

**United States Department of Labor  
Employees' Compensation Appeals Board**

L.G., Appellant	)	
	)	
and	)	<b>Docket No. 10-2387</b>
	)	<b>Issued: August 2, 2011</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Miami, AZ, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On September 13, 2010 appellant filed a timely appeal from a March 22, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees Compensation Act<sup>1</sup> 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 OWCP properly suspended appellant's right to compensation benefits on the grounds that she refused to submit to a medical examination pursuant to 5 U.S.C. § 8123(d).

On appeal appellant argues, *inter alia*, that the statement of accepted facts contained discrepancies, that all documents were not forwarded to the impartial medical examiner, that OWCP erroneously stated that appellant became hostile and angry during a second opinion

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<sup>1</sup> 20 C.F.R. § 501.3(a).

examination, that the medical evidence demonstrates that she still has residuals from her accepted injury and that she has been harassed by OWCP.

### **FACTUAL HISTORY**

On August 11, 1987 appellant, then a 34-year-old part time flexible clerk/carrier, filed an occupational disease claim alleging that she suffered from low back pain and muscle spasms as a result of carrying mail and lifting parcels in excess of 60 to 70 pounds. OWCP accepted her claim for lumbar strain, left shoulder strain and cervical condition. Appellant received appropriate wage-loss compensation and medical benefits. Total disability compensation was approved beginning April 26, 1988 and terminated on July 28, 1998.

On March 18, 2009 OWCP informed appellant that she was scheduled for a second opinion with Dr. John D. Douthit, a Board-certified orthopedic surgeon.

By letter dated April 2, 2009, appellant wrote a letter to OWCP asking for all information sent to the second physician, noting that she was concerned that the information sent to the doctor was incomplete. In a report of a telephone call dated April 13, 2009, OWCP reported that Dr. Douthit telephoned and indicated that appellant arrived with a male companion and that he refused to leave the examination room. The note indicated that, while Dr. Douthit was performing the evaluation, both appellant and her friend became hostile and angry and appellant took a recorder out and started recording the conversation. Dr. Douthit indicated that he felt very uncomfortable and that appellant was yelling and making a scene, and the doctor asked appellant to leave.

On April 15, 2009 OWCP proposed suspension of appellant's compensation because Dr. Douthit reported that he was unable to complete the examination due to noncooperation on appellant's part. It advised appellant that when a claimant refuses to cooperate with a medical examination required by OWCP, all compensation benefits, including medical expenses are suspended, through the date of full compliance. OWCP gave appellant 14 days from the date of the letter to submit, in writing, her reasons for noncooperation and to submit evidence.

In a letter to appellant dated April 15, 2009, OWCP responded to appellant's April 2, 2009 letter by noting that OWCP judiciously provides the entire file to the examining physicians without compromise, and that if she believed records were missing, that she should feel free to forward them for inclusion in the file.

In a letter dated April 16, 2009, appellant requested review of the written record. She argued, *inter alia*, that OWCP did not properly and timely respond to various requests. Appellant argued that the statement of accepted facts was incorrect and that the record was incomplete. She alleged numerous discrepancies, including, *inter alia*, job duties, dates of employment and differing interpretations of medical reports. Appellant indicated, *inter alia*, that he spent little time reviewing the record, that he arbitrarily chose some pages from the record for his assistant to copy, that she asked him numerous questions about her case and noted his responses. She further stated that when he found out that she was recording the appointment, he told her to leave. Appellant stated that a copy of the recording she made was submitted for evidence. She disputed Dr. Douthit's conclusions. In an April 20, 2009 letter, appellant stated

that she did cooperate with Dr. Douthit's examination, but that he refused to examine her once he found out that she was recording the examination. She noted that Dr. Douthit stated that he would prefer that her partner not stay in the examination, but that he was allowed to stay. Appellant also stated that she would not be the victim anymore and in the future will record second opinion examinations.

In April 13 and 27, 2009 letters, OWCP informed appellant that a determination had been made that a second opinion examination was warranted because no medical evidence established an ongoing diagnosis that was causally related to the accepted work injury. OWCP stated that all requests for treatment are pending receipt of a second opinion evaluation.

In another April 27, 2009 letter, OWCP stated that in light of appellant's statement, the proposed suspension was withdrawn, and that she would be sent to a new appointment with a different physician. It instructed appellant that the physician has sole discretion and authority to allow voice recording of the examination and the presence of a male companion. OWCP also stated that it would request a female physician, if possible.

By letter to OWCP dated May 1, 2009, appellant stated, *inter alia* that she was "through with your antics and suppositions." She stated that OWCP's statements have no reliability and that she was "worn out by the rebuttal process you continue to force on me." Appellant contended that the "true medical records hold more weight than your fictitious statements." She stated that OWCP's reason for requesting a second opinion was based on a lie.

On May 11, 2009 OWCP referred appellant to Dr. Robert Philip Mack, a Board-certified orthopedic surgeon, for a second opinion.

In response to appellant's April 13, 2009 letter identifying alleged discrepancies in the statements of accepted facts of March 16, 2009, OWCP stated that a second review of all factual information in the file supported the factual basis of the statement of accepted facts. It stated that it reviewed with the employing establishment a breakdown identifying weekly work hours and a spreadsheet used in verifying average hours worked. OWCP also considered appellant's request to rephrase the medical questions to the second opinion examiner and found no difference in appellant's phrasing, and found that there was insufficient substantive argument to warrant changing the questions to the examiner dated March 16, 2009.

Appellant was seen by Dr. Mack, who issued a report dated June 5, 2009. Dr. Mack stated that it was his impression that appellant's current symptoms were not related to her injury of 22 years ago. He opined that her ongoing symptoms are related to age and ongoing mechanical stress. Dr. Mack opined that her current physical limitations are not the result of her work-related injury, and that he does not consider her to be disabled from that injury. He opined that appellant can continue doing the type of work that she has been doing for the last 20 years.

By letter dated August 17, 2009, OWCP found that a conflict existed between appellant's physicians and Dr. Mack and OWCP's medical adviser. It set an appointment with Dr. Stephen Dinenberg, an orthopedic surgeon, for an impartial medical examination on September 4, 2009.

By letter dated August 19, 2009, appellant contended that there was no conflict as the opinion of her treating physician should be given greater weight. She also alleged that OWCP

was not acting in a nonadversarial manner. Appellant submitted with her letter a copy of an August 20, 2009 letter from Michael P. Curiel, M.D., who stated that appellant was injured at work carrying a heavy mailbag in 1987 and that because of the work-related injury, she developed a stress fracture at L5 and had to stop doing that type of work. Dr. Curiel noted that his first contact with appellant was in May 2005 and that from that time he has repeatedly stated that her current condition is related to her initial work injury. He stated that the chronic pain she suffers, as stated in his January 13, 2009 letter are conditions that were caused by the work-related injury and not simply age-related phenomenon.

By letter dated August 24, 2009, appellant informed OWCP that she would not be able to keep the appointment due to previously scheduled appointments and because Dr. Mack did not have a magnetic resonance imaging (MRI) scan because one of OWCP's contract doctors lost it and that a complete examination cannot be completed without the document.

By letter dated September 23, 2009, OWCP indicated that it intended to reschedule the previously scheduled appointment with an impartial medical examiner. Appellant responded by letter dated October 6, 2009 stating that she did not agree with the necessity to schedule the appointment, as the medical evidence already confirms that her current medical condition was either caused by or directly related to the job injury. She enclosed a report on a new MRI scan taken on September 17, 2009.

On October 14, 2009 OWCP again scheduled appellant for an impartial medical examination with Dr. Dinenberg on October 27, 2009. By letter dated October 20, 2009, appellant stated that she could not keep the appointment because it required her to drive 100 miles one way and because she will not attend the appointment without her partner or witness. She forwarded a copy of a September 21, 2009 medical report by a Dr. Kenneth A. Pettine.

A report of a phone call on October 23, 2009 indicated that Dr. Dinenberg's office called and stated that appellant rescheduled her appointment for November 9, 2009. By letter to OWCP dated November 1, 2009, appellant stated that Dr. Dinenberg must be informed that appellant will be allowed to tape record the appointment and have someone in the examination room with her at all times. She again noted discrepancies in the statement of accepted facts, including disputes about her job duties and different interpretations as to what the medical evidence stated. Appellant also stated that she has not worked since July 2007 whereas the statement of accepted facts stated that she has not worked since 2008. By letter dated November 6, 2009, she stated that she called Dr. Dinenberg's office and they informed her that they would not allow a tape recorder or another person in the examining room.

By letter dated November 9, 2009, OWCP proposed suspending appellant's compensation because she failed to report to the referee examinations on October 27 or November 9, 2009. It considered her request but determined that no exceptional circumstances exist warranting the presence of another person or a recording device in the examining room. Furthermore, OWCP found no exceptional circumstances existed warranting a "male" (sic) referee. It provided appellant 14 days from the date of the letter to show good cause for not suspending her medical benefits. On November 23, 2009 OWCP suspended her benefits.

In a letter dated November 20, 2009, appellant again objected, *inter alia*, to the scheduling of an impartial medical examination, stated that OWCP did not forward to Dr. Dinenberg a copy of her “noted discrepancies” with the statement of accepted facts and that without this, he did not know the “true” facts of the case. Further, appellant related that Dr. Dinenberg’s office stated that they would not allow another person in the examination room or let her record and reiterated that she did not want to be alone with a male physician.

By letter dated December 3, 2009, appellant requested a review of the written record. In addition to the arguments she made previously, she stated that it was only 14 days between the proposed suspension of benefits and the suspension of benefits, which did not allow 14 days between receipt and response time.

By decision dated March 22, 2010, the hearing representative affirmed OWCP’s November 23, 2009 decision.

### **LEGAL PRECEDENT**

Section 8123 of the Act authorizes OWCP to require an employee, who claims disability as a result of employment, to undergo a physical examination as it deems necessary.<sup>2</sup> The determination of the need for an examination, the type of an examination, the choice of locales and the choice of medical examiners are matters within the province and discretion of OWCP.<sup>3</sup> OWCP’s regulations at section 10.320 provide 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>4</sup> Section 8123(d) of the Act and section 10.323 of its regulations provide that, if an employee refuses to submit to or obstructs a directed medical examination, her right to compensation is suspended until the refusal or obstruction ceases.<sup>5</sup> OWCP’s 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 the reasons for the refusal or obstruction.<sup>6</sup> If good cause or the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of the Act.

### **ANALYSIS**

OWCP directed appellant to submit to an impartial medical examination with Dr. Dinenberg on October 27, 2009. The purpose of this appointment was to resolve the conflict between appellant’s treating physicians, including, Dr. Curiel, and the second opinion physicians, including Dr. Mack, with regard to whether appellant still had residuals from her

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<sup>2</sup> 5 U.S.C. § 8123.

<sup>3</sup> *M.B.*, Docket No. 10-1755 (issued March 24, 2011); *J.T.*, 59 ECAB 293 (2008).

<sup>4</sup> 20 C.F.R. § 10.320.

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

<sup>6</sup> Federal (FECA) Procure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (July 2000); *J.T.*, *supra* note 3.

accepted employment condition that occurred over 20 years prior to the date the appointment was set. Appellant rescheduled the appointment to November 9, 2009 and then failed to keep that appointment.

The Board has recognized OWCP's responsibility in developing claims.<sup>7</sup> Section 8123 of the Act authorizes it to require an employee, who claims a medical condition as a result of federal employment, to undergo a physical examination as OWCP deems necessary. 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. The only limitation on this authority is that of reasonableness.<sup>8</sup> The referral to an appropriate specialist in appellant's area at OWCP's expense cannot be considered unreasonable. In this case, OWCP clearly acted within its discretion in referring appellant for an impartial medical examination to resolve a conflict with regard to whether appellant had residuals from the accepted condition. When appellant failed to attend, OWCP properly advised her of its intention to suspend compensation benefits and, after a 14-day period, suspended her benefits. In its November 9, 2009 letter proposing suspension of benefits, OWCP clearly gave appellant 14 days from the date of that letter to file a response. Accordingly, the termination dated November 23, 2009 was properly issued.

The Board finds that appellant did not demonstrate good cause for her failure to report to the scheduled appointment. Appellant alleged various discrepancies in the statement of accepted facts and the questions submitted to the physician. She also stated that all information was not forwarded to the physician. The Board finds that appellant's objections to the statement of accepted facts are not a valid excuse to refuse to attend an impartial medical examination nor are her allegations regarding submission of evidence submitted to the physician.<sup>9</sup> Similarly, appellant, barring exceptional circumstances, has no right to record an examination, have another person present at the examination, or to demand a female physician. Pursuant to OWCP's regulations, an employee is not entitled to have anyone else present at the examination unless OWCP decides that exceptional circumstances exist.<sup>10</sup> The fact that appellant has a lack of trust in the opinions of impartial medical examiners does not amount to exceptional circumstances.

Appellant makes numerous arguments about whether an impartial medical examination was necessary. She may not decide whether the circumstances warrant an impartial medical examination. There is no discretion for her to exercise in this matter.<sup>11</sup>

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<sup>7</sup> *Scott R. Walsh*, 56 ECAB 353 (2005).

<sup>8</sup> 20 C.F.R. § 10.320; *see J.T.*, *supra* note 3.

<sup>9</sup> *See V.H.*, Docket No. 07-1200 (issued September 10, 2008).

<sup>10</sup> 20 C.F.R. § 10.320; *see also Ida L. Townsend*, 45 ECAB 750 (1994) (where the Board found that under section 5 U.S.C. § 8123(a) a claimant has the right to have another physician present during a second opinion examination directed by the Office; however, a claimant does not have the right to have a family member or her representative participate in the second opinion examination).

<sup>11</sup> *See G.M.*, Docket No. 09-1835 (issued June 21, 2010).

OWCP has shown a great deal of good faith in its interactions with appellant. When there appeared to be some sort of verbal altercation between her and Dr. Douthit, OWCP scheduled a new examination. OWCP reviewed her objections to the statement of accepted facts and other arguments, but determined that they were without merit. Appellant was permitted to reschedule her first appointment with Dr. Dinenberg.

The Board further finds that as the issue is whether appellant's compensation was properly suspended for her failure to attend the impartial medical examination, appellant's arguments with regard to the weighing of the medical evidence are not relevant.<sup>12</sup> OWCP properly exercised its discretion in determining that appellant refused to submit to a properly scheduled medical examination and suspended her right to compensation benefits.

### **CONCLUSION**

The Board finds that OWCP properly suspended appellant's right to compensation benefits on the grounds that she refused to submit to a medical examination.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 22, 2010 is affirmed.

Issued: August 2, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>12</sup> *Id.*