

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

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| <b>K.M., Appellant</b>                      | ) |                               |
|   | ) |                               |
| <b>and</b>                                  | ) | <b>Docket No. 11-125</b>      |
|   | ) | <b>Issued: August 9, 2011</b> |
| <b>DEPARTMENT OF HOMELAND SECURITY,</b>     | ) |                               |
| <b>TRANSPORTATION SECURITY</b>              | ) |                               |
| <b>ADMINISTRATION, Goleta, CA, Employer</b> | ) |                               |
| <hr/>                                       | ) |                               |

*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  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On October 19, 2010 appellant filed a timely appeal from the September 24, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) suspending her compensation for refusing to submit to a medical examination. Pursuant to the Federal Employees' Compensation Act (FECA)<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 compensation effective March 30, 2010 for refusing to submit to a necessary medical examination.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

In December 2007, OWCP accepted that appellant, then a 55-year-old transportation security screener, sustained sprains of her back, thoracic region and ribs due to her repetitive work duties. Appellant received compensation for periods of disability.

In October 2009, OWCP referred appellant to Dr. Harlan Bleecker, a Board-certified orthopedic surgeon, for a medical evaluation regarding the extent of her work-related disability. On November 27, 2009 Dr. Bleecker recommended that appellant undergo a magnetic resonance imaging (MRI) scan test of her thoracic spine and electromyogram (EMG) and nerve conduction velocity (NCV) studies of her upper extremities.

On December 7, 2009 appellant was referred for MRI scan testing at Pueblo Radiology Medical Group, Inc. Dr. Bleecker indicated that the findings showed essentially normal results. On December 21, 2009 appellant was referred for EMG and NCV studies at Grossman Imaging. The test results were unsatisfactory due to her intolerance of needles.

OWCP asked for a supplemental report from Dr. Bleecker, who advised that a computerized tomography (CT) scan of appellant's thoracic spine was needed to evaluate her condition. Appellant was referred for diagnostic testing on February 19, 2010 at the Cancer Center of Santa Barbara. She did not attend the scheduled examination. Appellant was rescheduled to appear for diagnostic testing on March 12, 2010 but also failed to attend the rescheduled appointment.

By letter dated March 15, 2010, appellant was advised that OWCP proposed to suspend her compensation because she failed to report for an evaluation as directed. OWCP found she did not report for diagnostic testing on February 14, 2010 as directed. Appellant was given 14 days to cooperate with the examination or provide good cause for her refusal. She was informed that if she did not show good cause for not attending or fully cooperating with an examination her entitlement to compensation would be suspended under 5 U.S.C. § 8123(d) until after she attended and fully cooperated with the examination. Appellant did not respond.

By decision dated March 30, 2010, OWCP suspended appellant's benefits effective that date for refusing to submit to a necessary medical examination.<sup>2</sup>

Subsequent to the denial, OWCP received factual statements from appellant dated February 13 and April 9, 2010. Appellant asserted that she was justified in not attending the scheduled examination due to her concern about cancer-causing radiation from diagnostic testing. She indicated that her attending physician assured her that no further diagnostic tests were required to evaluate her condition. Appellant claimed that she had already been exposed to the yearly ceiling level for radiation exposure in that she had been exposed to radiation from prior diagnostic testing and from a coal-powered energy plant and airport near her home.

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<sup>2</sup> Appellant retired from the employing establishment in March 2008.

In an April 5, 2010 report, Dr. Mark H. Musicant, an attending Board-certified occupational medicine physician, stated that appellant had undergone a number of diagnostic tests including MRI scans, a CT scan, x-rays and an EMG. He stated:

“It has come to my attention that a bone scan has been recommended to further evaluate the persistent thoracic pain. [Appellant] is concerned about radiation and about any benefit that could come from doing this procedure. She prefers not to have any further procedures. I have asked [appellant] to talk to the physicians to find out if there is any other way of further evaluating the back. If it is essential to do this bone scan, a discussion with [her] about benefits and risks needs to be done.”

Appellant requested a hearing before OWCP’s hearing representative. At the hearing held on July 7, 2010, she reiterated that she had already undergone numerous diagnostic tests and asserted that her chest tissue was very sensitive to radiation. Appellant stated that she was at special risk because she was not a young woman and had already been exposed to the yearly ceiling level for radiation. She advised that she did not refuse to take a bone scan but that she had asked for an 18-month postponement in order to heal in between all the diagnostic testing she had undergone. Appellant stated that she also wanted time to gather information about the risks of radiation.

Appellant submitted medical records and treatment notes from the Spine and Orthopedic Center in Santa Barbara dated in June and July 2010. In an August 13, 2010 letter, she asserted that she did not refuse to undergo scheduled diagnostic testing.

In a September 24, 2010 decision, OWCP’s hearing representative affirmed the March 30, 2010 decision.

### **LEGAL PRECEDENT**

Section 8123(a) of FECA<sup>3</sup> authorizes OWCP to require an employee who claims compensation for an employment injury to undergo such physical examinations as it deems necessary. The determination of the need for an examination, the type of examination, the choice of local 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>4</sup> Section 8123(d) of FECA provides that, “[i]f an employee refuses to submit to or obstructs an examination, his right to compensation is suspended until refusal or obstruction stops.”<sup>5</sup> If an employee fails to appear for an examination, OWCP must ask the employee to provide in writing an explanation for the failure within 14 days.<sup>6</sup>

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<sup>3</sup> 5 U.S.C. § 8123(a).

<sup>4</sup> See *Dourine Jenkins*, 32 ECAB 1502, 1505 (1981).

<sup>5</sup> 5 U.S.C. § 8123(d). See 20 C.F.R. § 10.323.

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010).

### ANALYSIS

OWCP accepted that appellant sustained sprains of her back, thoracic region and ribs due to her repetitive work duties. It scheduled her for an examination on November 24, 2009 with Dr. Bleecker, a Board-certified orthopedic surgeon serving as OWCP referral physician. The referral was designed to evaluate the extent of appellant's work-related disability. Appellant underwent MRI scan and EMG/NCV testing per Dr. Bleecker's recommendation. On February 19, 2010 OWCP referred her to Santa Barbara Cancer Center for CT scan testing as Dr. Bleecker indicated that such testing was necessary to further evaluate her condition. Appellant failed to report for the examination. The examination was rescheduled for March 12, 2010 but she also failed to keep that appointment.

By letter dated March 15, 2010, appellant was asked to provide good cause for her failure to attend the appointment for diagnostic testing. She responded noting that she was fearful of developing cancer from diagnostic testing radiation. Before OWCP and on appeal to the Board, appellant asserted that she was at risk for cancer from radiation, but she did not provide medical documentation supporting that she was unable to undergo the requested diagnostic testing because of such risk. The April 5, 2010 medical report received from Dr. Musicant, an attending Board-certified occupational medicine physician, did not state that appellant could not undergo a CT scan for medical reasons but only advised that she preferred not to have any such procedures.

Given the medical recommendation for additional diagnostic testing, OWCP acted reasonably in requiring such testing. Appellant did not present reasonable justification for her failure to keep or fully cooperate with the scheduled medical appointment and OWCP acted properly in suspending her compensation effective March 30, 2010.

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 compensation effective March 30, 2010 for refusing to submit to a necessary medical examination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 24, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 9, 2011  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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