

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

C.G., Appellant)

and)

U.S. POSTAL SERVICE, LOGISTICS &)
DISTRIBUTION CENTER, Tampa, FL,)
Employer)

**Docket No. 15-0303
Issued: January 14, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 3, 2014 appellant filed a timely appeal of an October 17, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.²

ISSUE

The issue is whether OWCP met its burden of proof to suspend appellant's compensation benefits in accordance with 5 U.S.C. § 8123(d) of FECA as she refused to attend a March 24, 2014 medical examination.

¹ 5 U.S.C. § 8101 *et seq.*

² On December 19, 2014 appellant filed a motion to vacate prior Board decisions dated May 21 and December 1, 2014, as well as OWCP decisions issued after March 31, 2009. By order dated November 25, 2015, the Board denied her motion. *Order Denying Appellant's Motion to Vacate*, Docket No. 15-0303 (issued November 25, 2015).

On appeal appellant argues that OWCP erred in suspending her compensation benefits based on her failure to attend the scheduled appointment. She also argues that OWCP lacked jurisdiction to refer her for a second opinion while appeals were pending before the Board regarding OWCP File Nos. xxxxxx098 and xxxxxx258.

FACTUAL HISTORY

This case has previously been before the Board. On June 9, 2011 appellant filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her back, right knee, and ankle while pushing an automated postal cart.³ OWCP accepted the claim for cervical and lumbosacral sprains. On March 21, 2013 it suspended appellant's compensation benefits for failure to attend an appointment with Dr. William Dinenberg, a Board-certified orthopedic surgeon under File No. xxxxxx258.⁴ Appellant requested reconsideration and by decision dated August 19, 2013 OWCP denied modification of its March 21, 2013 decision. On November 21, 2013 she filed an appeal of that decision to the Board. In its May 21, 2014 decision, the Board affirmed OWCP's August 19, 2013 OWCP decision denying modification of the March 21, 2013 decision suspending appellant's compensation. The facts and circumstances surrounding the prior appeal are incorporated by reference.

The record indicates that appellant received wage-loss benefits on the short-term rolls as of July 29, 2011 and on the periodic rolls as of October 20, 2013.

While the above-referenced appeal was pending before the Board, by letter dated February 21, 2014, OWCP again informed appellant that a second opinion evaluation was needed for an assessment of her work-related condition.

On February 27, 2014 appellant was informed that an appointment for a second opinion evaluation had been scheduled with Dr. Fanourious I. Ferderigos, a Board-certified orthopedic surgeon, for March 24, 2014 at 2:00 p.m. She was informed that if she failed to attend the scheduled appointment she must advise OWCP within seven days of the reason. Appellant was further advised that if she refused or obstructed the examination her right to compensation would be suspended while the refusal or obstruction continued.

On March 24, 2014 OWCP was informed that appellant did not attend the appointment with Dr. Ferderigos.

³ This claim was assigned OWCP File No. xxxxxx258. On September 17, 2013 OWCP combined OWCP File Nos. xxxxxx098, xxxxxx258, and xxxxxx723. OWCP File No. xxxxxx098 was listed as the master file number. Under OWCP File No. xxxxxx098, OWCP accepted that appellant sustained lumbar strain and left shoulder and arm strain on February 9, 2009 while moving a bulk mail cart. Under OWCP File number xxxxxx723 OWCP accepted that appellant sustained neck, left shoulder, and left upper arm strains on March 31, 2009 while pulling a heavy tray of mail off a pallet of high heavy letter trays.

⁴ Docket 14-315 (issued May 21, 2014) *petition for recon., denied*, Docket No. 14-315 (issued December 1, 2014). In the May 21, 2014 decision, the Board also affirmed the denial of appellant's claim for wage-loss compensation for the period September 9 to October 8, 2011 as she had already been paid wage-loss compensation for the period July 29, 2011 to March 9, 2013 under File No. xxxxxx258, *i.e.*

On March 27, 2014 OWCP issued a notice proposing to suspend appellant's compensation because she had failed to appear for the examination scheduled with Dr. Ferderigos on March 24, 2014. Appellant was informed of the penalty provision of section 8123(d) of FECA and was given 14 days to provide in writing good cause for her failure to appear. She was also advised to contact OWCP immediately if she intended to report for a rescheduled examination with Dr. Ferderigos.

In a letter dated April 7, 2014, appellant disagreed with the proposal to suspend her benefits. She argued that there was no issue requiring referral for a second opinion evaluation. Appellant asserted that OWCP lacked the jurisdiction to send her for a second opinion evaluation as she currently had an appeal before the Board and the Board and OWCP could not have simultaneous jurisdiction.

In an April 18, 2014 decision, OWCP finalized the proposed suspension, effective that day. It found that appellant had failed to attend the appointment scheduled for March 24, 2014 and that she had failed to provide good cause for her failure to appear. OWCP informed her that wage-loss compensation would be reinstated after she attended and fully cooperated with an examination.

On April 21, 2014 appellant requested a review of the written record by an OWCP hearing representative.

By decision dated October 17, 2014, an OWCP hearing representative affirmed the April 18, 2014 OWCP decision suspending appellant's benefits for failure to attend a scheduled second opinion appointment on March 24, 2014.

LEGAL PRECEDENT

Section 8123(a) 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.⁵ 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.⁶ OWCP's federal 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 OWCP considers reasonably necessary.⁷ Section 8123(d) of FECA and section 10.323 of OWCP's regulations provide that, if an employee refuses to submit to or obstructs a directed

⁵ 5 U.S.C. § 8123(a).

⁶ *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).

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

medical examination, his or her compensation is suspended until the refusal or obstruction ceases.⁸ However, before OWCP may invoke these provisions, the employee is provided a period of 14 days within which to present in writing his reasons for the refusal or obstruction.⁹ If good cause for the refusal or obstruction is not established entitlement to compensation is suspended in accordance with section 8123 of FECA.¹⁰

ANALYSIS

The Board finds that OWCP properly suspended appellant's compensation benefits pursuant to section 8123(a) of FECA.

By letter dated February 21, 2014, OWCP notified appellant that a second opinion evaluation was needed. It properly informed her in its February 21, 2014 letter that her right to compensation would be suspended if she refused to undergo the examination. On February 27, 2014 OWCP referred appellant for the second opinion evaluation with Dr. Ferderigos, a Board-certified orthopedic surgeon, to assess her employment-related medical condition, treatment, and continuing disability related to her accepted employment injuries. The appointment was scheduled for March 24, 2014. The notice was sent to appellant's address of record.

Appellant did not attend the scheduled appointment on March 24, 2014. In a March 27, 2014 notice, OWCP afforded 14 days to provide good cause in writing for her failure to attend the scheduled March 24, 2014 examination. Appellant was again advised of the penalty provision of section 8123(d) of FECA for failure to attend such an examination.

The Board finds that OWCP was within its authority to schedule the second opinion examination, that appellant failed to attend the scheduled medical examination on March 24, 2014, and that she failed to provide good cause for her failure within 14 days of OWCP's March 27, 2014 notice of proposed suspension.

Appellant argues that OWCP erred in referring her to a second opinion evaluation without first obtaining evidence of her current medical condition from her treating physician. She also argues that OWCP did not have jurisdiction to schedule a second opinion evaluation as the Board and OWCP could not have simultaneous jurisdiction. As noted above, OWCP has discretion to determine when a second opinion evaluation is required. There is no requirement that OWCP seek an opinion from a treating physician prior to a second opinion examination. As to appellant's argument that OWCP lacked jurisdiction to refer her for a second opinion evaluation while an aspect of her claim was on appeal to the Board, this argument is without merit. The issue on appeal to the Board under OWCP File No. xxxxxx258 in the prior appeal

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

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluation Medical Evidence*, Chapter 2.810.13(d) (September 2010). See *J.C.*, *supra* note 7; *Dana D. Hudson*, *supra* note 6; *Lynn C. Huber*, 54 ECAB 281 (2002).

¹⁰ See *J.C.*, *supra* note 7; *Dana D. Hudson*, *supra* note 6; *Scott R. Walsh*, 56 ECAB 353 (2005).

concerned her failure to attend an appointment with Dr. Dinenberg on December 21, 2012. By February 21, 2014, the date appellant had been referred for the examination with Dr. Ferderigos, appellant had been returned to receiving wage-loss compensation benefits. OWCP acted within its discretion when it referred her for another second opinion evaluation to determine her then medical status. In the prior appeal, the Board only had jurisdiction over whether OWCP properly suspended appellant's compensation benefits for refusing to attend the appointment with Dr. Dinenberg on December 21, 2012.

Appellant further asserts that the statement of accepted facts (SOAF) dated February 21, 2014 was not provided to her prior to the scheduled March 24, 2014 appointment and that the SOAF was missing accepted and worsening conditions contained in OWCP File Nos. xxxxx098 and xxxxxx723. There is no requirement that OWCP provide appellant with a SOAF before a second opinion examination has been scheduled.¹¹ A claimant is at any time afforded the opportunity to obtain a copy of his or her case record. Appellant provided no evidence to substantiate her claim that the SOAF was inaccurate. Thus, the Board finds these arguments also to be without merit.

As noted above, OWCP had the discretion to determine that a second opinion evaluation was required. Contrary to appellant's contention, while a case is on appeal to the Board, OWCP is only precluded from rendering a decision over the same issue that is on appeal to the Board.¹² The Board could not have had jurisdiction over a need for a new second opinion evaluation on March 24, 2014 as that issue had not arisen prior to appellant's filing of the previous appeal on November 21, 2013.¹³

CONCLUSION

The Board finds that OWCP met its burden of proof to suspend appellant's compensation benefits in accordance with 5 U.S.C. § 8123(d) of FECA as she refused to attend a scheduled medical examination.

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.3(c)(1) (July 2011) provides that the SOAF should be provided to the second opinion physician. However, 3.500.3(d) discusses the information to be provided to appellant at the time of the second opinion examination and does not state that the SOAF should be provided.

¹² See 20 C.F.R. § 501.2(c)(3).

¹³ *Douglas E. Billings*, 41 ECAB 880 (1990) (the Board and OWCP may not exercise concurrent jurisdiction over the same issue).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 17, 2014 is affirmed.

Issued: January 14, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board