

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

M.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Phoenix, AZ, Employer**

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**Docket No. 12-1892
Issued: March 25, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 13, 2012 appellant filed a timely appeal of the June 12, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), suspending her compensation benefits. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 compensation benefits effective December 15, 2011 under 5 U.S.C. § 8123(d) due to her failure to attend a scheduled medical examination on November 21, 2011.

On appeal, appellant contends that she did not deliberately obstruct OWCP's directed examination on January 10, 2012 and, thus, she is entitled to compensation for the period January 10 through June 12, 2012. She underwent emergency surgery on January 4, 2012 and could not attend the scheduled examination.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that appellant, a city carrier, sustained a sprain of the left shoulder and upper arm and left superior glenoid labrum lesion as a result of her federal employment. It authorized left shoulder arthroscopic surgery which was performed on October 4, 2010.

By letters dated November 8 and 9, 2011, OWCP directed appellant to report to a second opinion examination by Dr. Ronald M. Lampert, a Board-certified orthopedic surgeon, on November 21, 2011 at 12:15 p.m. to determine the nature of her condition, extent of disability and appropriate treatment. It informed her that the failure to keep, refusal to submit to or obstruction of the examination might result in suspension of her right to compensation under section 8123(d) of FECA. OWCP stated that compensation was not payable while the refusal or obstruction continued and that the period of the refusal or obstruction would be deducted from the period for which compensation was payable.

On November 18, 2011 QTC Medical Services, OWCP's medical scheduler, informed OWCP that appellant wished to cancel the appointment with Dr. Lampert because it was too far away and she did not like the physician. OWCP advised her that arrangements could be made for transportation and that there were a limited number of second opinion physicians who performed workers' compensation examinations. Appellant adamantly refused to attend the scheduled appointment.

By letter dated November 22, 2011, QTC advised OWCP that appellant did not attend the November 21, 2011 examination.

In a November 30, 2011 letter, OWCP proposed to suspend appellant's compensation benefits on the grounds that she failed to report for the scheduled examination on November 21, 2011. It allowed her 14 days to provide a written statement containing a valid reason for failing to submit to the examination. OWCP stated that, if she did not show good cause, her entitlement to any future compensation would be suspended under 5 U.S.C. § 8123(d) until after she attended and fully cooperated with the examination.

In a December 9, 2011 letter submitted by facsimile (fax) to OWCP, appellant contended that she did not refuse to attend the scheduled examination. She stated that on November 17, 2011 several days before the scheduled examination, she faxed to OWCP a valid reason for not attending the examination. Appellant claimed that she had no income and could not get to and from the appointment, which was 70 miles roundtrip. She was willing to reschedule the examination after she could afford transportation. Appellant requested an examination by a physician within 15 miles of her home. She would have attended the examination if OWCP had provided transportation in advance.

In a December 15, 2011 decision, OWCP finalized the proposed suspension of appellant's compensation benefits effective that date under 5 U.S.C. § 8123(d). It found that she did not provide a valid explanation for her failure to attend the scheduled examination. OWCP informed appellant that compensation benefits would be reinstated after she attended and fully cooperated with an examination.

On December 23, 2011 appellant informed OWCP that she wanted to reschedule the second opinion examination. OWCP ultimately rescheduled an examination with Dr. Lampert for March 21, 2012.²

In a December 27, 2011 letter, received by OWCP on January 26, 2012, appellant contended that she did not receive the November 30, 2011 notice of suspension until December 9, 2011 and was advised by her claims examiner that she had only two business days to reply, which she did. She stated that she had provided OWCP with her bank statement showing her depleted funds, thereby substantiating her inability to travel to Dr. Lampert's office. Moreover, appellant stated that, when speaking with a claims examiner, on November 8, 2011 she had agreed to undergo the November 21, 2011 examination. However, she could not afford to travel to Dr. Lampert's office because her claims examiner withheld her compensation benefits, that the doctor's office was 80 miles roundtrip and that she had to walk two miles to get public transportation. Appellant further contended that the doctor was known for conducting unfair examinations, and helping attorneys and employers deny claims. She requested another physician that all parties could agree to conduct the examination.

On January 24, 2012 appellant requested a telephone hearing with an OWCP hearing representative regarding OWCP's December 15, 2011 decision.

In a June 12, 2012 decision, an OWCP hearing representative affirmed the December 15, 2011 decision. The hearing representative found that appellant did not have good cause for failing to attend the scheduled November 21, 2011 examination.³

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.⁴ 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.⁵ OWCP regulations at section 10.320 provide that a claimant must submit to examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary.⁶ Section 8123(d) of FECA and section 10.323 of OWCP 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.⁷ OWCP procedures provide

² The Board notes that appellant attended this examination. *See* note 13, *infra*.

³ In the June 12, 2012 decision, OWCP's hearing representative noted that OWCP erroneously found in its December 15, 2011 decision that appellant had not provided an explanation for her failure to attend the November 21, 2011 examination as she had provided a response by fax on December 9, 2011.

⁴ 5 U.S.C. § 8123.

⁵ *J.T.*, 59 ECAB 293 (2008).

⁶ 20 C.F.R. § 10.320.

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

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.⁸ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.⁹

ANALYSIS

OWCP scheduled a second opinion examination on November 21, 2011 at 12:15 p.m. with Dr. Lampert. Appellant did not appear for the scheduled examination. By decisions dated December 15, 2011 and June 12, 2012, OWCP suspended her compensation for failure to attend the scheduled examination. The Board finds that it properly suspended appellant's compensation for failure to attend a medical examination on November 21, 2011.

The Board has recognized OWCP's responsibility in developing claims.¹⁰ Section 8123 of FECA 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.¹¹ The referral to an appropriate specialist in appellant's area at OWCP's expense cannot be considered unreasonable. In this case, OWCP acted within its discretion in referring appellant for a second opinion medical examination to determine the extent of her employment-related conditions, continuing disability and medical treatment. 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 30, 2011 letter proposing suspension of benefits, OWCP gave appellant 14 days from the date of that letter to file a response.

The Board finds that, in her December 9, 2011 response, appellant did not demonstrate good cause for her failure to report to the scheduled appointment. Appellant refused to attend the examination because it was too far from her home, she did not have any money for transportation which involved a two-mile walk to public transportation and she did not like Dr. Lampert who was known for conducting unfair examinations and assisting attorneys and employers deny claims. The Board finds that appellant's objections are not valid excuses to refuse to attend a scheduled second opinion medical examination. OWCP reasonably noted that the physician selected was one of a limited number of physicians who performed examinations for a workers' compensation case. Further, it explained to appellant that arrangements could be made for transportation. The Board notes that she did not contact OWCP to make arrangements for transportation to the scheduled November 21, 2011 examination. Lastly, appellant's lack of trust in the opinion of Dr. Lampert does not amount to exceptional circumstances. Without

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000); *J.T.*, *supra* note 5.

⁹ *Id.*

¹⁰ *Scott R. Walsh*, 56 ECAB 353 (2005).

¹¹ 20 C.F.R. § 10.320; *see J.T.*, *supra* note 5.

evidence in support of her allegation of bias, OWCP has nothing more than an unsubstantiated excuse.¹² Appellant has not submitted sufficient evidence to establish that she was incapable of attending the scheduled medical examination. The Board finds that OWCP properly suspended her right to future compensation benefits effective December 15, 2011.

On appeal, appellant contended that she was entitled to compensation benefits from January 10 through June 12, 2012 because she did not deliberately obstruct the January 10, 2012 second opinion medical examination as she was unable to attend the appointment due to her surgery on January 4, 2012. The relevant issue, however, is whether OWCP properly suspended appellant's compensation benefits effective December 15, 2011 under 5 U.S.C. § 8123(d) due to her failure to attend the scheduled medical examination on November 21, 2011.¹³ As appellant did not submit sufficient evidence to establish that she was incapable of attending the November 21, 2011 examination, the Board finds that OWCP properly suspended her compensation benefits effective December 15, 2011.

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 OWCP properly suspended appellant's right to future compensation effective December 15, 2011.

¹² *Atanacio G. Sambrano*, 51 ECAB 557 (2000).

¹³ The Board notes that appellant subsequently attended the rescheduled second opinion examination on March 21, 2012. Since the obstruction has ceased, OWCP may wish to further develop the issue of reinstatement of appellant's compensation benefits. *See, e.g., Billy V. Lewis*, 32 ECAB 1943 (1981); *Dorine Jinkins*, 32 ECAB 1502 (1981).

ORDER

IT IS HEREBY ORDERED THAT the June 12, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 25, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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