

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

T.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Denver, CO, Employer**

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**Docket No. 12-1651
Issued: August 2, 2013**

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 27, 2012 appellant, through her attorney, filed a timely appeal from February 1 and 2, 2012 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly suspended appellant's compensation benefits effective February 1, 2012 due to her failure to attend a scheduled medical examination; and (2) whether appellant met her burden of proof to establish a recurrence of disability causally related to her July 7, 2007 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the February 2, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, counsel contends that OWCP failed to consider appellant's temporomandibular joint (TMJ) condition and reiterated that she objected to the selection of the impartial medical examiner, Dr. Jeffrey Sabin, a Board-certified orthopedic surgeon.

FACTUAL HISTORY

OWCP accepted that appellant, then a 33-year-old city carrier, sustained a scalp contusion, neck sprain and degeneration of cervical intervertebral disc as a result of being rear-ended in a motor vehicle accident while in the performance of duty on July 7, 2007. She did not stop work and continued in her date-of-injury position without restrictions.

In a March 22, 2010 report, Dr. Amy Brown, a Board-certified family medicine physician, provided restrictions of twisting, pushing, pulling, lifting and operating a motor vehicle for eight hours a day. On March 25, 2010 appellant accepted a full-time modified letter carrier position with restrictions on twisting, pushing, pulling, lifting and operating a motor vehicle.³

In an April 5, 2010 report, Dr. Brown diagnosed cervical strain/TMJ and provided restrictions on sitting, standing, walking, climbing, kneeling, bending/stooping, twisting, pulling/pushing, simple grasping, fine manipulation, reaching above shoulder and driving a vehicle. On June 28, 2010 she indicated that appellant's restrictions were permanent.

On June 22, 2010 appellant accepted a modified city letter carrier position with restrictions on standing, walking and lifting that limited her working hours to three hours a day.⁴

On June 25, 2010 appellant, through her attorney, filed a recurrence claim. The employing establishment noted that, as of June 26, 2010, she began working less than eight hours a day under the National Reassessment Process (NRP). Appellant also filed claims for wage-loss compensation for intermittent periods commencing June 26, 2010. On the Form CA-7 claim, an employing establishment supervisor noted that appellant was working a partial day under NRP. Time analysis forms signed by employing establishment officials and leave summary forms indicated that appellant began working less than eight hours a day on June 26, 2010 because insufficient work was available within her restrictions.

OWCP referred appellant to Dr. Hendrick J. Arnold, III, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a September 30, 2010 report, Dr. Arnold reviewed the medical evidence and reported findings of a physical examination. He found no objective findings in the imaging reports, the documented clinical course or the physical examination to explain appellant's prolonged subjective complaints, which were worsening. Dr. Arnold concluded that she had no residuals of the accepted conditions and was capable of performing her date-of-injury job for eight hours a day without restrictions.

³ The assignment described the duties as carrier office work, prepare letters and flats for street delivery, process mail transport equipment for three to four hours a day; other office duties, shred, file, telephones, data entry undeliverable bulk business mail for one to four hours a day; distribution of letters/flats to box section for four to five hours a day.

⁴ The assignment described the duties as casing routes for one to two hours a day.

By decision dated January 7, 2011, OWCP denied appellant's recurrence claim as the medical evidence did not establish that she continued to have residuals of the accepted conditions.

On February 2, 2011 appellant, through her attorney, requested a hearing before an OWCP hearing representative and submitted a March 24, 2011 report by Dr. Brown, who opined that appellant sustained a neck and jaw injury after being rear-ended at work on July 7, 2007 and continued to suffer residuals, such as chronic neck pain, headaches and TMJ. On April 7, 2011 Dr. James M. Kennedy, a physician of dental surgery, opined that she suffered injuries to her TMJs in the motor vehicle accident on July 7, 2007.

On May 10, 2011 a hearing was held *via* telephone before an OWCP hearing representative. Appellant provided testimony and the hearing representative held the record open for 30 days for the submission of additional evidence.

By decision dated July 22, 2011, OWCP's hearing representative denied appellant's recurrence claim on the basis that the medical evidence did not establish that she continued to have residuals of the accepted conditions.

On October 17, 2011 appellant, through her attorney, requested reconsideration and submitted a September 29, 2011 report by Dr. Christopher B. Ryan, a Board-certified physiatrist, who diagnosed cervical rotation and hyperextension injury in the upper cervical spine. Dr. Ryan stated that there were very dramatic objective findings on physical examination and explained that this type of rotational injury was never corroborated by x-ray findings or magnetic resonance imaging (MRI) scanning, unless the injury was so extreme as to cause a fracture-dislocation. He added that such a condition frequently resulted in a fatality. Thus, it was not surprising that x-ray findings were minimal. Dr. Ryan indicated that, with such well-developed musculature and excellent flexibility, even injured, appellant's physical examination made her look like a normal individual, unless one looked for specific evidence of an upper cervical or cervico-occipital injury. He concluded that she continued to suffer residuals of her employment injury which resulted in her inability to perform the essential functions of her job, including lifting, carrying, driving, twisting and getting into and out of her vehicle.

Appellant also submitted an October 10 to 12, 2011 functional capacity evaluation indicating that she was capable of part-time, sedentary work for no more than four hours a day with restrictions on lifting, neck flexion, overhead reaching, twisting of neck, bending of torso, sitting, static standing and walking.

OWCP referred appellant to Dr. Sabin for an impartial medical examination to resolve the conflict between Drs. Arnold and Ryan. The appointment was scheduled for December 9, 2011 at 3:00 p.m.

On December 7, 2011 appellant, through her attorney, objected to the selection of Dr. Sabin. Counsel argued that it did not appear that Dr. Sabin was selected by independent rotation based on her zip codes and indicated that there were other Board-certified orthopedists that were closer to her in the area.

By notice of proposed suspension dated December 9, 2011, OWCP indicated that it had been informed that appellant had not kept her appointment with Dr. Sabin. It notified her that she had 14 days to show good cause for her failure to keep the scheduled appointment or her entitlement to compensation would be suspended in accordance with 5 U.S.C. § 8123(d). That same day, appellant called OWCP and stated that she was cancelling her scheduled appointment because her daughter was sick and also that she would probably be moving out of state soon.

In a December 14, 2011 letter to appellant's attorney, OWCP stated that it had considered the objection and indicated that the selection of Dr. Sabin would not be changed. It explained that not all Board-certified specialists in her area had contracted with OWCP to perform impartial medical examinations.

By notice of proposed suspension dated December 14, 2011, OWCP notified appellant that a future relocation out-of-state was not a valid reason for refusing to submit to a scheduled medical examination. It afforded her 14 days to show good cause for her failure to keep the scheduled appointment of December 9, 2011 or her entitlement to compensation would be suspended in accordance with 5 U.S.C. § 8123(d).

On December 28, 2011 OWCP indicated that it utilized the Physician's Directory System (PDS) to select Dr. Sabin who was randomly chosen based on appellant's home zip code and his name was the first to appear. It enclosed a November 10, 2011 MEO23 iFECS report, which states that her referee appointment was scheduled with Dr. Sabin.⁵

Appellant, through her attorney, requested that OWCP reschedule an examination with Dr. Sabin. It was rescheduled for 12:00 p.m. on January 26, 2012. On January 24, 2012 appellant called OWCP and stated that she had received a letter stating that she had a physician's appointment in Colorado and that she had moved to Illinois a year ago. She did not attend the scheduled examination.

By decision dated February 1, 2012, OWCP suspended appellant's compensation benefits effective that same day for failure to attend a scheduled medical examination under 5 U.S.C. § 8123(d).

By decision dated February 2, 2012, OWCP denied modification of the July 22, 2011 decision denying appellant's claim for a recurrence of disability.

LEGAL PRECEDENT -- ISSUES 1 & 2

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.⁶ 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.⁷

⁵ The record also contains a "Referee Medical Referral Form" containing the names of all physicians previously involved with the case.

⁶ 5 U.S.C. § 8123.

⁷ See *J.T.*, 59 ECAB 293 (2008).

OWCP regulations at section 10.320 provide that a claimant must submit to examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary.⁸

Section 8123(d) of FECA and section 10.323 of OWCP regulations provide that, if an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction ceases.⁹ OWCP procedures provide that before OWCP may invoke these provisions, the employee is to be provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.¹⁰ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.¹¹

ANALYSIS -- ISSUES 1 & 2

The Board finds that appellant's claim for a recurrence of disability as of June 26, 2010 is precluded under the suspension provision of section 8123(d) of FECA.

In an attempt to follow the provisions under FECA Bulletin No. 09-05,¹² OWCP referred appellant to Dr. Sabin to resolve a conflict in medical opinion between Drs. Arnold and Ryan and scheduled an appointment for December 9, 2011. It properly notified her of the appointment and need for examination. Appellant, nonetheless, failed to keep her appointment. OWCP scheduled a second appointment with Dr. Sabin on January 26, 2012 and properly notified appellant. Upon receiving information from Dr. Sabin's office that she failed to keep her appointments of December 9, 2011 and January 26, 2012, OWCP provided appellant the opportunity to present in writing her reasons for failing to keep the appointments scheduled. Appellant indicated that she canceled her December 9, 2011 appointment because her daughter was sick and also that she would probably be moving out of state soon. Then, she indicated that she had received notice of her January 26, 2012 appointment with Dr. Sabin in Colorado, but did not attend because she had moved to Illinois a year prior. The Board finds these reasons insufficient to establish good cause for appellant's failure to attend the scheduled medical examinations.

On appeal, counsel reiterated that appellant objected to the selection of Dr. Sabin as the impartial medical examiner. On December 28, 2011 OWCP indicated that it utilized the PDS to select Dr. Sabin who was randomly chosen based on appellant's home zip code. The record contains a November 10, 2011 MEO23 iFECS report indicating that appellant's referee appointment was scheduled with Dr. Sabin and a "Referee Medical Referral Form" containing

⁸ 20 C.F.R. § 10.320.

⁹ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; *see also Dana D. Hudson*, 57 ECAB 298 (2006).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d)-(e) (September 2010); *J.T.*, *supra* note 7.

¹¹ *Id.*

¹² FECA Bulletin No. 09-05 (issued August 18, 2009) outlines procedures for light-duty positions withdrawn pursuant to NRP.

the names of all physicians previously involved with the case. There is no evidence that OWCP abused its discretion in directing the medical examinations. As appellant did not undergo a medical examination by Dr. Sabin and has not established good cause for her failure to attend the medical examinations scheduled on December 9, 2011 and January 26, 2012, the Board finds that OWCP properly suspended appellant's compensation benefits effective February 1, 2012.

The Board further finds that the February 1, 2012 suspension of benefits continues in effect, as appellant has not advised OWCP of her agreement to undergo the directed medical examination.¹³ The Board has interpreted the plain meaning of section 8123(d) of FECA to provide that compensation is not payable while a refusal or obstruction of an examination continues.¹⁴ Thus, section 8123(d) serves as a suspension of appellant's entitlement to further compensation arising out of the accepted employment injury.¹⁵ In this case, appellant was provided notice of the suspension provision and had the opportunity to report for examination by the impartial medical specialist. She did not report for the examinations and did not provide good cause for her failure to attend. Therefore, appellant's refusal to submit to the directed medical examinations has suspended her right to further compensation until such refusal ceases. In this regard, section 8123(d) serves as a penalty provision.¹⁶ For this reason, OWCP's February 2, 2012 denial of appellant's recurrence of disability claim will be affirmed, as modified, to reflect the suspension provision under section 8123(d) of FECA.¹⁷

On appeal, counsel contends that OWCP failed to consider appellant's TMJ condition in its decision. OWCP did not accept a TMJ condition in this case. Thus, the Board finds that counsel's argument is irrelevant to the issues on appeal.

CONCLUSION

The Board finds that OWCP properly suspended appellant's compensation benefits effective February 1, 2012 due to her failure to attend a scheduled medical examination. The Board further finds that her claim for a recurrence of disability is precluded under the suspension provision of section 8123(d) of FECA.

¹³ See *Alfred R. Anderson*, 54 ECAB 179 (2002).

¹⁴ *Id.*; see also *William G. Saviolidis*, 37 ECAB 174-75 (1985).

¹⁵ See *id.*

¹⁶ See *Margaret M. Gilmore*, 47 ECAB 718 (1996).

¹⁷ See *Alfred R. Anderson*, *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the February 2 and 1, 2012 decisions of the Office of Workers' Compensation Programs are affirmed, as modified.

Issued: August 2, 2013
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