bleeding, and no loss of fluid.

In an April 10, 2014 letter, OWCP notified appellant of the deficiencies of her claim and afforded her 30 days to submit additional evidence and respond to its inquiries.

Appellant submitted massage therapy notes dated April 9 to 24, 2014 from Jessica Willis, a licensed massage practitioner.

In reports dated April 4 to 24, 2014, Dr. David Adich, appellant's chiropractor, indicated that appellant presented for consultation, examination, and treatment of injuries she sustained in a work-related motor vehicle accident on April 4, 2014. He advised that she should not submit to x-rays as she was 8.5 months pregnant. Dr. Adich diagnosed acute thoracic, cervical, and left lumbar strains with associated subluxation complexes and post-traumatic headaches with associated cervical subluxation complexes.

By decision dated May 16, 2014, OWCP denied appellant's claim on the basis that the medical evidence failed to establish a diagnosis causally related to the employment incident.

On June 17, 2014 appellant requested a review of the written record by an OWCP hearing representative and submitted an April 4, 2014 report from Dr. Karen O'Keefe, a Board-certified family practitioner, who indicated that appellant was pregnant and advised her to wait for x-ray until she delivered her baby.

By decision dated January 13, 2015, the hearing representative affirmed the May 16, 2014 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] 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

[2] *Id.*

States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury[3] was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[4]

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. A fact of injury determination is based on two elements. First, an 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. Second, an employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[5]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[6]

ANALYSIS

OWCP has accepted that the employment incident of April 3, 2014 occurred at the time, place, and in the manner alleged. The issue is whether appellant sustained an injury as a result. The Board finds that she did not meet her burden of proof to establish an injury related to the April 3, 2014 employment incident.

On appeal, appellant contends that she was pregnant at the time of her injury and was advised by her doctors against x-rays. She further contends that there must be some provision made for pregnant employees seeking chiropractic treatment after being injured on the job. The Board has held that medical opinion, in general, can only be given by a qualified physician.[7]

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[3] OWCP regulations define 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. 20 C.F.R. § 10.5(ee).

[4] *See T.H.*, 59 ECAB 388 (2008). *See also Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *Id. See Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

[6] *Id. See Gary J. Watling*, 52 ECAB 278 (2001).

[7] *See Charley V.B. Harley*, 2 ECAB 208, 211 (1949); *Donald J. Miletta*, 34 ECAB 1822 (1983) (medical evidence must be in the form of a reasoned opinion by a qualified physician based on a complete and accurate factual and medical history of the employee whose claim is being considered).

Pursuant to sections 8101(2) and (3) of FECA[8] the Board has recognized chiropractors as physicians to the extent of diagnosing spinal subluxation according to OWCP's definition[9] and treating such subluxation by manual manipulation.[10] Appellant's chiropractor, Dr. Adich, diagnosed acute thoracic, cervical, and left lumbar strains with associated subluxation complexes and post-traumatic headaches with associated cervical subluxation complexes. He did not obtain x-rays because appellant was pregnant. In *Debra Cochran*,[11] the claimant argued on appeal that she was seven months pregnant at the time of her injury and was advised by her chiropractor that she should not submit to x-rays due to that condition. In his reports, Dr. Adich diagnosed subluxations along with cervical thoracic strain injuries which he opined were related to the employment incident. The Board found that appellant's pregnancy "[did] not mitigate the statutory requirement that before a chiropractor can be considered a physician for purposes of [FECA] he must utilize x-rays to diagnose a subluxation of the spine."[12] Therefore, the Board held that OWCP properly denied the employee's claim on the basis that the chiropractor's report could not be afforded evidentiary weight in the case.

As in *Cochran*,[13] the Board finds that appellant's pregnancy does not in the instant case mitigate the statutory requirement that a chiropractor can only be considered a physician for purposes of FECA if he has used x-rays to diagnose a subluxation of the spine. Thus, the Board finds that Dr. Adich does not qualify as a physician under FECA because, as he did not diagnose spinal subluxation based on x-ray findings. Dr. Adich's opinion is therefore of no probative medical value.[14] Moreover, services for "physical therapy" performed by a chiropractor, if authorized by appellant's designated treating physician, may be compensable regardless of whether a subluxation by x-ray is diagnosed.[15] However, in the instant case, there is no evidence

[8] 5 U.S.C. §§ 8101(2) and (3). Section 8102(2) of FECA recognizes chiropractors as physicians "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." 5 U.S.C. § 8101(2). *See Marjorie S. Geer*, 39 ECAB 1099, 1101-02 (1988).

[9] 20 C.F.R. § 10.400(e).

[10] *See, e.g., Christine L. Kielb*, 35 ECAB 1060, 1061 (1984).

[11] Docket No. 00-2330 (issued May 11, 2001).

[12] *Id.*

[13] *Supra* note 7.

[14] *See Elizabeth R. Rios*, Docket No. 94-981 (issued July 2, 1996); *Kathleen J. Washpon*, Docket No 94-1044 (issued December 6, 1995).

[15] *See Rebecca Ortiz*, 42 ECAB 134 (1990).

to establish that appellant was referred by her attending physician to a chiropractor and thus the treatments were not authorized.[16]

In an April 4, 2014 report, Dr. O'Keefe indicated that appellant was pregnant and advised her to wait for x-ray until she delivered her baby. On April 23, 2014 Dr. Mora indicated that appellant was involved in a low-speed motor vehicle accident on April 3, 2014 while she was pregnant and found good fetal movement, no contractions, no bleeding, and no loss of fluid. Dr. O'Keefe and Dr. Mora failed to provide a firm diagnosis. Therefore, the Board finds that the reports from Drs. O'Keefe and Mora are insufficient to establish a medical diagnosis in connection with the injury and appellant has failed to establish her claim.

In support of her claim, appellant submitted massage therapy notes dated April 9 to 24, 2014 from Ms. Willis, a licensed massage practitioner. These documents do not constitute competent medical evidence because they lack an opinion supported by 17 rationale from a physician.[17] The Board finds that appellant did not meet her burden of proof with these submissions.

As appellant has submitted no evidence to support her allegation that she sustained an injury related to the April 3, 2014 employment incident, she has failed to meet her burden of proof to establish a claim for compensation.

The Board notes that the employing establishment issued appellant a Form CA-16 on April 3, 2014 authorizing medical treatment. The Board has held that 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, it creates a contractual obligation, which does not involve the employee directly, to pay the cost of the examination or treatment regardless of the action taken on the claim.[18] Although OWCP denied appellant's claim for an injury, it did not address whether she is entitled to reimbursement of medical expenses pursuant to the Form CA-16. Upon return of the case record, OWCP should further address this issue.

[16] *See also Mary E. Verwey*, Docket No. 95-1271 (issued March 7, 1997) where OWCP accepted the employee's claim for right hip strain. Following her injury, she received treatment from a chiropractor who diagnosed moderate acute lumbar disc herniation and opined that the injury was causally related to the employment incident. The Board found that the claimant would be entitled to reimbursement for chiropractic expenses if she could demonstrate that she sustained a subluxation of the spine as a result of her employment injury, noting that services rendered by chiropractors are payable by OWCP only for manual manipulation to treat a subluxation demonstrated by x-ray to exist. The chiropractor diagnosed a subluxation but did not obtain x-rays of the claimant's spine because she was pregnant. Therefore, the Board found that he did not qualify as a physician under FECA and his services rendered were not compensable.

[17] 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." *See also Paul Foster*, 56 ECAB 208, 212 n.12 (2004); *Joseph N. Fassi*, 42 ECAB 677 (1991); *Barbara J. Williams*, 40 ECAB 649 (1989).

[18] *See D.M.*, Docket No. 13-535 (issued June 6, 2013). *See also* 20 C.F.R. §§ 10.300, 10.304.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP 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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty on April 3, 2014 as alleged.

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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