

ISSUES

The issues are: (1) whether OWCP properly suspended appellant's compensation benefits effective March 28, 2001 due to his failure to attend a scheduled medical examination; and (2) whether OWCP's hearing representative properly denied appellant's request to issue subpoenas.

FACTUAL HISTORY

This case has previously been before the Board on appeal. OWCP has accepted that appellant sustained a lumbar sprain and L5-S1 disc herniation on March 3, 1986. In the September 16, 2003 decision, the Board found that OWCP properly reduced appellant's compensation benefits to zero on March 19, 2002 due to his failure to cooperate with vocational rehabilitation efforts.³ The facts and circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

On July 21, 2004 OWCP accepted that appellant sustained an employment-related temporary depression as a result of his March 3 and 19, 1986 employment injuries.

Appellant requested reconsideration of the March 19, 2002 decision on September 25, 2007. OWCP declined to reopen appellant's claim for consideration of the merits on December 21, 2007 on the grounds that his request for reconsideration was not timely filed and did not establish clear evidence of error.

Appellant's attending physician provided ongoing medical treatment for his accepted back condition. He recommended repeat lumbar trigger point injections and right sacroiliac joint injections in February 2010. OWCP referred appellant for a second opinion evaluation by Dr. Robert Allen Smith, a Board-certified orthopedic surgeon. On June 17, 2010 Dr. Smith opined that there was no further need for more injections.

By decision dated June 30, 2010, OWCP denied appellant's request for medical treatment in the form of trigger point injections.

Appellant requested an oral hearing before an OWCP hearing representative and alleged that the statement of accepted facts provided the second opinion physician was deficient. The Branch of Hearings and Review considered appellant's request on December 27, 2010 and found that additional development of the medical evidence was necessary to determine if appellant had medical residuals due to his accepted employment injury. The hearing representative remanded the case for an impartial medical specialist to resolve the conflict between appellant's attending physician and the second opinion physician regarding appellant's current medical condition.

In a letter dated February 17, 2011, OWCP informed appellant of the conflict of medical opinion evidence and directed him to report for an impartial medical examination by Dr. Menachem Meller, a Board-certified orthopedic surgeon, on March 15, 2011 at 4:00 p.m. OWCP informed appellant that the failure to keep, refusal to submit to or obstruction of the

³ Docket No. 03-1087 (issued September 16, 2003).

examination might result in suspension of his right to compensation under section 8123(d) of FECA.⁴ It stated that compensation was not payable while the refusal or obstruction continued and that the period of the refusal or obstruction would be deducted from the period for which compensation was payable.

Appellant responded on March 7, 2011 and alleged that the statement of accepted facts provided to Dr. Meller was inadequate. He telephoned OWCP on March 11, 2011 and stated that he would not be attending the appointment as the statement of accepted facts contained false information. In a letter dated March 11, 2011, appellant again stated that the statement of accepted facts was inappropriate as it concealed the facts of the claim. He stated that he would not participate in the March 15, 2011 examination.

By letter dated March 14, 2011, OWCP proposed to suspend appellant's compensation benefits on the grounds that he failed to report for the scheduled examination on March 15, 2011. It allowed appellant 14 days to provide a valid reason for failing to submit to the examination. OWCP stated, "If you do not show good cause, your entitlement to any future compensation will be suspended under 5 U.S.C. § 8123(d) until after you attend and fully cooperate with the examination."

Appellant responded on March 28, 2011 and stated that the statement of accepted facts was based on false statements and failed to include compensable conditions. He also alleged that the good cause for canceling the appointment was OWCP's failure to provide him with the medical information that was provided to Dr. Meller. Appellant also stated that Dr. Meller was known for negligent treatment and malpractice and that OWCP was engaging in adversarial conduct.

In a decision dated March 28, 2011, OWCP finalized suspension of appellant's compensation benefits under 5 U.S.C. § 8123(d) effective that date.

Appellant requested an oral hearing before an OWCP hearing representative on March 31, 2011. He requested subpoenas for three employees of OWCP and three employees of the Department of Labor, Office of Investigator General (OIG).

OWCP scheduled the hearing for November 18, 2011. It received a letter November 1, 2011 alleging that appellant's good cause for failing to submit to the medical examination was based on intentional acts of fraud, forgery and perjury by OWCP.

OWCP's hearing representative denied appellant's request for subpoenas in a letter dated November 3, 2011 as he had not provided a detailed statement indicating exactly what he hoped to establish with the subpoenaed testimony or explained why the testimony was directly relevant to the issues in his case. Appellant responded on November 7, 2011 and stated that the claims examiners had provided physicians with false and misleading statements of accepted facts. He also alleged that his complete medical history was not included on the statement of accepted facts provided to Dr. Meller.

⁴ 5 U.S.C. § 8123(d).

Appellant testified at the oral hearing on November 18, 2011. He stated that the statement of accepted facts provided by OWCP to Dr. Meller was incomplete and that the omissions were compelling circumstances beyond his control. Appellant stated that Dr. Meller was known for malpractice. He stated that he did not submit to the examination because he was not provided with the information given to Dr. Meller. Appellant stated that he was not willing to attend an appointment with Dr. Meller as he was guilty of malpractice and that he needed to see all the information that was provided to the selected physician. Appellant requested to participate in the selection of the impartial medical examiner.

By decision dated January 10, 2012, the hearing representative found that appellant did not have “good cause” for failing to attend the scheduled examination and that he did not establish that Dr. Meller was not medically competent to conduct the scheduled examination. The hearing representative affirmed OWCP’s March 28, 2011 decision.

LEGAL PRECEDENT -- ISSUE 1

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.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 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.⁷ 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.⁸ The Federal (FECA) 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.⁹ 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.¹⁰

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

⁶ *S.B.*, 58 ECAB 267 (2007).

⁷ 5 U.S.C. § 8123(d).

⁸ *Margaret M. Gilmore*, 47 ECAB 718 (1996).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

¹⁰ *Id.*; see *Scott R. Walsh*, 56 ECAB 353 (2005); *Raymond C. Dickinson*, 48 ECAB 646 (1997).

ANALYSIS -- ISSUE 1

OWCP scheduled an impartial medical examination with Dr. Meller on March 15, 2011 to resolve a conflict between appellant's treating physician and OWCP's second opinion physician, Dr. Smith, regarding the need for further medical treatment due to his accepted back injury. It advised appellant that his benefits would be suspended if he refused to submit to or obstructed the examination. As there was a medical conflict which required resolution,¹¹ OWCP acted properly in referring appellant for an impartial examination with Dr. Meller. As noted, 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

Appellant informed OWCP by telephone and by letters dated March 7 and 11, 2011 that the statement of accepted facts provided to Dr. Meller was inadequate and that he would not be attending the appointment. He responded to OWCP's request for his reasons for refusing to attend the examination on March 28, 2011 and stated that the statement of accepted facts was inadequate, that OWCP failed to provide him with the medical information that was provided to Dr. Meller and that Dr. Meller was known for negligent treatment and malpractice and that OWCP was engaging in adversarial conduct. In his testimony at the oral hearing, appellant repeated his allegations of errors and omissions in the statement of accepted facts and asserted that the omissions were compelling circumstances beyond his control. Appellant again stated that Dr. Meller was known for malpractice and that he did not submit to the examination because he was not provided with the information given to Dr. Meller.

The Board has found in other cases that, for different reasons, an IME physician selected by OWCP was unqualified for that role or an IME report was not adequate.¹³ Where this occurs, the Board remands the case for OWCP to obtain another report from a different, and presumably qualified, physician.¹⁴ Appellant has mistakenly argued in this case that his dislike and mistrust of Dr. Meller justifies him in refusing to attend an examination with that doctor and allows him to bring the process of managing his claim to a halt. He asserts that OWCP must continue paying him benefits. Despite appellant's claims, it is OWCP that schedules medical examinations and selects examining physicians.¹⁵ The law further allows and requires OWCP to stop paying an appellant who obstructs an examination until he or she attends, and cooperates in, the medical examination as directed.¹⁶

¹¹ See 5 U.S.C. § 8123(a).

¹² *Supra* note 6; *J.J.*, Docket No. 11-693 (issued November 1, 2011).

¹³ *Steve A. Williams*, 53 ECAB 772 (2002); *Barbara J. Warren*, 51 ECAB 413 (2000).

¹⁴ *Nancy Keenan*, 56 ECAB 687 (2005).

¹⁵ *William B. Webb*, 56 ECAB 156 (2004); *Cynthia G. Tharp*, 43 ECAB 297 (1991).

¹⁶ *Tyrone Huff*, 53 ECAB 589 (2002); *Larry B. Guillory*, 45 ECAB 522 (1994); *Robert S. Wilcox*, 45 ECAB 265 (1993).

The Board finds that appellant has not established good cause for his failure to attend the scheduled appointment with Dr. Meller.¹⁷ Appellant has raised unsubstantiated allegations of malpractice against Dr. Meller.¹⁸ This is an insufficient reason for refusing to attend the appointment. Furthermore, his disagreement with the statement of accepted facts does not provide good cause for refusing to submit to the scheduled examination. A statement of accepted facts may later render a medical report invalid but is not a determination appellant can make unilaterally to justify a refusal to attend a medical examination.¹⁹ Appellant has not submitted any evidence that he was incapable of attending the scheduled medical examination. The Board finds that OWCP properly suspended appellant's right to future compensation benefits effective March 28, 2011.

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 2

Section 8126 of FECA provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.²⁰ The implementing regulations provide that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.²¹ In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.²² Section 10.619(a)(1) of the implementing regulations provide that a claimant may request a subpoena only as a part of the hearings process and no subpoena will be issued under any other part of the claims process.

To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.²³

¹⁷ The Board has previously found that Dr. Meller was appropriately selected as an impartial medical examiner and that he had not been suspended for medical practice. *E.P.*, Docket No. 09-457 (issued October 19, 2009).

¹⁸ *Atanacio G. Sambrano*, 51 ECAB 557 (2000).

¹⁹ *E.B.*, 59 ECAB 298 (2008).

²⁰ 5 U.S.C. § 8126(1).

²¹ 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

²² *Id.*

²³ 20 C.F.R. § 10.619(a)(1).

OWCP's hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.²⁴ Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.²⁵

ANALYSIS -- ISSUE 2

On March 31, 2011 appellant requested OWCP issue subpoenas to six government employees. The hearing representative denied his request to subpoena the individuals on November 3, 2011 as appellant had not provided a detailed statement indicating exactly what he hoped to establish with the subpoenaed testimony or explained why the testimony was directly relevant to the issues in his case.

Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts. It is not enough to show that the evidence could be construed so as to produce a contrary factual conclusion.²⁶ As appellant has not provided a detailed statement explaining why relevant information of the individuals in question could not be obtained by other means, the Board finds that OWCP was within its authority to deny the request for subpoenas.

CONCLUSION

The Board finds that OWCP properly suspended appellant's right to future compensation effective March 28, 2011 and further finds that the hearing representative did not abuse her discretion in denying appellant's requested subpoenas.

²⁴ See *Gregorio E. Conde*, *supra* note 21.

²⁵ *Claudio Vazquez*, 52 ECAB 496 (2001).

²⁶ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 14, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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