

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

N.B., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Fort Worth, TX, Employer)

**Docket No. 13-1604
Issued: December 3, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 27, 2013 appellant filed a timely appeal from a May 28, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) suspending 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 over the merits of this case.

ISSUE

The issue is whether OWCP properly suspended appellant's compensation benefits effective May 28, 2013 due to her failure to attend a scheduled medical examination.

FACTUAL HISTORY

This case was previously before the Board. On June 30, 2008 OWCP accepted appellant's claim for cervical brachial neuritis or radiculitis. In its June 7, 2012 decision, it accepted that appellant sustained a recurrence of her work injury from February 13 through

¹ 5 U.S.C. § 8101 *et seq.*

June 1, 2012. OWCP denied her claim for compensation, however, for the period December 5, 2011 to February 12, 2012. By decision dated January 28, 2013, the Board affirmed in part and set aside in part the June 7, 2012 OWCP decision. The Board remanded the case for OWCP to prepare a statement of accepted facts (SOAF) and develop the medical record as to whether appellant was totally disabled as a result of her cervical radiculitis condition for the period December 5, 2011 to February 12, 2012.² The findings of fact and conclusions of law from the prior decision and order are hereby incorporated by reference.

OWCP prepared a statement of accepted facts on March 20, 2013 which included a detailed employment history, job descriptions for each position held, specific functions performed and restrictions imposed by appellant's treating physicians.

By letter dated March 20, 2013, OWCP notified appellant that a second-opinion examination was needed to address her claim for benefits. Appellant was advised that, if she refused or obstructed the examination, her compensation could be suspended under 5 U.S.C. § 8123(d). In a March 28, 2013 letter, QTC Medical Services, Inc., the medical appointment scheduler, notified appellant that she was scheduled for an appointment with Dr. Robert E. Holladay, IV, a Board-certified orthopedic surgeon, at 1:00 p.m. on April 17, 2013.

By letter dated April 9, 2013, appellant informed OWCP that she received its March 20, 2013 letter. She contended that OWCP had no justification to request a second opinion examination. Appellant stated that OWCP had trusted the reports of Dr. Karen M. Perl, her treating physician, for many years and that her medical condition had not changed. She further argued that the second opinion request constituted harassment and administrative action taken by OWCP in an attempt to terminate her benefits.

By letter dated April 30, 2013, OWCP was informed by QJC Medical Services, Inc., that appellant did not keep her appointment with Dr. Holladay on that date.

On May 1, 2013 OWCP proposed to suspend appellant's compensation benefits pursuant to section 8123(d) of FECA for failure to attend the April 17, 2013 examination with Dr. Holladay. Appellant was advised to provide a written explanation of her reasons, with substantive corroborating evidence, within 14 days for failing to attend the scheduled examination.

By letter dated May 3 and 6, 2013, appellant contended that OWCP did not have a valid reason to request a second opinion examination and should have relied on the reports of her treating physician. She alleged that she received harassing and threatening telephone calls from her claims examiner to switch to OPM disability retirement and cease OWCP benefits. Appellant argues that the second opinion examination was scheduled as retaliation for her decision to continue receiving OWCP benefits and in an effort to terminate her benefits. Appellant requested an investigation in the matter. Once OWCP could assure her that the request for the second opinion examination was not a result of the threatening telephone calls she received, she would comply and attend the appointment as requested. Appellant submitted

² Docket No. 12-1368 (issued January 28, 2013).

letters dated February 24 and April 9, 2013, previously of record, where she argued that OWCP was not justified in requesting a second opinion examination.

By decision dated May 28, 2013, OWCP suspended appellant's wage-loss benefits effective that same date. It found that it directed appellant to report for an examination scheduled on April 17, 2013 but she did not attend the examination or establish good cause for her failure to attend.

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.³ 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.⁴ The implementing federal regulations provide that a claimant must submit to an examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary.⁵ Section 8123(d) of FECA and 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.⁶ Before OWCP may invoke these provisions, the employee is to be provided a period for 14 days within which to present in writing his or her reasons for the refusal or obstruction.⁷ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.⁸

ANALYSIS

OWCP scheduled a second opinion examination on April 17, 2013 with Dr. Holladay. Appellant did not appear for the scheduled examination. By decision dated May 28, 2013, it suspended her compensation benefits based on her failure to appear, finding that she did not establish good cause. The Board finds that OWCP properly suspended appellant's compensation benefits for her failure to attend the medical examination on April 17, 2013.

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

³ 5 U.S.C. § 8123.

⁴ *J.T.*, 59 ECAB 293 (2008); *S.B.*, 58 ECAB 267 (2007); *James C. Talbert*, 42 ECAB 974 (1991).

⁵ 20 C.F.R. § 10.320.

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

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

⁸ *Id.*

employee failed to submit to or obstructed a medical examination.⁹ In this case, the time for the second opinion medical examination by Dr. Holladay was set. Appellant was duly notified of the scheduled appointment by letter dated March 20, 2013, but she failed to appear. The only remaining issue is whether appellant presented a good cause for her failure to appear.

The Board finds that appellant has not established good cause for her failure to attend the scheduled April 17, 2013 examination with Dr. Holladay. In letters dated April 9, May 3 and 6, 2013, appellant stated that she did not attend the examination because OWCP did not have a reasonable basis for requesting such examination and that her claim had remained unchanged since her initial injury. She further argued that the request for the second opinion examination was retaliation by her claims examiner who threatened and harassed her for not switching to OPM disability retirement.

The Board finds that appellant's explanation of her failure to appear for the scheduled April 17, 2013 examination lacks good cause.¹⁰ In a prior decision, the Board instructed OWCP to obtain a second-opinion evaluation on the issue of appellant's claimed disability as a result of her cervical radiculitis condition for the period December 5, 2011 to February 12, 2012.¹¹ Dr. Perl's reports were found not sufficient to meet appellant's burden of proof to establish her claim. OWCP was directed to further develop the medical evidence. Appellant's allegations that OWCP requested a second opinion examination as a retaliatory measure are unsubstantiated by the evidence of record. OWCP requested the second opinion examination as instructed by the Board.

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 OWCP's authority, with regard to instructing a claimant to undergo a medical examination, is that of reasonableness.¹² The Board has interpreted the plain meaning of section 8123(d) to provide that compensation is not payable while a refusal or obstruction of an examination continues.¹³ There is no evidence that OWCP abused its discretion in directing the medical examination.¹⁴

Appellant has not submitted any evidence that she was incapable of attending the medical examination scheduled on April 17, 2013. Because she failed to attend the directed medical examination and did not provide good cause for the failure within 14 days of OWCP's May 1, 2013 notice of proposed suspension, OWCP properly suspended her compensation benefits.¹⁵

⁹ *Herbert L. Dazey*, 41 ECAB 271 (1989).

¹⁰ *D.B.*, Docket No. 13-727 (issued June 3, 2013).

¹¹ *Supra* note 2.

¹² *Lynn C. Huber*, 54 ECAB 281 (2002).

¹³ *M.B.*, Docket No. 10-1755 (issued March 24, 2011).

¹⁴ *B.C.*, Docket No. 12-1904 (issued February 1, 2013); *J.T.*, 59 ECAB 293 (2008).

¹⁵ *R.C.*, Docket No. 09-2328 (issued July 12, 2010).

Thus, the Board finds that OWCP properly suspended entitlement to compensation in accordance with 5 U.S.C. § 8123 until the date on which appellant agrees to attend the examination. When appellant actually reports for examination, payment retroactive to the date on which she agreed to attend the examination may be made.¹⁶

CONCLUSION

The Board finds that OWCP properly suspended appellant's compensation benefits effective May 28, 2013 for failure to attend a medical examination.

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 3, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

¹⁶ C.S., Docket No. 11-1366 (issued December 12, 2011); *E.B.*, 59 ECAB 298 (2008).