

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

E.R., Appellant)	
)	
and)	Docket No. 11-1718
)	Issued: June 6, 2012
FEDERAL DEPOSIT INSURANCE)	
CORPORATION, Arlington, VA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 20, 2011 appellant filed a timely appeal of a January 26, 2011 Office of Workers' Compensation Programs' (OWCP) merit decision terminating 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 to consider the merits of the case.

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's compensation benefits effective December 20, 2009; (2) whether appellant has met her burden of proof to establish any continuing disability or medical residuals on or after December 20, 2009; and (3) whether OWCP properly suspended her compensation benefits effective October 25, 2009 due to her failure to attend scheduled medical examinations.

On appeal, appellant alleged that OWCP improperly terminated her compensation benefits without resolving a conflict of medical opinion evidence.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been on appeal before the Board. On June 26, 2000 appellant, then a 37-year-old technician, filed a traumatic injury claim alleging that she slipped and fell in the performance of duty. OWCP denied her claim finding that she had not established that her injury occurred in the performance of duty. In a decision and order dated July 24, 2002, the Board found that the case was not in posture for decision and remanded for additional development of the issue of whether appellant was on the employing establishment premises at the time the injury occurred.² The facts and circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

On September 26, 2002, following the Board's decision, OWCP accepted appellant's claim for sprain/strain of the left foot, left hand and left shoulder. It referred her for a second opinion evaluation with Dr. Robert Draper, Jr., a Board-certified orthopedic surgeon. In a report dated October 28, 2004, Dr. Draper found that appellant could return to light-duty work with restrictions. OWCP referred her for vocational rehabilitation services.

Appellant's attending physician, Dr. Eduardo R. Ilano, a Board-certified internist, completed a work capacity evaluation on June 8, 2006 and opined that appellant had no use of her left arm. He stated that she was totally disabled. Dr. Ilano completed a second work capacity evaluation on April 3, 2007 and diagnosed contusion of the left shoulder and arm, lumbar spine pain and no control of the left arm and hand with weakness and pain. He stated that appellant was totally disabled.

OWCP suspended appellant's compensation benefits by decision dated February 24, 2009 for the refusal to complete a report of earnings. In a letter dated May 4, 2009, it again informed her that her compensation benefits were suspended effective March 14, 2009 until she completed the necessary report of earnings. OWCP received the completed form from appellant on May 13, 2009 and reinstated benefits.

OWCP referred appellant for a second opinion evaluation on May 20, 2009 with Dr. Draper. In a letter dated June 15, 2009, it proposed to suspend her compensation benefits due to her failure to submit the scheduled medical examination. Appellant responded on June 21, 2009 and stated that she had not received the May 20, 2009 letter and requested a physician located in Maryland. In a letter dated June 17, 2009, OWCP directed her to report for a second opinion examination with Dr. Robert Smith, a Board-certified orthopedic surgeon, on July 7, 2009. On July 9, 2009 it again proposed to suspend appellant's compensation for refusing to report for the scheduled examination. In a letter dated July 17, 2009, OWCP directed her to attend a second opinion evaluation with Dr. Smith scheduled for August 6, 2009.

Dr. Smith examined appellant on August 6, 2009 and found no atrophy of the left upper extremity, no skin changes or abnormal sensation. He stated that she reported that she could not extend her fingers which appeared to be nonorganic. Dr. Smith found, by clinical examination, that appellant's left leg was normal with no atrophy, radiculitis or neuritis. He opined that the

² Docket No. 01-1895 (issued July 24, 2002).

accepted conditions had resolved and that she was capable of returning to full duty. Dr. Smith found that appellant did not require further medical treatment.

In a letter dated September 15, 2009, OWCP determined that there was a conflict of medical opinion evidence between Dr. Ilano and Dr. Smith, appellant's physicians, and scheduled an appointment with Dr. Sager Nootheti, a Board-certified orthopedic surgeon, on September 30, 2009 to resolve the conflict. In a letter dated October 5, 2009, it proposed to suspend appellant's compensation benefits due to her failure to report for the scheduled examination on September 30, 2009. OWCP allowed her 14 days for a response. It rescheduled the appointment with Dr. Nootheti for October 21, 2009 in a letter dated October 9, 2009.

In a letter dated October 22, 2009, OWCP again proposed to suspend appellant's compensation due to her failure to appear for the October 21, 2009 appointment with Dr. Nootheti. It allowed her 14 days to respond. Appellant rescheduled her appointment for October 28, 2009, but again failed to appear. The record contains an electronic entry on a "Comp Termination Sheet" indicating that OWCP "terminated" her compensation on October 25, 2009 as she failed to keep her medical appointment twice.

By letter dated November 9, 2009, OWCP proposed to terminate appellant's compensation and medical benefits based on Dr. Smith's report. It stated that this report represented the weight of the medical evidence as Dr. Ilano did not provide a diagnostic test to support his opinion of continuing disability. Appellant responded on December 3 and 17, 2009 and disagreed with the proposed termination. She asked why she had not received her November and December 2009 compensation benefits.

By decision dated December 23, 2009, OWCP terminated appellant's medical and wage-loss benefits effective December 18, 2009. It adopted the findings in the pretermination notice regarding the weight of the medical evidence and further found that her December 3 and 17, 2009 statements did not explain her failure to keep her scheduled appointments with Dr. Nootheti. OWCP stated that appellant's compensation benefits were suspended on October 25, 2009 due to her refusal to attend the scheduled medical examinations. It concluded that she had not submitted sufficient evidence including any additional medical evidence from Dr. Ilano to alter the recommendation to terminate her medical and wage-loss compensation.

OWCP completed a letter dated February 22, 2010 and stated that appellant elected to receive benefits from the Office of Personnel Management effective October 25, 2009 and that her compensation benefits under FECA were terminated that date. In a telephone memorandum dated August 9, 2010, the claims examiner indicated that appellant's benefits were terminated on October 25, 2009.

Appellant requested reconsideration on December 21, 2010. Her representative argued that OWCP improperly terminated her compensation benefits as there was an existing conflict of medical opinion evidence between Drs. Ilano and Smith. Counsel further argued that it in fact terminated appellant's compensation benefits on the grounds that she refused to cooperate with a scheduled examination. He stated that OWCP could not rely on Dr. Smith's report as there was an existing conflict of medical opinion evidence.

By decision dated January 26, 2011, OWCP reviewed the merits of appellant's claim and declined to modify the December 23, 2009 decision. It stated that her compensation benefits were suspended on October 24, 2009 for failure to cooperate with a medical examination and subsequently terminated.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁵ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁶

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.⁷ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof to terminate appellant's medical and compensation benefits. Appellant's attending physician, Dr. Ilano, submitted form reports supporting appellant's total disability for work due to her accepted conditions. OWCP referred appellant for a second opinion evaluation with Dr. Smith, who found that she had no medical residuals and could return to her date-of-injury position. Although, it found a conflict between these physicians, the Board finds that there was no true conflict of medical opinion evidence.

The Board finds that Dr. Smith's well-reasoned report is sufficient to constitute the weight of the medical opinion evidence and establish that the accepted conditions had resolved that appellant was capable of returning to full duty. In contrast to Dr. Ilano's form reports which do not provide physical findings or a detailed opinion on the causal relationship between

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁴ *Id.*

⁵ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁶ *Id.*

⁷ 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

⁸ *R.C.*, 58 ECAB 238 (2006).

appellant's accepted conditions of sprain/strain of the left foot, left hand and left shoulder and her current disability, Dr. Smith provided physical findings including no atrophy of the left upper extremity, no skin changes or abnormal sensation. He found that appellant's inability to extend her fingers was nonorganic. Dr. Smith concluded based on his physical examination that her left leg was normal with no atrophy, radiculitis or neuritis. He found that appellant did not require further medical treatment. The Board finds that this report is sufficient to meet OWCP's burden of proof and establish that appellant had no medical residuals or disability due to her accepted employment injury on or after December 20, 2009, the date determined in OWCP's December 23, 2009 decision.

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had disability causally related to her accepted employment injury.⁹ To establish a causal relationship between the condition, as well as any disability claimed, and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual background, supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹⁰

ANALYSIS -- ISSUE 2

Counsel requested reconsideration of OWCP's December 23, 2009 decision on December 21, 2010 and submitted three legal arguments in support of the request. He argued that there was a conflict of medical evidence between Drs. Ilano and Smith, that OWCP had not resolved this conflict and that OWCP improperly terminated appellant's compensation benefits rather than suspending her benefits based on her refusal to cooperate with the medical examination scheduled with Dr. Nootheti.

While these legal arguments are sufficient to require OWCP to reopen appellant's claim for consideration of the merits, the arguments are not accompanied by the necessary medical evidence to support her claim for continuing disability and medical residuals on or after December 20, 2009, the date OWCP terminated her benefits. As noted above, the Board finds that OWCP met its burden of proof to terminate appellant's benefits, finding that there was no conflict of medical opinion and that Dr. Smith's report was sufficient to constitute the weight of the medical evidence. As such, in order to receive continuing medical and compensation

⁹ *George Servetas*, 43 ECAB 424, 430 (1992).

¹⁰ *James Mack*, 43 ECAB 321 (1991).

benefits, appellant must submit rationalized medical evidence supporting her claim. She has not submitted such evidence and the Board finds that she has not established entitlement to benefits after December 20, 2009.

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.

LEGAL PRECEDENT -- ISSUE 3

Section 8123(a) of FECA and section 10.320 of OWCP's regulations authorize OWCP to require an employee, who claims disability as a result of federal employment to undergo a physical examination as it deems necessary.¹¹ 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.¹² FECA further states in section 8123(d) that if the employee refused to or obstructs an examination his or her right to compensation is suspended until the refusal or obstruction stops and that the period of refusal or obstruction is deducted from the period for which compensation is payable.¹³ The Board has held that a time must be set for a medical examination and the employee must fail to appear for the appointment, without an acceptable excuse or reason, before OWCP can suspend or deny the employee's entitlement to compensation on the grounds that the employee failed to submit to or obstructed a medical examination.¹⁴ OWCP's procedure manual provides that if the claimant does not report for a scheduled appointment, he or she should be asked in writing to provide an explanation within 14 days.¹⁵ If good cause is not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d) until the claimant reports for examination.¹⁶

ANALYSIS -- ISSUE 3

In regards to OWCP's suspension of appellant's compensation benefits on October 25, 2009, allegedly in accordance with section 8123(a) of FECA and section 10.320 of OWCP's regulations, the Board notes that neither the October 5 and 22, 2009 letters are final decisions. The letters are not accompanied by appeal rights and do not on their face constitute final appealable determinations that her compensation is suspended. Each letter states that OWCP proposes to suspend appellant's compensation and allows her additional time to comply with the medical examination or provide good reasons for her refusal. Its procedure manual provides that

¹¹ 5 U.S.C. § 8123(a); 20 C.F.R. § 10.320.

¹² *S.B.*, 58 ECAB 267 (2007).

¹³ 5 U.S.C. § 8123(d).

¹⁴ *Margaret M. Gilmore*, 47 ECAB 718 (1996).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13.d (September 2010).

¹⁶ *Id.*; see *Scott R. Walsh*, 56 ECAB 353 (2005); *Raymond C. Dickinson*, 48 ECAB 646 (1997).

only if “good cause” is not established then benefits should be suspended as of the date of the decision.¹⁷

The record, however, establishes that OWCP “terminated” or suspended/stopped appellant’s compensation benefits on October 25, 2009 for twice failing to undergo a medical examination without issuing a corresponding final decision with appeal rights addressing this suspension in keeping with 5 U.S.C. § 8123(d). The Board finds that OWCP did not appropriately suspend appellant’s compensation effective October 25, 2009, as there is no final decision on that date in accordance with OWCP’s established procedures.

To the extent that the December 23, 2009 termination decision addresses the suspension of compensation benefits, the Board finds that this decision does not contain the necessary findings of fact and statement of reasons addressing why appellant’s compensation benefits were suspended on October 25, 2009, but that based on this decision her entitlement to compensation benefits ended on December 20, 2009.¹⁸ In regards to the period October 25 to December 18, 2009, OWCP merely addressed her response to the proposed termination and stated that she had not explained why she failed to keep her medical appointments. It also for the first time informed appellant that her compensation benefits had been suspended on October 25, 2009. As OWCP has not issued an appropriate final decision suspending her compensation benefits prior to the December 23, 2009 decision terminating her compensation benefits effective December 20, 2009, the Board finds that, upon return of the record, OWCP shall reinstate her compensation effective October 25, 2009 through December 18, 2009.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant’s compensation benefits effective December 20, 2009. The Board further finds that appellant has not met her burden of proof to establish continuing disability or residuals. Additionally, the Board finds that the record does not contain an appropriate final decision suspending her compensation benefits in accordance with 5 U.S.C. § 8123(d) prior to December 20, 2009, *i.e.*, for the period October 25 through December 18, 2009 and therefore compensation benefits will be reinstated for that period.

¹⁷ *Supra* note 16.

¹⁸ 20 C.F.R. § 10.126.

ORDER

IT IS HEREBY ORDERED THAT the January 26, 2011 decision of the Office of Workers' Compensation Programs is affirmed in part, reversed in part and remanded to OWCP.

Issued: June 6, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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