

<sup>2</sup> On August 16, 2011 the Board received a letter from appellant advising that, on July 21, 2011 he e-mailed the Board to request an oral argument. In his letter, appellant reiterated that he desired oral argument before the Board. However, the Board notes that a request for oral argument must be made no later than 60 days after the filing of an appeal. 20 C.F.R. § 501.5(b). As the appeal was filed on January 26, 2011, and the request for oral argument was made no earlier than July 21, 2011, the request was untimely and must be denied.

## **ISSUE**

The issue is whether OWCP properly suspended appellant's right to compensation benefits effective November 1, 2010, under 5 U.S.C. § 8123(d) for obstructing a medical examination.

## **FACTUAL HISTORY**

OWCP accepted that on June 1, 1978 appellant, then a 32-year-old air traffic control specialist, sustained aggravation of adjustment reaction of adult life with depressive reaction in the performance of duty. Appellant did not work after May 8, 1979. He received appropriate compensation benefits.

Appellant received treatment from Dr. W. Gary Walters, a Board-certified psychiatrist. In a July 20, 2009 report, Dr. Walters advised that appellant's work-related condition persisted with no significant change since his previous report. He diagnosed post-traumatic stress disorder, alcohol addiction, paranoid personality, subgradual bipolar disorder. Dr. Walters advised that appellant's condition had not resolved and was permanent. He indicated that appellant was disabled from all work and that his treatment was comprised of medication and supportive psychotherapy.

OWCP continued to develop the claim, and by letter dated July 29, 2009, referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Gregory Gass, a Board-certified psychiatrist and neurologist.

In an August 25, 2009 report, Dr. Gass noted that appellant arrived 35 minutes late for the second opinion examination and greeted him in an irritable and angry state and in an accusatory fashion. He noted that appellant was irritated as he had a difficult time locating the physician's office. Dr. Gass stated that he gave appellant some time to relax and settle in and then proceeded with the examination. He examined appellant and diagnosed: depressive disorder, not otherwise specified; impulse control disorder; and rule out intermittent explosive disorder; personality disorder not otherwise specified with narcissistic traits, and paranoid traits. Dr. Gass determined that appellant had difficulty in social interaction and could not leave his home without having rage episodes in driving or in simple activities such as going to the grocery store. He advised that it was "impossible to explain if his issues have to do with the actual events that occurred in his employment. Dr. Gass' issues seem to be intrinsic to his personality. He draws a line in time with the events that occurred at the time of his job. However it is difficult to believe that appellant did not have preexisting problems as his personality seems to be that of a very narcissistic and paranoid nature." Dr. Gass opined that he did not consider appellant employable or safe to be around others. He explained that appellant was late and blamed him for his lateness and it was difficult to contain him and get him ready for his interview. Dr. Gass also noted that appellant carried a gun with him in the workplace, and did so in the past and advised that the coworkers felt unsafe. He advised that appellant was not an individual that you would want in a workplace because of his impulse control issues. Dr. Gass opined that his "best educated guess would be that this is intrinsic to his personality and not related to employment factors in the statement of accepted facts."

By letter dated October 16, 2009, OWCP requested that appellant's treating physician Dr. Walters review Dr. Gass' opinion and provide comments regarding the evaluation.

On July 21, 2010 OWCP referred appellant along with a statement of accepted facts and the medical record to Dr. James Sydney Alexander, a Board-certified psychiatrist, for an impartial medical evaluation to resolve the conflict in opinion between Dr. Gary Walters, appellant's treating physician, and the second opinion physician, Dr. Gregory Gass, regarding the resolution of appellant's accepted conditions.<sup>3</sup> OWCP advised appellant that, he if refused to submit to or obstructed the examination, his benefits would be suspended under 5 U.S.C. § 8123(d).

In an August 24, 2010 telephone call memorandum, OWCP noted that Dr. Alexander telephoned OWCP on August 23, 2010 and left a message to request additional work performance evaluations. Dr. Alexander asked that OWCP call him for further explanation. In an August 24, 2010 letter, OWCP's claims examiner handling appellant's claim advised Dr. Alexander that OWCP procedures did not allow him to speak directly with the physician. The claims examiner advised that OWCP did not have any prior performance evaluations.

On August 25, 2010 Dr. Alexander's office left a message with OWCP citing a concern in relation to information found in appellant's file, which revealed that he carried or had access to a gun. OWCP contacted the physician's office and spoke to a receptionist advising her that if the physician had any concerns about his staff or patient safety to stop the examination and notify OWCP. The receptionist indicated that Dr. Alexander would proceed with the appointment but OWCP would be contacted if there were concerns.

On September 14, 2010 the date of the examination, OWCP was informed *via* telephone that appellant had not arrived for his appointment. However, a few minutes later, it received a telephone call from Dr. Alexander's office, indicating that appellant had arrived, with a hand gun. It was noted that appellant wanted to leave his gun with the receptionist while he was with the doctor. However, his request was declined and he was asked to wait outside. Dr. Alexander met with him at a safe distance and the appointment was cancelled.

On September 15, 2010 Dr. Alexander's office faxed to OWCP a letter that it received from appellant. In a letter dated September 14, 2010, appellant asked Dr. Alexander for a "written statement" concerning what happened that morning. He indicated that if he did not receive a response by September 30, 2010, his attorney would become involved. He advised Dr. Alexander not to "make the situation any worse than it already is." Two receptionists also signed a statement noting that appellant presented for an appointment on September 14, 2010 in a "very agitated" state because he could not find the office. The receptionists stated that appellant was "verbally angry and loud" in the lobby and continued in the same frame of mind when he met with Dr. Alexander and staff in the lobby, where he noted that he had a gun and a permit to carry the gun. The receptionists stated that appellant did not like the fact that he could not carry the gun into the office with him. After this, he left the building.

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<sup>3</sup> The record reflects that prior appointments with other physicians were cancelled due to various reasons which included having seen another physician in the practice, a conflict and scheduling, distance.

In a September 14, 2010 letter, Dr. Alexander described his encounter with appellant. He explained that appellant arrived 20 minutes late for his appointment, was loud and intrusive upon his entrance to the building. He noted that appellant's behavior continued and he directed it toward the office manager. Dr. Alexander stated that he walked by at this point and returned approximately 30 seconds later at which time his office manger inquired as to whether appellant had a weapon. Appellant responded "yes, I'm licensed to carry it and always do." Dr. Alexander noted that appellant showed him a copy of the letter that he was provided for his appointment and noted that "he was not instructed to not bring a gun." He related that appellant stated that he was "just another of the hired 'hitmen' to take away his disability." Dr. Alexander indicated that he and his office manager contacted OWCP and they were instructed to notify appellant that the "appointment was to be canceled due to his bringing his gun and he was to leave." He noted that appellant "angrily gathered his motorcycle helmet, satchel, jacket, [tele]phone, *etc.*, and left the building. Dr. Alexander made a comment about how calling his case manager on the [tele]phone has n[o]t worked, so he [wi]ll make a trip to see him face to face. He then left the building, made a several minutes cell phone call, then drove off on his motorcycle."

In a September 14, 2010 letter, appellant informed OWCP that he arrived at his appointment noting that "as usual he was armed and had a carry permit with him" He noted that he advised the receptionist that he had a gun when she asked him if he was carrying a weapon and showed her the permit. Appellant noted that she asked him to leave immediately and informed him that he was advised not to carry a weapon. He disputed this noting "This is a total lie. I have never been told not to carry a weapon by OWCP at any time." Appellant also indicated that the physician came out and introduced himself, and that he advised the physician that he "would be happy to leave my weapon at the reception desk." However, he noted that he was informed that the receptionist could not be responsible. Appellant also noted that even though it was against his better judgment, he would put my weapon in the backpack on his bike. He noted that the physician indicated that would be fine; however they called OWCP and when he came back, he was advised that his appointment had been cancelled.

In a telephone call memorandum dated September 16, 2010, OWCP contacted Dr. Alexander concerning the cancelled appointment. It was advised of appellant's aggressive manner which caused the office staff to be uneasy. Additionally, OWCP was informed that appellant was advised that he could not bring his gun into the doctor's office and that appellant became upset noting it was his right to carry and protect himself against people. Dr. Alexander advised OWCP that appellant was asked to leave his gun outside and that he refused to put it in the saddlebags on his motorcycle. OWCP was advised that Dr. Alexander and his staff believed it was not in their interest to continue with the examination in light of appellant's conduct.

In a September 16, 2010 letter to OWCP, Dr. Alexander explained:

"[Appellant's] history of carrying weapons along with his abrupt, angry, loud, demanding style presents a safety risk for anyone in the vicinity. His threatening manner places the psychiatrist in the untenable position of having to provide an ethically independent view while having concern about the safety of those present in the building. Furthermore, Dr. Alexander has to take into account the safety of these people, his/her staff, his/her family, and self should a fellow like [appellant]

end up having his disability terminated. It makes the job of performing an unbiased opinion extremely difficult.”

He explained that appellant had multiple psychiatric evaluations and there was a plethora of information that showed a history of similar symptoms, complaints and diagnoses. Dr. Alexander noted that appellant behaved similarly inappropriately during his evaluation with Dr. Gass and noted there were “unclear reasons” as to why other physicians refused to see him. He opined:

“It is clear to me that it is unsafe for an outpatient office to attempt to see him. I believe there are [at] least two options. One is to have an internal psychiatrist make the final decision when the community could be in danger. In [appellant’s] case, if an unfavorable internal decision is made without further psychiatric evaluation, he is likely to decide that I was the root cause, thus putting those around me and myself in danger.”

Dr. Alexander also recommended that another psychiatric evaluation occur in a secure building, such as a state or federal building, where an effective weapons search could occur, security was available to protect the psychiatrist and others from violent outbursts and the psychiatrist’s anonymity could be preserved. He further noted that it would “be best if the psychiatrist was one that was out of state or from far enough away that [appellant] could not discover their identity.” Dr. Alexander explained that the limitations placed on the psychiatrist’s ability to procure information were restrictive. He suggested that additional information was needed preceding his condition to show appellant’s prior behavior. In a September 16, 2010 letter to appellant, Dr. Alexander informed appellant that he advised OWCP that, due to appellant’s history and his actions of September 14, 2010, it would not be reasonable for his opinion regarding appellant to remain unbiased. He stated that his role as an independent specialist had been compromised and he could not evaluate appellant.

On October 4, 2010 OWCP proposed to suspend appellant’s compensation benefits on the grounds that his recent intimidating manner and the way he conducted himself and the “deliberate fashion on his attitude” when requested by OWCP to attend examinations caused alarm for the examiners which were selected by OWCP. It noted the events of September 14, 2010 and noted that Dr. Alexander and his staff believed it was not in their interest to continue with an examination due to appellant’s conduct. OWCP advised that appellant’s actions and demeanor were considered an obstruction of a necessary medical examination in order to ascertain the extent of appellant’s ongoing residuals from his accepted condition. It allowed appellant 14 days to provide in writing good cause for his obstruction and informed him of the penalty provision of section 8123(d) of FECA.

Appellant did not respond to the proposed suspension letter.

By decision dated November 1, 2010, OWCP finalized the proposed suspension, effective that date.

### **LEGAL PRECEDENT**

Section 8123 of FECA authorizes OWCP to require an employee, who claims disability as a result of federal employment, to undergo a physical examination as it deems necessary.<sup>4</sup> The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of OWCP.<sup>5</sup> OWCP regulations at section 10.320 provides that a claimant must submit to examination by a qualified physician as often and at such time and places as it considers reasonably necessary.<sup>6</sup> Section 8123(d) of FECA and section 10.323 of its regulations provide that, if an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction ceases.<sup>7</sup> OWCP procedures provide that, before OWCP may invoke these provisions, the employee is to be provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.<sup>8</sup> If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.

### **ANALYSIS**

OWCP scheduled an impartial medical examination on Dr. Alexander on September 14, 2010 to resolve a conflict in opinion between the treating physician, Dr. Gary Walters, and Dr. Gass, an OWCP referral physician, regarding whether there were residuals of appellant's accepted emotional condition. OWCP advised appellant that his benefits would be suspended if he refused to submit to or obstructed the examination. As there was a medical conflict which required resolution,<sup>9</sup> it acted properly in referring appellant for an impartial examination with Dr. Alexander. As noted, the determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of OWCP.<sup>10</sup>

The Board finds that appellant obstructed the impartial examination scheduled with Dr. Alexander. The record reflects that appellant appeared late at Dr. Alexander's office on September 14, 2010 in a very agitated state and notified the office staff that he was carrying a hand gun. The record contains a statement from Dr. Alexander's receptionists documenting that appellant was "verbally angry and loud" in the lobby and continued in the same frame of mind when he met with Dr. Alexander who informed appellant that he could not carry his gun into the

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<sup>4</sup> 5 U.S.C. § 8123.

<sup>5</sup> *J.T.*, 59 ECAB 293 (2008).

<sup>6</sup> 20 C.F.R. § 10.320.

<sup>7</sup> 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; *Dana D. Hudson*, 57 ECAB 298 (2006).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010); *J.T.*, *supra* note 5.

<sup>9</sup> *See* 5 U.S.C. § 8123(a).

<sup>10</sup> *J.T.*, *supra* note 5.

examination. Dr. Alexander provided statements indicating appellant was loud and intrusive upon arriving late for his appointment and that he referred to Dr. Alexander as a “hired” hit man to “take away” his compensation. He noted that he had concerns for his own safety and that of his staff and did not feel it was safe to proceed with the examination. The nature of appellant’s state of belligerence and lack of cooperation is underscored by his September 14, 2010 letter to Dr. Alexander asking for a statement and advising him not to “make the situation any worse than it already is.” The Board finds that according to witness statements from office staff and Dr. Alexander that appellant, from the time that he appeared for his scheduled appointment on September 14, 2010, he was uncooperative and threatening in his demeanor to Dr. Alexander and his staff. It was not reasonable to expect Dr. Alexander to proceed to examine an individual in such an agitated and threatening state who was arguing about his right to carry a hand gun into a medical examination. Although appellant asserted that it was his right to carry his gun and that he was not informed that he could not bring a gun, it was not reasonable for him to present himself for the examination in such a belligerent and uncooperative manner in which Dr. Alexander and his staff reasonably feared for their safety. OWCP allowed appellant 14 days to respond to the proposed suspension but appellant made no response before OWCP suspended benefits on November 1, 2010. The Board finds that appellant has not established good cause for his obstruction of the scheduled examination.

In these circumstances, OWCP properly suspended appellant’s compensation under 5 U.S.C. § 8123(d), effective November 1, 2010, for his obstruction of the September 14, 2010 examination.

### **CONCLUSION**

The Board finds that OWCP properly suspended appellant’s right to compensation benefits effective November 1, 2010 under 5 U.S.C. § 8123(d) for obstructing a medical examination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed

Issued: November 1, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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