

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

A.R., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HEALTH ADMINISTRATION,
San Antonio, TX, Employer**

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**Docket No. 12-739
Issued: January 11, 2013**

Appearances:
Dr. Anthony Rogers, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 22, 2012 appellant, through her representative, filed a timely appeal from Office of Workers' Compensation Programs' (OWCP) merit decisions dated September 15, 2011 and February 14, 2012 regarding the suspension of her right to compensation for obstructing medical examinations. 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 May 16, 2011 based on her obstruction of a May 16, 2011 medical examination, pursuant to 5 U.S.C. § 8123(d); and (2) whether OWCP properly suspended

¹ 20 C.F.R. § 8101 *et seq.*

² The Board notes that, following the issuance of the February 14, 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).

appellant's compensation benefits effective August 17, 2011 based on her obstruction of a July 1, 2011 medical examination, pursuant to 5 U.S.C. § 8123(d).

On appeal appellant's representative contends that appellant made an effort to cooperate but was not physically able to complete the functions of the functional capacity examinations due to her employment-related injuries as demonstrated by a January 3, 2012 report by Dr. Michael David Dennis, a Board-certified orthopedic surgeon. He further contends that the OWCP hearing representative did not consider the second denial of the compensation claim.

FACTUAL HISTORY

On August 11, 2010 appellant, then a 65-year-old program support assistant, filed a traumatic injury claim (Form CA-1) alleging muscle spasms across his back, neck and shoulders as a result of moving boxes in the performance of duty on August 10, 2010. OWCP accepted the claim for lumbosacral sprain, neck sprain and displacement of cervical intervertebral disc without myelopathy at C4-5 and C5-6. Appellant accepted a part-time light-duty position on September 7, 2010.

Appellant came under the treatment of Dr. Dennis who diagnosed cervical disc herniation and cervical instability on October 4, 2010. He reported that x-rays revealed kyphosis deformity at C4-5 and C5-6 with sublaxations at both levels and a magnetic resonance imaging (MRI) scan was consistent with disc protrusions at those levels. In a November 1, 2010 report, Dr. Dennis reiterated his diagnoses and opined that appellant was unable to work as any repetitive movement of her upper extremities would cause pain.

By letter dated April 7, 2011, OWCP referred appellant, together with a statement of accepted facts and the case record, for a second opinion evaluation to determine the extent of disability due to her employment-related conditions. It advised appellant that the appointment was scheduled for May 16, 2011 at 10:20 a.m. with Dr. Donald M. Mauldin, a Board-certified orthopedic surgeon. Appellant was also scheduled for a functional capacity evaluation (FCE) on the same date at 10:00 a.m. with Dr. William P. Osborne. OWCP informed appellant of her responsibility to attend the appointments and that, if she failed to do so without an acceptable reason, her compensation benefits could be suspended in accordance with section 8123(d) of FECA.³

On May 17, 2011 Angie Rios, an FCE technician, advised that appellant did not perform the FCE scheduled on May 16, 2011. Appellant filled out a consent form and her blood pressure was taken. Ms. Rios explained the FCE procedure to appellant and how she was to advise of any complaints or discomfort during the examination. Every time the test was explained, appellant stated that she was "scared of getting injured again" and could not perform part of the examination due to fear of reinjury. Ms. Rios reported that appellant was very emotional and cried as she discussed the occurrence of her injury.

In a May 25, 2011 second opinion report, Dr. Mauldin stated that appellant's physical limitations were strictly related to her cervicothoracic spine complaints on a subjective basis.

³ 5 U.S.C. § 8123(d).

Based on her diagnostic studies and the mechanism of injury to date, there was nothing to indicate that appellant was disabled. Dr. Mauldin reported that an FCE was ordered but appellant did not want to attempt any of the test protocols due to fear of reinjury and it was terminated. Since the FCE was not performed, he had no basis for restrictions. Dr. Mauldin opined that appellant had significant symptom magnification without clear-cut objective documentation of a major disc herniation or major structural damage to her cervical spine from the single incident of lifting.

By letter dated June 10, 2011, OWCP proposed to suspend appellant's compensation benefits on the grounds that she failed to report for a medical examination scheduled for May 16, 2011. It allowed her 14 days to provide good cause for her failure to submit or cooperate with the FCE and informed her of the penalty provision of section 8123(d) of FECA. The letter was also sent to appellant's representative. Thereafter, the representative submitted a narrative statement dated June 22, 2011 contending that appellant informed Ms. Rios that she wanted to complete the FCE. Appellant alleged that Ms. Rios replied, "I am afraid that you will be injured." Ms. Rios allegedly stated, "I will report it to the doctor that it was my decision not to conduct the FCE and you will not get in trouble."

On June 20, 2011 OWCP referred appellant for another FCE with Dr. Osborne on July 1, 2011 at 9:00 a.m.

By decision dated June 29, 2011, OWCP finalized the proposed suspension of compensation effective May 16, 2011, finding that appellant failed to attend the medical examination scheduled for May 16, 2011 and did not establish good cause for refusing to submit to the examination. It noted that, by letter dated April 7, 2011, appellant was given 14 days to provide written evidence justifying her failure to attend the examination but she did not respond.

In a July 11, 2011 functional capacity report, Dr. Osborne noted that appellant was referred for an FCE which was performed on July 1, 2011. He reported that she complained during each test with no physiological changes in her body to support the level of her complaints. Dr. Osborne opined that there was some rather significant psychosocial overlay and if a patient was that bad, she would not be able to get out of bed, stand upright or come to the examination. Appellant did not generate oxygen consumption that was compatible with the activities of daily living. Dr. Osborne concluded that she invalidated the FCE.

In a July 27, 2011 report, Dr. Mauldin reviewed the FCE report of July 11, 2011. He advised that the FCE report did not change his opinion in the May 25, 2011 report. Dr. Mauldin reiterated that appellant had significant symptom magnification without clear-cut objective documentation. On an objective basis, he could find no reason why she could not return to gainful employment. On a subjective basis, Dr. Mauldin would restrict appellant from repetitive overhead activities causing hyperextension of her spine or heavy lifting in excess of 20 pounds.

By decision dated September 15, 2011, OWCP finalized the proposed suspension of compensation, finding that appellant obstructed a medical examination and did not establish good cause for refusing to fully cooperate with the examination. It noted that on July 1, 2011 appellant was directed to report for a medical examination by Dr. Osborne that day but invalidated the examination. The suspension was effective August 17, 2011.

On October 31, 2011 appellant, through her representative, requested an oral hearing by telephone before an OWCP hearing representative, from the June 29, 2011 decision. A hearing was held on December 14, 2011. The hearing representative held the record open for 30 days for the submission of additional evidence.

Appellant submitted reports by Dr. Dennis dated November 11, 2010 and January 3, 2012 indicating that she had an MRI scan of the lumbar spine which showed a fairly large disc protrusion at L5-S1 to the left side. She also had associated spinal stenosis and lateral recess stenosis at that level with some bulging and facet disease at L4-5. Dr. Dennis opined that appellant sustained an injury to her lower back, particularly at L5-S1, and had preexisting degenerative changes at L4-5 that was aggravated by her August 10, 2010 employment injury. He recommended surgery at the L4-5 and L5-S1 levels given her severe pain, inability to walk and her bowel and bladder incontinence. Dr. Dennis also recommended an anterior lumbar discectomy with posterior instrumentation and fusion at L4-5 and L5-S1 to relieve her bowel and bladder incontinence, back pain and to improve her overall quality of life.

By decision dated February 14, 2012, an OWCP hearing representative affirmed the June 29, 2011 decision.

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.⁴ 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.⁵ 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.⁶ Section 8123(d) of FECA and section 10.323 of OWCP's regulations provide that, if an employee refuses to submit to or obstructs a directed medical examination, his or her compensation is suspended until the refusal or obstruction ceases.⁷ However, before OWCP may invoke these provisions, the employee is provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.⁸ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.⁹

⁴ 5 U.S.C. § 8123(a).

⁵ See *James C. Talbert*, 42 ECAB 974, 976 (1991).

⁶ 20 C.F.R. § 10.320.

⁷ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

⁹ *Id.*; see *Scott R. Walsh*, 56 ECAB 353 (2005); *Raymond C. Dickinson*, 48 ECAB 646 (1997).

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant obstructed the May 16, 2011 medical examination with Dr. Osborne within the meaning of section 8123(d) of FECA.

OWCP properly determined that it required a functional capacity examination in order to determine whether appellant was disabled from her employment-related conditions. It directed appellant to attend an FCE with Dr. Osborne, a functional capacity examiner. OWCP advised her that the examination was scheduled for May 16, 2011 at 10:00 a.m. and instructed her to attend the examination. It advised appellant that her compensation could be suspended if she refused to attend or obstructed the examination. Although appellant appeared for the FCE as scheduled, Ms. Rios, the FCE technician, reported that she did not fully cooperate as she stated that she could not perform any part of the medical examination due to fear of reinjury. In a May 25, 2011 second opinion report, Dr. Mauldin indicated that an FCE was ordered for May 16, 2011, but it was terminated because appellant did not want to attempt any of the protocols of the medical examination due to fear of reinjury. He opined that appellant had significant symptom magnification without clear-cut objective documentation and explained that since the FCE was not performed he had no basis for restrictions. Thus, because of the factual history corroborated by Ms. Rios and Dr. Mauldin and appellant's magnified responses as reported by Dr. Mauldin, the Board finds that OWCP properly suspended her entitlement to compensation.

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant obstructed the July 1, 2011 medical examination with Dr. Osborne within the meaning of section 8123(d) of FECA.

OWCP directed appellant to attend a second FCE on July 1, 2011 with Dr. Osborne. It properly determined that it required a functional capacity examination in order to determine whether appellant was disabled from her employment-related conditions. On June 20, 2011 OWCP referred appellant to Dr. Osborne for a FCE. It advised her that the examination was scheduled for July 1, 2011 at 9:00 a.m. and instructed her to attend the examination. OWCP advised appellant that her compensation could be suspended if she refused to attend or obstructed the examination. Although appellant appeared for the FCE as scheduled, Dr. Osborne reported that she did not fully cooperate as she complained during the necessary testing but her complaints were not supported by physiological changes in her body. Additionally, he reported that there was some psychosocial overlay, which if appellant were actually that debilitated, she would not have been able to physically attend the examination. Dr. Osborne also noted that appellant did not generate enough oxygen consumption compatible with daily activities. Thus, because of appellant's magnified responses as reported by him, the Board finds that OWCP properly suspended her entitlement to compensation.

On appeal appellant's representative contends that appellant made an effort to cooperate but was not physically able to complete the functions of the FCEs due to her employment-related injuries as demonstrated by Dr. Dennis' January 3, 2012 report. The Board has recognized

OWCP's responsibility in developing claims.¹⁰ Section 8123 authorizes it to require 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.¹¹ The referral to an appropriate specialist in appellant's area at OWCP's expense cannot be considered unreasonable. OWCP clearly acted within its discretion by referring appellant for an FCE to assess any disability related to her neck and back conditions after her first FCE was terminated and her stated reasons for not cooperating with the examination do not establish good cause. With regard to her assertion that she was not physically able to complete the functions of the FCEs due to her employment-related injuries, the Board finds that Dr. Dennis' January 3, 2012 report does not establish that appellant was unable to fully cooperate with the FCEs or otherwise show how this assertion would rise to the level of good cause for obstructing the FCEs by Dr. Osborne. Moreover, both Drs. Mauldin and Osborne noted that appellant magnified her symptoms by her responses as there was no supporting objective evidence. Further, Dr. Osborne reported that appellant's responses were so exaggerated that she should not have been physically capable of attending the examination if they were accurate. Thus, the Board finds that appellant did not establish good cause for her obstruction of the May 16 and July 1, 2011 examinations and OWCP properly invoked 5 U.S.C. § 8123(d) and suspended her entitlement to compensation benefits.

Appellant's representative further contends on appeal that OWCP's hearing representative did not consider the second denial of the compensation claim. The Board notes that appellant did not request an oral hearing from the September 15, 2011 denial. Nonetheless, the merits of OWCP's September 15, 2011 and February 14, 2012 decisions are considered by this decision of the Board. Thus, the Board finds that the representative's argument is moot.

CONCLUSION

The Board finds that OWCP properly suspended appellant's compensation benefits, pursuant to 5 U.S.C. § 8123(d), based on her obstruction of the medical examinations conducted on May 16 and July 1, 2011.

¹⁰ See *Scott R. Walsh*, *supra* note 9; *T.L.*, Docket No. 10-246 (issued August 9, 2010).

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2012 and September 15, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 11, 2013
Washington, DC

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

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

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