

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

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**L.B., Appellant**

**and**

**U.S. POSTAL SERVICE, CORONADO  
STATION, Santa Fe, NM, Employer**

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**Docket No. 14-2005  
Issued: January 28, 2015**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 17, 2014 appellant filed a timely appeal from an April 11, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 March 11, 2014 due to his failure to attend a scheduled medical examination.

On appeal, appellant contends that OWCP illegally ordered him to attend a referee examination with an impartial medical specialist whose office was located 380 miles one way from his home. He further contends that the medical reports of two attending physicians establish that his employment-related injuries are now a persistent, chronic, and permanent handicap to his ability to live a normal life.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> In a February 14, 2013 decision,<sup>3</sup> the Board reversed an OWCP hearing representative's August 31, 2012 decision terminating appellant's wage-loss compensation and medical benefits effective February 21, 2012 as he no longer had any residuals or disability causally related to his accepted December 4, 1996 employment-related injuries.<sup>4</sup> The Board found an unresolved conflict in the medical opinion evidence between an OWCP referral physician and appellant's attending physician, as to whether appellant had any continuing residuals and disability casually related to his accepted employment-related injuries and whether the accepted injuries caused consequential headaches and cervical and lumbar conditions. In a September 11, 2013 decision,<sup>5</sup> the Board set aside a February 22, 2013 OWCP decision which suspended appellant's compensation effective January 31, 2013 due to his failure to attend a scheduled referee examination. The Board found that OWCP had not properly selected the impartial medical specialist. The Board remanded the case for selection of a new impartial specialist in accordance with OWCP procedures. The facts and history as set forth in the Board's prior decisions are incorporated by reference. The relevant facts are set forth below.

On remand, by letter dated March 5, 2014, OWCP referred appellant, who lives in Santa Fe, New Mexico, to Dr. John D. Douthit, a Board-certified orthopedic surgeon, practicing in Englewood, Colorado, for a second impartial medical examination scheduled for March 24, 2014 at 9:00 a.m. It advised him that the failure to keep, refusal to submit to, or obstruction of the examination could result in suspension of his right to compensation under section 8123(d) of FECA (5 U.S.C. § 8123(d)). OWCP further informed appellant 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.

A March 4, 2014 iFECS report: ME023 (Appointment Schedule Notification) and a screenshot indicated that Dr. Douthit was selected as an impartial medical specialist on that date. A bypass history report indicated that Dr. Thomas G. Grace, a prior OWCP referral physician and Board-certified orthopedic surgeon, and Dr. Hendrick J. Arnold, III, a prior impartial medical specialist and Board-certified orthopedic surgeon, were located within 51.43 and 271.58 miles, respectively, of appellant's zip code. Dr. Grace was bypassed on March 4, 2014 due to a conflict because he had treated appellant. Dr. Arnold was bypassed on the same date because of

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<sup>2</sup> This case was before the Board with regard to the calculation of appellant's pay rate and payment of compensation. Docket No. 13-1308 (issued January 15, 2014). In a January 15, 2014 decision, the Board affirmed OWCP's calculation of appellant's pay rate for compensation purposes and found that he was not entitled to additional compensation.

<sup>3</sup> Docket No. 13-47 (issued February 14, 2013).

<sup>4</sup> OWCP accepted that on December 4, 1996 appellant, then a 49-year-old custodial laborer, sustained cervical and lumbar sprains, myalgias, and myositis while in the performance of duty. He stopped work on December 9, 1996 and resigned from the employing establishment in August 1997.

<sup>5</sup> Docket No. 13-968 (issued September 11, 2013).

a conflict as he had already submitted a report. No other physician was found or bypassed within a 200-mile range of appellant's zip code.

In a March 14, 2014 letter, Dr. Phillip A. Wong, an attending Board-certified osteopath, advised that appellant was not capable of driving to and back from Englewood, Colorado because of his physical condition.

By letter dated March 17, 2014, OWCP advised appellant that Dr. Wong's March 14, 2014 letter did not provide medical rationale to support his opinion that he was physically limited from traveling to the scheduled appointment. It noted that on November 7, 2011 and February 9, 2013, Dr. Melburn K. Huebner, an OWCP referral physician, and Dr. Arnold, respectively, indicated that there were no current physical limitations due to injury. OWCP noted its authority to require injured workers to submit to an examination under section 8123(a) of FECA and to suspend compensation for failure to report to an examination under section 8123(d) of FECA. It authorized reimbursement for travel expenses for mileage, lodging, and meals to attend the directed medical examination. OWCP stated that, if necessary, it would allow arrangement of air travel.

On March 24, 2014 Dr. Douthit advised OWCP that appellant did not appear at the examination on that day.

In a notice dated March 24, 2014, OWCP proposed to suspend appellant's compensation benefits pursuant to section 8123(d) of FECA for failure to attend the examination on that day with Dr. Douthit. Appellant was advised to provide a written explanation of his reasons, with substantive corroborating evidence, within 14 days for failing to attend the scheduled examination.

By letters dated March 19 and April 1, 2014, appellant objected to the scheduled appointment with Dr. Douthit. He contended that Dr. Douthit's office was 390 miles one way from his home and that a March 17, 2014 letter from Dr. Jimmie McClure, an attending chiropractor, and a March 19, 2014 letter from Dr. Wong established that he was unable to travel to the scheduled appointment.

In an examination note dated March 17, 2014, Dr. McClure provided a history of the December 4, 1996 employment injuries and appellant's medical treatment. He noted his complaints of neck and low back pain, and tingling and burning in his bilateral anterior thighs while performing activities of daily living. Dr. McClure conducted an examination, reviewed diagnostic test results, and diagnosed chronic cervical sprain/strain, cervical myofascitis, degenerative hypertrophic arthritis, and paresthesia, numbness, and tingling. He advised that appellant had significant loss of range of motion in the cervical and lumbar regions of his spine concomitant with degenerative changes, segmental dysfunction, chronic muscular strain, chronic ligamentous sprain, and chronic muscle rigidity and splinting. Dr. McClure agreed with appellant that he did not receive adequate treatment at the time of the accident in 1996 and that he did not receive adequate treatment until 2001 from Dr. Wong. He opined that given the degenerative changes to his cervical and lumbar spine and the length of time that he did not receive adequate care, appellant would likely need regular palliative and rehabilitative care on an

ongoing basis for pain management and to help prevent further degeneration of his spine and soft tissues.

In a March 19, 2014 letter, Dr. Wong noted that appellant had been requested to travel 390 miles one way. He advised that appellant was physically incapable of safely driving any farther than a maximum of 50 miles per day. Appellant suffered from claustrophobia and, therefore, he was unable to travel safely in any type of aircraft. Dr. Wong stated that there were plenty of Board-certified orthopedists in the Santa Fe/Albuquerque, New Mexico area. He reviewed appellant's activities of daily living listed in Dr. McClure's March 17, 2014 report and advised that there was no way appellant could drive that distance. Dr. Wong also reviewed Dr. McClure's range of motion test results and advised that his findings indicated that appellant's cervical and lumbar range of motion was less than 50 percent in all ranges. He noted that he would not release appellant to attend the medical evaluation by Dr. Douthit on March 24, 2014 due to the long distance and his physical disabilities. In a March 25, 2014 report, Dr. Wong noted appellant's complaints of neck, upper shoulders, arms, hands, and lower back stiffness, tightness, and weakness pain, and headaches. He provided findings on neurological examination and assessed somatic dysfunction. In a March 31, 2014 letter, Dr. Wong again noted Dr. McClure's March 17, 2014 findings and concurred with his conclusion that appellant's employment-related injuries were permanent in nature and that appellant would have to receive medical attention and treatment for the rest of his life.

In an April 11, 2014 decision, OWCP finalized its proposed suspension, effective March 11, 2014. It found that Dr. McClure's report was of diminished probative value as he was not a physician as defined under FECA. OWCP stated that the opinions of Drs. Huebner and Arnold established that the accepted work injuries had resolved and that appellant had no current physical limitations. It further stated that there were no physicians in appellant's area who would accept a referral. OWCP noted that Dr. Douthit was the nearest physician who would accept a referral. It authorized reimbursement for all travel expenses including, airfare, hotel, and meals. OWCP informed appellant that his compensation would be reinstated after he attended and fully cooperated with an examination.

### **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>6</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>7</sup> OWCP regulations provide that a claimant must submit to examination by a qualified physician as often and at such time and places as OWCP considers reasonably necessary.<sup>8</sup> Section 8123(d) of FECA and section 10.323 of OWCP's regulations provide that, if an employee refused to

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<sup>6</sup> 5 U.S.C. § 8123(a).

<sup>7</sup> *C.S.*, Docket No. 09-1597 (issued February 4, 2010); *J.T.*, 59 ECAB 293 (2008); *Dana D. Hudson*, 57 ECAB 298 (2006); *James C. Talbert*, 42 ECAB 974 (1991).

<sup>8</sup> 20 C.F.R. § 10.320; *see J.C.*, Docket No. 09-609 (issued January 5, 2010); *J.T.*, *supra* note 7; *Walter L. Jordan*, 57 ECAB 218 (2005).

submit to or obstructs a directed medical examination, his or her compensation is suspended until the refusal or obstruction ceases.<sup>9</sup> However, before OWCP may invoke these provisions, the employee is provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.<sup>10</sup> If good cause for the refusal or obstruction is not established entitlement to compensation is suspended in accordance with section 8123 of FECA.<sup>11</sup>

### ANALYSIS

OWCP suspended appellant's compensation effective March 11, 2014 under section 8123(d) of FECA on the grounds that he failed to attend a scheduled medical examination. 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 OWCP's authority, with regards to instructing a claimant to undergo a medical examination, is that of reasonableness.<sup>12</sup> The Board has interpreted the plain meaning of section 8123(d) to provide that compensation is not payable while a refusal or obstruction of an examination continues.<sup>13</sup>

The Board finds that OWCP properly suspended compensation benefits. In a letter dated March 5, 2014, OWCP notified appellant of the impartial medical examination scheduled with Dr. Douthit on March 24, 2014. It advised him of his rights and responsibilities with respect to the scheduled examination and warned him that his benefits may be suspended under section 8123(d) of FECA if he failed to report for the examination without an acceptable reason.

Appellant did not appear for his March 24, 2014 appointment. OWCP procedures provide that, if a claimant does not report for a scheduled appointment, he should be asked to provide a written explanation within 14 days to determine whether he has established good cause for failure to appear.<sup>14</sup> In letters dated March 19 and April 1, 2014, appellant objected to the distance of the appointment from his home and maintained that Dr. McClure's March 17, 2014 letter and Dr. Wong's March 19, 2014 letter established that he could not travel to the scheduled appointment. OWCP, however, reasonably noted in a bypass history report that the physician selected was the nearest physician who would accept a referral for examination. Further, it explained to appellant that it would reimburse him for mileage, lodging, and meals related to the appointment. Additionally, OWCP stated that it would allow arrangement for air travel, if necessary. While Dr. Wong opined in letters dated March 14 and 19, 2014 that appellant was

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<sup>9</sup> 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323. See *J.C.*, *supra* note 8; *Sharon Handy*, 57 ECAB 446 (2006); *Maura D. Fuller (Judson H. Fuller)*, 56 ECAB 383 (2005).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluation Medical Evidence*, Chapter 2.810.13(d) (September 2010). See *J.C.*, *supra* note 8; *Dana D. Hudson*, *supra* note 7; *Lynn C. Huber*, 54 ECAB 281 (2002).

<sup>11</sup> See *J.C.*, *supra* note 8; *Dana D. Hudson*, *supra* note 7; *Scott R. Walsh*, 56 ECAB 353 (2005).

<sup>12</sup> See *Lynn C. Huber*, *supra* note 10.

<sup>13</sup> See *M.B.*, Docket No. 10-1755 (issued March 24, 2011).

<sup>14</sup> Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.810.13(d)(3) (September 2010).

physically incapable of driving to and back from the scheduled appointment or traveling by any type of aircraft to the appointment due to his claustrophobia condition, he did not state that appellant was unable to ride as a passenger in a car. Further, Dr. Wong did not provide any medical rationale explaining how appellant's physical incapacity to drive a car or ride on an aircraft was causally related to the accepted December 4, 1996 employment injuries. Medical conclusions unsupported by rationale are of diminished probative value.<sup>15</sup>

The report from Dr. McClure, a chiropractor, is of no probative medical value. Under FECA, a chiropractor is a physician to the extent that the reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.<sup>16</sup> There is no indication from Dr. McClure's report that he diagnosed a subluxation as demonstrated by x-ray to exist. Accordingly, he is not a physician as defined under FECA and his report does not constitute competent medical evidence.

Appellant did not provide good cause for failing to appear at the March 24, 2014 scheduled examination. The Board finds that OWCP properly suspended his right to future compensation benefits effective March 11, 2014. When appellant actually reports for examination, payment retroactive to the date on which he agreed to attend the examination may be made.<sup>17</sup>

On appeal, appellant contended that OWCP illegally ordered him to attend an impartial medical examination with Dr. Douthit whose office was located 380 miles one way from his home. He did not, however, submit any evidence substantiating his allegation. In *Billie J. Gardner*,<sup>18</sup> the Board held that OWCP may refer a claimant to a distant city for a referral examination after documenting that there are no appropriate specialists in the claimant's geographical location. In this case, unlike *Gardner*, however, OWCP documented its attempts to locate an appropriate impartial medical specialist in appellant's area. A bypass history report indicated that while Drs. Grace and Arnold were located within 51.43 and 271.58 miles, respectively, of appellant's zip code, they were bypassed because they were previously involved with appellant's case. The report also indicated that no other physician was located or bypassed within 200 miles. In addition, OWCP indicated that it would reimburse travel expenses, including the cost of an overnight stay, if necessary. A simple preference for examination in a particular location is not considered a valid reason for objecting to an impartial medical examiner.<sup>19</sup> Accordingly, the Board finds that appellant did not present any evidence establishing that the impartial selection was improper.

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<sup>15</sup> *T.F.*, 58 ECAB 128 (2006).

<sup>16</sup> *See* 5 U.S.C. § 8101(2); *A.C.*, Docket No. 08-1453 (issued November 18, 2008).

<sup>17</sup> *C.S.*, Docket No. 11-1366 (issued December 12, 2011); *E.B.*, 59 ECAB 298 (2008).

<sup>18</sup> 53 ECAB 356 (2002).

<sup>19</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4(f) (July 2011).

Appellant further contended that reports from his attending chiropractor, Dr. McClure, and his physician, Dr. Wong, established that his employment-related injuries were a persistent, chronic, and permanent handicap to his ability to live a normal life. However, as found, Dr. McClure is not a physician as defined under FECA and Dr. Wong did not state that appellant was unable to ride as a passenger in a car to the scheduled examination with Dr. Douthit or provide medical rationale explaining the causal relationship between appellant's physical incapacity to drive a car or ride in an aircraft and the accepted December 4, 1996 employment injuries. As noted, OWCP informed appellant that it would reimburse him for mileage, lodging, and meals, and allow air travel to the appointment. As appellant did not submit sufficient evidence to establish that he was incapable of attending the March 24, 2014 examination, the Board finds that OWCP properly suspended his compensation benefits effective March 11, 2014.

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 and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP properly suspended appellant's compensation benefits effective March 11, 2014 due to his failure to attend a scheduled medical examination.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 11, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 28, 2015  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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