

FACTUAL HISTORY

On July 6, 1988 appellant, then a 34-year-old secretary/medical clerk, filed a traumatic injury claim alleging injury to her neck and back that day when she slipped and fell on a wet floor. OWCP accepted the claim for chronic low back pain, chronic low back strain, myalgia and myositis, lumbago and low back strain myofascial pain syndrome. By letter dated October 16, 1991, it placed appellant on the periodic rolls effective September 12, 1988.²

On May 22, 2007 appellant accepted an employing establishment limited-duty job offer as an information receptionist working four hours per day. She started the position on July 23, 2007, stopped on October 19, 2007 and did not return. OWCP accepted appellant's recurrence claim and placed her on the periodic rolls for temporary total disability effective October 28, 2007.

By letter dated February 9, 2010, OWCP informed appellant that an appointment for a second opinion evaluation had been scheduled with Dr. C. Sanford Carlson, a Board-certified orthopedic surgeon, for March 2, 2010 at 11:30 a.m. On April 14, 2010 it was informed that she did not show up for the appointment with Dr. Carlson.

On April 15, 2010³ OWCP informed appellant that a second opinion examination was necessary and would be scheduled. It informed her that she had not shown up for a previously scheduled appointment on March 2, 2010. Appellant was advised that her full cooperation with the examination was required or her right to compensation would be suspended until the refusal stopped.

By letter dated May 19, 2010, OWCP informed appellant that an appointment for a second opinion evaluation had been scheduled with Dr. Sidney Wallace, a Board-certified orthopedic surgeon, on July 14, 2010 at 1:00 p.m.

In a June 10, 2010 letter, Dr. Jay H. Warrick, a treating Board-certified internist and rheumatologist, diagnosed fibromyalgia and myofascial pain syndromes, which were totally disabling. He found that appellant was disabled from all work. Dr. Warrick stated that OWCP's requests for additional information and evaluations by other physicians caused her significant anxiety and stress, which exacerbated her physical symptoms. He stated that requiring appellant to undergo further diagnostic testing or evaluation was potentially counter-productive and inappropriate due to the fact that the condition had been established for more than 20 years.

On July 16, 2010 the scheduling agency informed OWCP that appellant did not attend the scheduled appointment with Dr. Wallace.

On July 26, 2010 OWCP received the June 28, 2010 report of Dr. Richard H. Mays, a treating Board-certified family practitioner, who diagnosed fibromyalgia with myofascial pain

² Appellant resigned from the employing establishment effective September 12, 1988.

³ The letter is undated, but both the received date and author date are noted as April 15, 2010.

syndrome and chronic back as the result of a July 1988 fall. Dr. Mays concluded that appellant was totally disabled and was permanently unemployable.

In a letter dated July 27, 2010, OWCP proposed to suspend appellant's compensation benefits on the grounds that she failed to appear for the examination scheduled with Dr. Carlson on March 2, 2010 or an examination scheduled with Dr. Wallace on July 14, 2010. 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. Wallace.

By letter dated August 23, 2010, appellant stated that she did not attend the July 14, 2010 appointment as it conflicted with a previously scheduled dental appointment. She contended that the March 2, 2010 appointment was not valid as she never received a letter informing her of the appointment. Appellant also argued that the July 14, 2010 scheduled appointment was invalid as the notification she received contained no signature or date.

On September 1, 2010 OWCP informed appellant that another appointment for a second opinion evaluation had been rescheduled with Dr. Wallace for November 3, 2010 at 1:00 p.m. On November 4, 2010 it was informed that she did not show up for her November 3, 2010 appointment with Dr. Wallace.

On December 17, 2010 OWCP issued a notice proposing to suspend appellant's compensation on the grounds that she failed to appear for the examination scheduled with Dr. Wallace on November 3, 2010. 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. Wallace.

In a January 7, 2011 decision, OWCP finalized the proposed suspension effective January 16, 2011. It found that appellant did not attend the appointment scheduled for November 3, 2010 or 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.

In a letter dated January 11, 2011, appellant stated that she had a conflicting medical appointment on November 3, 2010 and was sick that day. She contended that the letters sent by OWCP regarding the second opinion referrals were invalid. Appellant submitted a work/school excuse from Dr. Mays stating that he examined her on November 3, 2010.

On February 4, 2011 appellant requested an oral hearing before an OWCP hearing representative that was held on May 4, 2011.

On February 4, 2011 Dr. Mays wrote a letter stating that he was appellant's treating physician and he saw her on November 3, 2010 for severe pain. According to appellant, her pain was so severe that it "was almost impossible for her to walk to get into the doctor's appointment."

In a second February 4, 2011 letter, Dr. Mays stated that he saw appellant that day for fibromyalgia with myofascial pain syndrome and chronic back pain due to a fall, with fatigability and chronic malaise. He opined that appellant was totally disabled and unemployable for the remainder of her life.

In a letter dated May 24, 2011, appellant argued that she should not be required to undergo a second opinion evaluation as she has been disabled for over 22 years. She also contended that no further medical examination was required as both her attending physicians, Drs. Mays and Warrick, certified her to be permanently and totally disabled from any type of work.

By decision dated July 20, 2011, an OWCP hearing representative affirmed the January 7, 2011 OWCP decision, finding that appellant did not attend the medical examinations scheduled with Dr. Wallace or provide acceptable reasons for her failure to attend.⁴ It found appellant's reason for missing her appointment on November 3, 2010 unacceptable as there was no evidence in the record reflecting when the November 3, 2010 appointment with Dr. May was made or that she attempted to resolve the conflicting medical appointments. The hearing representative also found it notable that she kept her appointment with Dr. May, but was too unwell to attend the appointment with Dr. Wallace that same day.

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.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 refused to submit to or obstructs a directed 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

⁴ The Board notes that appellant has submitted new evidence with her appeal to the Board. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. See 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁵ 5 U.S.C. § 8123(a).

⁶ *C.S.*, Docket No. 09-1597 (issued February 4, 2010); *J.T.*, *supra* note 4; *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.*, *supra* note 4; *Walter L. Jordan*, 57 ECAB 218 (2005).

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).

to present in writing his or her 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 appellant refused to submit to the scheduled November 3, 2010 second opinion examination with Dr. Wallace. OWCP properly suspended appellant's compensation benefits pursuant to section 8123 of FECA. It properly exercised its discretion when it directed appellant to attend a second opinion evaluation with Dr. Wallace, a Board-certified orthopedic surgeon to obtain an assessment of her employment-related condition, medical treatment and continuing disability.

By letter September 1, 2010, OWCP informed appellant that a second opinion evaluation was needed and that one had been rescheduled with Dr. Wallace for November 3, 2010. It sent that notice to her address of record.

Appellant did not attend the scheduled appointment on November 3, 2010. In a December 17, 2010 notice, OWCP afforded her 14 days to provide good cause in writing for her failure to attend the scheduled November 3, 2010 examination. Appellant was advised of the penalty provision of section 8123(d) of FECA for failure to attend such an examination.

The Board has recognized OWCP's responsibility in developing claims.¹¹ Section 8123 authorizes an employee who claims disability as a result of federal employment to undergo a physical examination as OWCP deems necessary. 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 this authority is that of reasonableness.¹² The referral to an appropriate specialist in appellant's area at OWCP's expense was not unreasonable. In this case, OWCP did not abuse its discretion by referring appellant for a second opinion examination to assess the residuals and disability related to her employment-related conditions.

The Board finds that appellant failed to attend the scheduled medical examination on November 3, 2010 and did not provide good cause for her failure within 14 days of the December 17, 2010 notice of proposed suspension. Appellant stated that she did not attend the November 3, 2010 appointment because she was ill and saw Dr. May that day. However, she submitted no evidence documenting the time of the November 3, 2010 medical appointment with Dr. May or when she scheduled her medical appointment with Dr. May or that she attempted to

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*, *id.*; *Scott R. Walsh*, 56 ECAB 353 (2005).

¹¹ *Scott R. Walsh*, *id.*

¹² 20 C.F.R. § 10.320; see *J.T.*, *supra* note 6.

reschedule the appointment with Dr. Wallace. The only evidence submitted was a note from Dr. May that she saw him on November 3, 2010. OWCP's letter sent to appellant informing her of the second opinion appointments contained a telephone number to contact if there was a problem. As noted, there is no evidence that she contacted OWCP to either cancel or reschedule the second opinion appointments. Appellant also contended that the letter scheduling the examination was invalid as it was not signed; but the letters were sent by OWCP in the ordinary course of business and those letters were on OWCP letterhead.¹³ They were valid and constituted a reasonable exercise of OWCP's discretion under section 8123 of FECA to schedule medical appointments. The Board finds that OWCP properly suspended her compensation benefits effective January 16, 2011.¹⁴

In a May 24, 2011 letter, appellant argued that a second opinion evaluation was not appropriate as no medical issues existed and as she had been found totally disabled by her attending physicians, Dr. May and Dr. Warrick. She also argued that, according to OWCP procedure, a referral for a second opinion evaluation was inappropriate as evaluations by physicians other than attending physicians is only required when determining an employee's permanent impairment, ability to return to light-duty or full-duty work or other issues.

The Board addressed similar arguments regarding the appropriateness of OWCP-directed medical examinations in *Eva M. Morgan*¹⁵ and *Donald E. Ewals*.¹⁶ The Board rejected similar arguments in both cases and held that OWCP may require a beneficiary to submit to examinations by an OWCP referral physician as frequently and at such times and places that OWCP deems to be reasonably necessary. The Board has reviewed the brief treatment notes of Drs. May and Warrick which found appellant to be totally and permanently disabled from all work. The physicians failed to provide any supporting rationale, physical findings or adequate explanation as to why appellant was permanently disabled. The reports of record are not sufficient justification for appellant's refusal to cooperate with the examination arranged by OWCP with Dr. Wallace.

On appeal, appellant contends that, although she underwent an examination on December 11, 2010, OWCP has failed to pay compensation for the period suspended. The Board has held that compensation for the period in which the employee refuses to undergo a reasonably requested medical examination by OWCP is forfeited.¹⁷ As appellant refused to attend the scheduled examination, OWCP properly found that she forfeited compensation effective January 16, 2011 for the period of the obstruction. Based upon the forfeiture of her

¹³ See *Joseph R. Giallanza*, 55 ECAB 186 (2003).

¹⁴ *J.T.*, *supra* note 6.

¹⁵ 47 ECAB 400 (1996).

¹⁶ 51 ECAB 428 (2000).

¹⁷ *Maura D. Fuller (Judson H. Fuller)*, *supra* note 8; *William G. Saviolidis*, 37 ECAB 174 (1985). The employee will forfeit compensation otherwise paid or payable under FECA for the period of the refusal or obstruction and any compensation already paid for that period will be declared an overpayment and will be subject to recovery pursuant to 5 U.S.C. § 8129. 20 C.F.R. § 10.323 (the penalties for failing to report for or obstructing a second opinion or referee).

compensation benefits for that period, OWCP properly denied her request for retroactive compensation during this period.¹⁸

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 benefits effective January 16, 2011, as she failed to attend the scheduled medical examination without showing good cause for her refusal.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 20, 2011 is affirmed.

Issued: October 11, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁸ When the claimant actually reports for the examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made. *E.B.*, 59 ECAB 298 (2008); *C.S.*, Docket No. 11-1366 (issued December 12, 2011).