

FACTUAL HISTORY

On August 22, 2015 appellant, then a 61-year-old nurse practitioner, filed an occupational disease claim (Form CA-2) alleging that he developed arthritis/spondylosis, degenerative disc disease, and grade 1 spondylolisthesis L5 on S1 as a result of his federal employment duties. He noted that he was required to document medical examinations in specialized computer templates. Appellant indicated that on July 14, 2015 he was required to sit at the keyboard for at least 6.5 hours, and that during this activity he began to experience tightness and spasms with constant pain in his mid-to-lower back. He noted that, on July 15, 2014, in attempting to perform his duties, the symptoms continued and progressed causing him to stop work and seek treatment.

In an August 17, 2011 note, Dr. Dean McCaughan, a chiropractor, related that appellant had presented on December 20, 2007 for a chiropractic evaluation. On that date full spine sectional radiographs were taken to further evaluate his spine. Dr. McCaughan noted that the lateral cervical projection revealed a moderate loss of the normal cervical lordosis with moderate anterior head carriage, and that osteoarthritis was noted at the C6-7 spinal level. He also noted that the anterior posterior open mouth cervical spine view (APOM) demonstrated left spinous rotation at C2. The lateral lumbar projection revealed osteoarthritis at L2-3 and a grade 1 spondylolisthesis at L5. Mild pelvic tilt was noted on the anteroposterior projection.

In an August 3, 2015 attending physician's report (Form CA-20), Dr. McCaughan diagnosed spondylosis with subluxation due to the onset of severe strain with spasm. He noted that appellant's condition was aggravated by his prolonged work activity causing severe spasms and pain. Dr. McCaughan checked a box marked "yes" indicating that appellant's condition was caused or aggravated by his employment activity, noting prolonged keyboarding and that appellant had not had spasms prior to this activity.

On September 22, 2015 Dr. McCaughan noted that appellant became his patient on December 20, 2007 presenting with symptoms similar to his recent aggravation of his neck and back. He stated that appellant's symptoms began while at the employing establishment, when he was required to sit long hours "performing required electronic medical records." Dr. McCaughan further noted that appellant had been diagnosed with spinal subluxation with arthritis, degenerative disc disease, and spondylolisthesis. He noted that appellant met with him on July 14, 2015 after sitting at work which resulted in his need to leave work. Dr. McCaughan stated that appellant severely strained his back with development of severe pain and spasms causing unfavorable ankyloses and initially an inability to take deep breaths. He noted that the symptoms aggravated his comorbid conditions of subluxation, arthritis, degenerative disc disease, and spondylolisthesis grade 1. Dr. McCaughan also found that appellant required urgent treatment on September 11, 2015 due to his recurrent chronic injury after sitting up to eight hours at work on September 9, 2015. He found severe strain with his underlying conditions, and that the x-ray evidence of record already established the subluxation, arthritis, and spondylolisthesis. Dr. McCaughan noted that appellant had regular chiropractic adjustments, massage therapy, and two times a week physical therapy. He concluded that it was as likely as not that the aggravation causing chronic strain was a direct result of appellant's required electronic medical records keyboarding work and the sitting required over 10 years of activity,

noting that appellant had performed prolonged sitting duties for four to seven hours a day for over 10 years of full-time employment as a nurse practitioner.

By decision dated October 26, 2015, OWCP denied appellant's claim. It determined that, although he established that the employment factors occurred as alleged and that a medical condition had been diagnosed, the medical evidence failed to demonstrate that the medical condition was related to the established employment-related factors. OWCP found that Dr. McCaughan's report could "not be used" because he did not diagnose a subluxation by x-ray and, thus, was not a physician under FECA.

On February 8, 2016 appellant requested reconsideration. He alleged that OWCP had failed to consider all evidence of record.

In a February 1, 2016 report, Dr. McCaughan noted that, in his initial report, he found that the APOM x-ray demonstrated left spinous rotation at C2, and a grade 1 spondylolisthesis at L5, and that pelvic tilt was noted on the anteroposterior projection. He explained that subluxation is defined as a slight misalignment of the vertebrae, regarded in chiropractic theory as the cause of many health problems. Dr. McCaughan opined that, without specifically using the word subluxation, these are all demonstrations of subluxations as demonstrated by x-ray. He indicated that spinous rotation, along with the anterior head carriage, demonstrated misalignment in the neck, and the spondylolisthesis and pelvic tilt demonstrated misalignment in the lumbopelvic region.

By decision dated March 29, 2016, OWCP denied modification of its October 26, 2015 decision. It determined that although the new evidence contained a diagnosis of subluxation from a chiropractor, the evidence of record did not contain any x-ray findings demonstrating the presence of subluxation, and since appellant had not submitted an x-ray report demonstrating a spinal subluxation, Dr. McCaughan was not considered a physician under FECA and his opinion addressing appellant's medical condition had no probative value.

On April 19, 2016 appellant requested reconsideration. He alleged that the decision was made by an unlicensed examiner and ignored a licensed chiropractor who read the x-ray and found subluxation meeting the standards. Appellant argued that Dr. McCaughan's finding of subluxation was consistent with his previous explanations contained in his x-ray reports.

Appellant also submitted an October 17, 2013 report of an x-ray taken on October 17, 2013 that was interpreted by Dr. Robin Daum Kowalski, a Board-certified diagnostic radiologist, as evincing bilateral L5 spondylolysis with grade 1 spondylolisthesis L5-S1 with disc bulge and facet arthropathy at L5-S1; disc bulge, central protrusion and facet arthropathy L4-5; disc bulge, facet hypertrophy and right foraminal annular tear L3-4; and disc bulge with retrolisthesis L2-3.

By decision dated May 31, 2016, OWCP denied modification of its prior decisions.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 FECA, that the claim was timely filed within the applicable time

limitation period, that an injury was sustained in the performance of duty as alleged and that any disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.² 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.³

Whether an employee actually sustained an injury in the performance of duty begins with an analysis of whether fact of injury has been established.⁴ To establish fact of injury in an occupational disease claim, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁵

Under FECA, a chiropractor is a physician only to the extent that the reimburseable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.⁶ OWCP regulations define subluxation as an 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.⁷ Section 10.311(c) states:

“A chiropractor may interpret his or her x-rays to the same extent as any other physicians. 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-ray, but the report must be available for submittal on request.”⁸

ANALYSIS

OWCP determined that appellant experienced the employment factors as alleged. However, it denied his claim, finding that appellant had failed to provide a physician’s opinion

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁴ *See S.P.*, 59 ECAB 184, 188 (2007).

⁵ *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *see also P.W.*, Docket No. 10-2402 (issued August 5, 2011).

⁶ Section 8101(2) of FECA provide 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. 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).

⁷ 20 C.F.R. § 10.5(bb).

⁸ *Id.* at § 10.311(c).

establishing a causal relationship between the accepted factors of employment and an injury. OWCP determined that Dr. McCaughan, a chiropractor, was not a physician under FECA. The Board finds that this case is not in posture for decision.

OWCP regulations provide that a chiropractor may interpret x-rays to the same extent as any other physician and do not require that an x-ray film or x-ray report be submitted. Instead the regulations provide that the x-ray or a report of the x-ray be made available for submittal upon request.⁹ Although Dr. McCaughan made no reference to the existence of subluxation as demonstrated by x-ray, he explained that the terms he did use in his February 1, 2016 report, that the APOM x-ray demonstrated left spinous rotation at C2, that there was a grade 1 spondylolisthesis at L5, and that the pelvic tilt was noted on the anteroposterior projection, were terms which described a slight misalignment of the vertebrae or a subluxation and that the x-rays had demonstrated these misalignments.

The Board finds that Dr. McCaughan did diagnose a subluxation based upon x-ray evidence, he therefore was a physician for the purpose of FECA as he diagnosed subluxation of the spine as demonstrated by x-rays.¹⁰ OWCP procedures do not require that the x-ray itself be of record, but rather that it be available upon request. OWCP did not request that Dr. McCaughan submit the x-ray for further evaluation.¹¹

As the Board finds that Dr. McCaughan is a physician under 5 U.S.C. § 8101(2), the case will be remanded for further development as OWCP deems necessary, and a *de novo* decision on the merits of appellant's claim.

CONCLUSION

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

⁹ *Id.*; see also *R.S.*, Docket No. 11-355 (issued May 25, 2011).

¹⁰ See *D.G.*, Docket No. 12-0374 (issued August 24, 2012).

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 31, 2016 is set aside and the case is remanded for further development consistent with this decision.

Issued: June 23, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board