



## ISSUE

The issue is whether appellant has met her burden of proof to establish that she sustained subluxation complexes as a result of her accepted January 4, 2013 employment incident.

On appeal counsel contends that there is an unresolved conflict of medical opinion evidence which requires referral to an impartial medical examiner.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> The facts set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 4, 2013 appellant, then a 67-year-old contact representative, filed a traumatic injury claim (Form CA-1) alleging on that date she fell on the transition from a rug pathway to a tiled floor at 11:35 a.m. She stated that her feet slipped out from under her and she fell to the ground with force. Appellant reported that she was experiencing pain in her right knee, hip, side, and back. On the reverse side of the claim form appellant's supervisor indicated that appellant was in the performance of duty when she fell.

Dr. Kimberly A. Romaine, a chiropractor, examined appellant on January 10, 2013 and noted that appellant sustained a work injury on January 4, 2013 when she slipped and fell on her right side when walking 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 stated that appellant stepped off of 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 checking a box marked "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 that appellant's lumbar spine x-ray demonstrated degenerative disc disease at L2-3 with levoscoliosis and a slightly exaggerated lordotic curve. Dr. Rosenberg noted that x-rays of her 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 7. Dr. Romaine stated that appellant's condition was employment related as she was walking at work and fell.

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<sup>3</sup> Docket No. 15-0398 (issued July 24, 2015).

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 of 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 sitting as required by her usual work duties.

By decision dated May 16, 2013, OWCP denied appellant's claim, finding that she failed to submit medical evidence containing a medical diagnosis. It found that the x-rays of record did not support Dr. Romaine's diagnoses of spinal subluxations and as such that she was not considered a physician for the purposes of FECA.

On June 7, 2013 appellant requested a review of the written record before an OWCP hearing representative. 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 did not provide the medical reasoning necessary to establish that the diagnosed subluxations were related to appellant's accepted employment incident and noted that appellant had preexisting spondylosis and degeneration.

Counsel requested reconsideration on May 13, 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 [appellant's] 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 and interpreted them to find spinal subluxations. It, therefore, concluded that Dr. Romaine was not considered a physician under FECA and that her reports did not constitute medical evidence. Appellant appealed this decision to the Board and on July 24, 2015, the Board

found that Dr. Romaine had diagnosed subluxation of the spine as demonstrated on her x-rays and she was, therefore, considered a physician under FECA. The Board remanded the case for OWCP to fully consider the medical evidence and issue a *de novo* decision on the merits of her claim.<sup>4</sup>

Following the Board's July 24, 2015 decision, OWCP referred a statement of accepted facts (SOAF) to OWCP's medical adviser and requested that he review the medical evidence and determine whether appellant sustained a subluxation as a result of the work injury. In a report dated April 13, 2016, OWCP's medical adviser, Dr. Michael M. Katz, a Board-certified orthopedic surgeon, reviewed appellant's history of injury and x-rays. He opined that the degenerative changes found on appellant's x-rays by Dr. Rosenberg preexisted her January 4, 2013 employment incident and did not result from it. Dr. Katz found, "It is my further opinion that, while Dr. Romaine chooses to describe multiple subluxations throughout the spine, it is my opinion that instability is not demonstrated on the diagnostic radiology reports." He disagreed with Dr. Rosenberg's findings. Dr. Katz diagnosed possible aggravation of preexisting lumbar and thoracic degenerative disc disease and cervical spondylosis. He opined that this aggravation was permanent.

By decision dated April 28, 2016, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that her diagnosed medical condition was causally related to the accepted January 4, 2013 employment incident. It found, "The medical evidence of record fails to provide a well-reasoned rationalized opinion as to how [appellant's] slip and fall caused any of [the] diagnoses."

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> has the burden of proof to establish 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, 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.<sup>6</sup> 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.<sup>7</sup>

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."<sup>8</sup> To determine

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<sup>4</sup> *Id.*

<sup>5</sup> *Supra* note 2.

<sup>6</sup> *Kathryn Haggerty*, 45 ECAB 383, 388 (1994); *Elaine Pendleton*, 41 ECAB 1143 (1989).

<sup>7</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>8</sup> 20 C.F.R. § 10.5(ee).

whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether 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 and place, and in the manner alleged.<sup>9</sup> 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.<sup>10</sup> A medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.<sup>11</sup> Medical rationale includes a physician's detailed opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment activity. The opinion of the physician must be based on a complete factual and medical background of the claim, 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 specific employment activity or factors identified by the claimant.<sup>12</sup>

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, 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 who shall make an examination and resolve the conflict of medical evidence.<sup>13</sup> This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>14</sup>

### ANALYSIS

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

The Board has previously found that appellant's attending physician, Dr. Romaine, a chiropractor, was a physician for the purposes of FECA. Dr. Romaine diagnosed subluxation complexes at C1-2, C4-5, C5-6, and C6-7 as demonstrated by x-rays to exist. She attributed these conditions to appellant's January 4, 2013 fall at the employing establishment.

In accordance with the Board's instructions on remand, OWCP undertook additional development of the medical evidence and referred appellant's x-rays to Dr. Katz, OWCP's medical adviser. Dr. Katz opined that the changes found on appellant's x-rays by Dr. Rosenberg preexisted her January 4, 2013 employment incident and did not result from the January 4, 2013 employment incident.

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<sup>9</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>10</sup> *J.Z.*, 58 ECAB 529 (2007).

<sup>11</sup> *T.F.*, 58 ECAB 128 (2006).

<sup>12</sup> *A.D.*, 58 ECAB 149 (2006).

<sup>13</sup> 5 U.S.C. § 8123(a); *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

<sup>14</sup> *R.C.*, 58 ECAB 238 (2006).

The Board finds that there remains a conflict of medical opinion between appellant's physician, Dr. Rosenberg, and Dr. Katz, an OWCP medical adviser, on whether the diagnosed condition of subluxation complexes result of her accepted January 4, 2013 employment incident. On remand OWCP shall refer appellant to an appropriate Board-certified physician for an impartial medical examination to determine whether appellant's subluxation complexes were causally related to the accepted employment incident.<sup>15</sup> After this and such other development as OWCP deems necessary, OWCP shall issue a *de novo* decision.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** April 28, 2016 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: January 25, 2018  
Washington, DC

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

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

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

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<sup>15</sup> *S.W.*, Docket No. 10-0607 (issued January 24, 2011); *George E. Reilly*, 44 ECAB 458 (1993) (Groom, M., concurring).