

accepted her claim for contusion of the shoulder and left upper arm as well as a sprain of the shoulder and upper arm.

OWCP referred appellant for a second opinion evaluation with Dr. Sanford Wert, a Board-certified orthopedic surgeon, on September 2, 2009. In a report dated October 5, 2009, Dr. Wert reviewed her history of injury and performed a physical examination. He found diffuse tenderness in the left shoulder and noted that appellant complained of pain on all ranges of motion with no deltoid atrophy or tightness. Dr. Wert stated, "Due to claimant's complaints of pain objective testing could not be performed." He noted appellant's range of motion with flexion of 15 degrees, abduction of 5 degrees and 0 degrees of internal and external rotation. Dr. Wert stated:

"The claimant complained of pain, placed severe limitations on today's examination, allowed for virtually no movement of the left shoulder/arm and allowed for no objective testing. It is my impression that the claimant exhibited significant symptom magnification during the examination. Due to the limitations placed on my examination by the claimant I am unable to comment on if her condition has resolved. I defer comments until such time as the claimant will allow for an objective examination."

Dr. Wert found that appellant's symptoms did not correlate clinically with the left shoulder magnetic resonance imaging (MRI) scan. He stated that he was unable to determine if she still had residuals of her accepted condition, if she was able to return to work or her restrictions due to the severe limitations that she placed on his examination.

In a letter dated January 8, 2010, OWCP informed appellant that she was noncompliant with her scheduled second opinion evaluation with Dr. Wert. It proposed to suspend her compensation benefits. It allowed her 14 days to submit in writing her reasons for failing to cooperate with the scheduled examination. OWCP informed appellant, "If you do not show good cause, your entitlement to compensation will be suspended under 5 U.S.C. § 8123(d) until after you attend and fully cooperate with the examination."

On January 14, 2010 appellant responded stating that she attended the examination with Dr. Wert and cooperated to the fullest. She contended that Dr. Wert confused her with another patient.

OWCP referred appellant for a second examination by Dr. Wert on January 27, 2010. The accompanying documentation stated, "If an employee refuses to submit or obstructs an examination, his right to compensation ... is suspended until the refusal or obstructions stops. Compensation for the period for the refusal or obstruction is deducted from the period for which compensation is payable to the employee."

Dr. Wert examined appellant on March 12, 2010. He noted her continued complaints of left shoulder pain, stiffness, tightness and swelling. Dr. Wert stated that appellant reported limitations in sitting, walking and standing due to shoulder pain. Appellant stated that she required assistance in cooking, cleaning, shopping, running errands and maintaining personal hygiene. On physical examination, Dr. Wert stated that she had a normal gait and independent

ambulation and that she was able to mount and dismount the examining table without difficulty. He noted that examination of the left shoulder elicited complaints of pain to light touch and that range of motion testing was performed actively by appellant. Dr. Wert advised that due to appellant's complaints no objective testing could be performed. He noted that there was deltoid atrophy or grittiness with flexion to 50 degrees abduction to 40 degrees, internal rotation of 75 degrees and external rotation to 35 degrees. Dr. Wert diagnosed sprain and strain of the left shoulder. He stated:

“As exhibited during my prior examination and yet again, [appellant] complained of pain to light touch, did not allow for objective left shoulder examination and due to her complaints, muscle testing of the left upper extremity could not be accurately measured. [Appellant] permitted markedly diminished range of motion testing. It is my impression that [she] exhibited significant symptom magnification during today's physical examination. Yet, again, I defer comments pertaining to disability until such time as [appellant] will allow for an objective examination.”

Dr. Wert stated that he was unable to address appellant's ability to return to work or her restrictions. He was also unable to comment on whether she still had disabling residuals.

By decision dated March 19, 2010, OWCP finalized the suspension of appellant's compensation under section 8123(d) of FECA effective March 19, 2010. It found that she was noncompliant with the physical examination by Dr. Wert. Appellant did not allow for a proper orthopedic evaluation and impeded Dr. Wert's efforts to render an objective decision.

On March 26, 2010 appellant contended that she cooperated with Dr. Wert's examination to the fullest despite pain and swelling. She requested an oral hearing that was held on July 19, 2010. Appellant stated that she responded to all questions posed by Dr. Wert, did not refuse any tests, but informed Dr. Wert that she had pain in her left arm as he raised it.

By decision dated September 3, 2010, the Branch of Hearings and Review found that OWCP properly suspended appellant's compensation benefits based on her refusal to cooperate with a medical examination. The hearing representative found that appellant exaggerated her symptoms to such an extent that Dr. Wert could not provide an objective report.

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.² 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.³ 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

² 5 U.S.C. § 8123(a).

³ *James C. Talbert*, 42 ECAB 974, 976 (1991).

reasonably necessary.⁴ Section 8123(d) of FECA and section 10.323 of OWCP's regulations provide that, if an employee refused to submit to or obstructs a directed medical examination, his or her compensation is suspended until the refusal or obstruction ceases.⁵ 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.⁶ If good cause for the refusal or obstruction is not established entitlement to compensation is suspended in accordance with section 8123 of FECA.⁷

ANALYSIS

The Board finds that OWCP abused its discretion in suspending appellant's compensation for obstructing an examination. Appellant's claim was accepted for a contusion and sprain of the left upper arm. OWCP referred her for a second opinion evaluation with Dr. Wert to determine the extent of her disability and residuals. In an October 5, 2009 report, Dr. Wert stated that appellant's symptom magnification was such that he was unable to provide objective findings addressing appellant's current condition, disability or medical residuals. By letter dated January 8, 2010, OWCP informed appellant of her obligation to cooperate with medical evaluations and allowed 14 days for a response. On January 14, 2010 she replied that she had cooperated and OWCP rescheduled the medical examination by Dr. Wert. In a March 12, 2010 report, Dr. Wert again found that appellant's symptom magnification interfered with his ability to provide objective findings regarding the issues of diagnoses, disability and medical residuals. OWCP then suspended appellant's compensation benefits by decision dated March 19, 2010.

While OWCP provided appellant notice that she had 14 days to provide reasons for failing to cooperate with the October 5, 2009 examination by Dr. Wert, it did not provide her with similar notice following the March 12, 2010 examination. Rather, it finalized the suspension effective March 19, 2010. OWCP's procedures clearly state that if a claimant does not cooperate with a scheduled appointment he or she should be asked to provide a written explanation within 14 days.⁸ After her failure to cooperate with the March 12, 2010 examination, appellant should have been provided proper notice and given 14 days to submit written reasons for her failure to cooperate. The Board finds that OWCP erred in suspending her right to compensation benefits based on notice pertaining to the October 5, 2009 examination.⁹

⁴ 20 C.F.R. § 10.320.

⁵ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluation Medical Evidence*, Chapter 2.810.14(d) (July 2000).

⁷ See *Scott R. Walsh*, 56 ECAB 592 (2005); *Raymond C. Dickinson*, 48 ECAB 646 (1997).

⁸ *Supra* note 6.

⁹ *K.G.*, Docket No. 10-137 (issued August 6, 2010); *J.C.*, Docket No. 09-609 (issued January 5, 2010).

CONCLUSION

The Board finds that OWCP did not properly suspend appellant's right to compensation benefits beginning March 19, 2010.

ORDER

IT IS HEREBY ORDERED THAT the September 3, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 2, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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