United States Department of Labor
Employees' Compensation Appeals Board

L.G., Appellant	)	
and	)	**Docket No. 19-1616**
	)	**Issued: March 10, 2020**
U.S. POSTAL SERVICE, PRIORITY MAIL ANNEX, Kent, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On July 22, 2019[1] appellant filed a timely appeal from a January 24, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal Employees'

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from January 24, 2019, the date of OWCP's last decision, was July 23, 2019. Since using July 25, 2019, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is July 22, 2019, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1); *X.Y.*, Docket No. 19-1290 (issued January 24, 2020).

[2] The Board notes that, during the pendency of this appeal, OWCP issued a September 30, 2019 decision, which denied appellant's request for a review of the written record by the Branch of Hearings and Review of the January 24, 2019 decision that is the subject of the current appeal. The Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s). 20 C.F.R. §§ 501.2(c)(3), 10.626. *See J.A.*, Docket No. 19-0981 (issued December 30, 2019); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Douglas E. Billings*, 41 ECAB 880 (1990). Consequently, OWCP's September 30, 2019 decision is set aside as null and void.

Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether appellant has met his burden of proof to establish a low back condition causally related to the accepted July 3, 2018 employment incident.

FACTUAL HISTORY

On July 10, 2018 appellant, then a 56-year-old small parcel bundle sorting clerk, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury to his lower back on July 3, 2018 while lifting flat tubs, which weighed more than 20 pounds, while in the performance of duty. He stopped work on July 6, 2018 and returned to work July 16, 2018 performing modified, limited-duty work.

In a July 16, 2018 narrative statement, appellant described the July 3, 2018 incident, and further explained that, after he lifted the tubs of mail, he carried them to hampers, at which time he felt radiating pain in his back. He also described his continuing symptoms since the incident.

On July 6, 2018 appellant sought chiropractic treatment from Dr. Alex Selinsky, D.C., a chiropractor. In a July 6, 2018 note, Dr. Selinsky indicated that appellant had spinal sprain/strain and requested that he be excused from work from July 6 through 12, 2018 to avoid aggravation of his condition. In a report signed July 10, 2018, he noted appellant's report of a July 3, 2018 lower back injury due to lifting at work. Based on appellant's July 6, 2018 examination findings of muscle spasms, segmental dysfunction, restricted range of motion, positive orthopedic tests and x-ray findings, Dr. Selinsky diagnosed sprain of pelvis, sprain of lumbar spine, and sprain of thoracic spine. In July 11, 2018 progress notes, he indicated a July 3, 2018 date of injury and provided diagnosis codes for sprain of pelvis, sprain of lumbar spine, and sprain of thoracic spine. Dr. Selinsky requested that appellant be excused from work from July 13 through 16, 2018 to avoid aggravation of his spinal condition. In a July 14, 2018 note, he indicated that appellant could return to light-duty work with restrictions on July 16, 2018.

In a July 26, 2018 development letter, OWCP advised appellant that the evidence submitted was insufficient to establish his claim and requested that he provide additional factual and medical information. It specifically advised that it had received evidence from a chiropractic physician, but that under FECA a "physician" included a chiropractor only if there was a diagnosed spinal subluxation and it was demonstrated by x-ray evidence. Appellant was afforded 30 days to submit additional evidence.

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that, following the January 24, 2019 decision, additional evidence was received by OWCP and the Board on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

In response, appellant submitted copies of Dr. Selinsky's chart notes from July 6 through August 1, 2018. These notes reflected that appellant had received spinal adjustments for subluxations at the thoracic and lumbar regions, for relief of mid and low back pain. OWCP also received an August 13, 2018 report from Dr. Selinsky which noted that appellant had been released to full-duty work on August 14, 2018. An unsigned radiological report, dated "June 8, 2018," noted that July 6, 2018 x-rays of appellant's cervical, thoracic, and lumbar areas of the spine were negative for recent fracture or gross osteopathology. Calcification was noted throughout the cervical spine and the right and left ilium were rotated due to spasms. No diagnosis was provided.

OWCP also received Dr. Selinsky's July 11, 2018 referral for massage therapy. A massage therapist's report dated July 11, 2018 set forth appellant's symptoms.

By decision dated August 29, 2018, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a diagnosis in connection with the accepted July 3, 2018 employment incident. Thus, it found that appellant failed to establish the medical component of fact of injury.

On September 17, 2018 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

In a September 17, 2018 letter, Dr. Selinsky indicated that a thoracic subluxation at T10-T11, lumbar subluxation at L3-4, and a subluxation of the right sacroiliac articulation were objectively detected during physical examination and that an x-ray that was performed on July 6, 2018 revealed subluxations at the same levels. He indicated that those findings were included in an updated x-ray report. Dr. Selinsky indicated that appellant lifted a tub of letters and flats that weighed approximately 20 pounds and that, while lifting this tub, appellant bent forward and twisted to transfer the load into a hamper and experienced sharp pain in the thoracolumbar region (T10-T11), pain and spasms at the L3-4 lumbar region, and sharp pain in the right sacroiliac joint and in the mid thoracic spine to the lower buttock area. He indicated that spasms and restricted motion were evident on examination. Dr. Selinsky noted that, while appellant originally had leg pain, this had resolved. Additional work excuse notes dated November 5, 2018 were provided.

By decision dated January 24, 2019, an OWCP hearing representative affirmed OWCP's August 29, 2018 decision, finding that appellant had not established a medical condition causally related to the accepted July 3, 2018 employment injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish 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 of FECA,[5] that an injury was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally

[5] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

related to the employment injury.[6] 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.[7] To determine 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.[8] 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.[9] 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.[10]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a lower back condition related to the accepted July 3, 2018 employment incident.

The record contains reports and notes from Dr. Selinsky, appellant's treating chiropractor, who indicated that appellant had subluxations based on x-ray evidence. However, chiropractors are only considered "physicians" under FECA, and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist, 5 U.S.C. § 8101(2).[11] The x-ray relied on by the chiropractor must be signed by a physician.[12] OWCP's regulations at 20 C.F.R. § 10.5(bb) have defined subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.[13] If the diagnosis of a subluxation as demonstrated by x-ray is not established, the chiropractor is not considered a

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[6] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *R.B.*, Docket No. 17-2014 (issued February 14, 2019); *B.F.*, Docket No. 09-0060 (issued March 17, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[9] *S.F.*, Docket No. 18-0296 (issued July 26, 2018); *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

[10] *A.D.*, Docket No. 17-1855 (issued February 26, 2018); *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008).

[11] Section 8101(2) of FECA provides that medical opinion, in general, can only be given by a qualified physician. This section defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2). Section 8101(3) of FECA, which defines services and supplies, limits reimbursable chiropractic services 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. 5 U.S.C. § 8101(3). *See H.K.*, Docket No. 19-0429 (issued September 18, 2019); *K.J.*, Docket No. 18-1520 (issued June 13, 2019); *Thomas W. Stevens*, 50 ECAB 288 (1999); *George E. Williams*, 44 ECAB 530 (1993).

[12] *See T.W.*, Docket No. 17-1819 (issued March 14, 2018).

[13] 20 C.F.R. § 10.5(bb); *see also D.C.*, Docket No. 19-0363 (issued July 18, 2019); *Bruce Chameroy*, 42 ECAB 121 (1990).

physician as defined under FECA and his or her report is of no probative value to the medical issue presented.[14]

While Dr. Selinsky indicated that he was providing manual manipulation based upon x-ray evidence of subluxation, the Board finds that the only radiological report of record is an unsigned report, dated "June 8, 2018" which noted July 6, 2018 x-ray findings. Furthermore, there were no findings which noted subluxations or any of the attributes which define a subluxation. A report that is unsigned or bears an illegible signature lacks proper identification and cannot be considered probative medical evidence as the author cannot be identified as a physician.[15] The Board thus finds that the evidence of record does not include an x-ray establishing the diagnosis of subluxation.[16] Accordingly, Dr. Selinsky is not considered a physician under FECA and his reports, therefore, are of no probative value to establish appellant's claim.

While Dr. Selinsky indicated in his September 17, 2018 report that an updated x-ray report demonstrating that appellant had thoracic and lumbar subluxations at T10-11 and L3-4, respectively, would be provided, no such x-ray report was of record at the time of the hearing representative's January 24, 2019 decision.

Appellant also submitted massage therapy notes. However, a report from a massage therapist has no probative medical value as licensed massage therapists are not considered physicians as defined under FECA.[17] Consequently, this evidence is insufficient to establish appellant's claim.

As the medical evidence of record does not establish a medical condition causally related to the accepted employment incident, the Board finds that appellant has not met his burden of proof.

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 his burden of proof to establish a lower back condition related to the accepted July 3, 2018 employment incident.

[14] *Id.*; *see also T.W, supra* note 12.

[15] *K.C.,* Docket No. 18-1330 (issued March 11, 2019).

[16] *See T.W., supra* note 12.

[17] *See J.C.*, Docket No. 18-1390 (issued April 1, 2019); *see A.M.*, Docket No. 18-0542 (issued November 1, 2018); *David P. Sawchuk,* 57 ECAB 316, 320 n.11 (2006) lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 2020
Washington, DC

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

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board