



## **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 it properly suspended 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 Dr. James E. Butler, a Board-certified orthopedic surgeon and OWCP referral physician, confirmed the diagnosis made by appellant's treating physician and indicated that she cooperated with the functional capacity examination (FCE), which suggests that the former OWCP physicians were not truthful in their statements regarding her lack of cooperation with the previous examinations.

## **FACTUAL HISTORY**

This case has previously been before the Board. In a decision dated January 11, 2013, the Board affirmed OWCP's September 15, 2011 and February 14, 2012 decisions finding 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.<sup>4</sup> The facts of the case, as set forth in the prior decision, are incorporated by reference.

OWCP directed appellant to attend two FCE examinations with Dr. William P. Osborne, an occupational medicine specialist. On the May 16, 2011 scheduled examination appellant appeared; however, she did not fully cooperate due to her fear of reinjury. Again on July 1, 2011 she appeared at the second scheduled FCE to determine whether she was disabled from her employment-related condition. Dr. Osborne reported that appellant did not fully cooperate as her complaints were not supported by her physiological changes in her body.

By letter dated February 9, 2013, appellant, through her representative, requested reconsideration.<sup>5</sup> She submitted new hospital records indicating that she underwent a two-staged lumbar fusion on May 22, 2012. Appellant was placed on the periodic rolls and received appropriate compensation benefits.

Appellant submitted new reports from Dr. M. David Dennis, a Board-certified orthopedic surgeon and her attending physician, who requested authorization for anterior cervical decompression and fusion surgery on November 19, 2012.

On February 13, 2013 an OWCP medical adviser reviewed the new medical evidence of record and found that, although pathology was present at multiple levels, the cervical fusion

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<sup>4</sup> Docket No. 12-739 (issued January 11, 2013). OWCP accepted that appellant, then a 65-year-old program support assistant, sustained a neck sprain, lumbosacral sprain, and displacement of the cervical and lumbar intervertebral discs without myelopathy as a result of moving boxes in the performance of duty on August 10, 2010.

<sup>5</sup> Appellant had one year from the Board's January 11, 2013 merit decision to file a timely request for reconsideration from OWCP's September 15, 2011 and February 14, 2012 decisions.

proposed by Dr. Dennis represented a complex spinal procedure with a significant morbidity risk and, therefore, a second opinion evaluation was recommended for purposes of authorization.

In a February 15, 2013 report, Dr. Dennis diagnosed cervical disc herniation and lumbar postfusion and reiterated his opinion that appellant needed cervical spine surgery. On February 25, 2013 he diagnosed acute thoracic strain and indicated that appellant was also having worsening pain through the neck. On March 22, 2013 Dr. Dennis diagnosed displacement of cervical intervertebral disc without myelopathy and cervical spondylosis without myelopathy and reiterated his opinion that appellant would benefit from surgery.

OWCP referred appellant, together with a statement of accepted facts and the case record, to Dr. Butler for a second opinion evaluation. In a March 26, 2013 report, Dr. Butler diagnosed status post 360-degree fusion at L4-S1 with residuals, left lower extremity weakness and cervical disc disorder at C3-6, left. Upon physical examination, he found significant tenderness and spasms at C3-6, a positive foraminal compression test on the left with pain radiating down into the left shoulder, decreased cervical and lumbar spine range of motion, and weakness in the left arm and left leg. Dr. Butler concurred with Dr. Dennis that the proposed cervical surgery was medically appropriate. He noted that an FCE was performed on March 26, 2013 and appellant “gave a reliable effort upon testing.” Dr. Butler found that appellant was capable of sedentary work with restrictions of no prolonged sitting and standing.

By decision dated April 10, 2013, OWCP denied modification of the prior decision.<sup>6</sup>

### **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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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 compensation is suspended until the refusal or obstruction ceases.<sup>10</sup> 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.<sup>11</sup> If good cause for the

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<sup>6</sup> The Board notes that OWCP approved appellant’s cervical spine surgery by letter dated June 19, 2013 and placed her on the periodic rolls to receive appropriate disability compensation.

<sup>7</sup> 5 U.S.C. § 8123(a).

<sup>8</sup> See *James C. Talbert*, 42 ECAB 974, 976 (1991).

<sup>9</sup> 20 C.F.R. § 10.320.

<sup>10</sup> 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010); *Scott R. Walsh*, 56 ECAB 353 (2005); *Raymond C. Dickinson*, 48 ECAB 646 (1997).

refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.<sup>12</sup>

### ANALYSIS -- ISSUES 1 & 2

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.

OWCP scheduled an FCE with Dr. Osborne on May 16, 2011 at 10:00 a.m. and July 1, 2011 at 9:00 a.m. Although appellant appeared for the FCE on May 16, 2011 as scheduled, the record establishes that the examination was terminated because she did not attempt any of the protocols due to fear of reinjury. She also appeared for the FCE on July 1, 2011 as scheduled; however, the record establishes that she did not fully cooperate as she provided magnified responses and complaints during the necessary testing, which were not supported by physiological changes in her body.

The Board has recognized OWCP's responsibility in developing claims.<sup>13</sup> 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.<sup>14</sup> The referral to an appropriate specialist in appellant's area at OWCP's expense cannot be considered unreasonable. In this case, OWCP acted within its discretion by referring appellant for an FCE to determine the extent of her employment-related conditions, continuing disability and medical treatment.

The Board has held that a failure to properly cooperate in an FCE constitutes an obstruction of an examination under section 8123(d).<sup>15</sup> Appellant did not submit any evidence to establish good cause for her obstruction of the scheduled examinations. She did not offer sufficient reasons for her refusal to cooperate with the FCEs, nor did she submit any medical evidence that she could not physically perform the evaluations. The Board finds that there is no justification in the record for appellant's refusal to submit to the medical examinations scheduled by OWCP.<sup>16</sup> The Board further finds that OWCP properly followed its established procedures when it invoked the provision of 5 U.S.C. § 8123(d), in suspending her entitlement to compensation due to her refusal to cooperate with the medical examinations as directed. OWCP did not abuse its discretion in this matter.

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<sup>12</sup> *Id.*

<sup>13</sup> See *Scott R. Walsh*, *supra* note 11; *T.L.*, Docket No. 10-246 (issued August 9, 2010).

<sup>14</sup> 20 C.F.R. § 10.320; *see id.*

<sup>15</sup> See *Gilbert Ortega*, Docket No. 98-642 (issued December 29, 1999); *Gloria D. Livingston*, Docket No. 94-2573 (issued October 22, 1996).

<sup>16</sup> *Id.*

On appeal appellant's representative contends that Dr. Butler confirmed the diagnosis made by Dr. Dennis and advised that appellant had cooperated with the FCE, which suggests that the former OWCP physicians were not truthful in their statements regarding her lack of cooperation on previous examinations. There is no evidence of record to establish that the reports from the former OWCP physicians were flawed or not based on proper findings. Without evidence in support of appellant's allegation of bias, OWCP has nothing more than an unsubstantiated excuse.<sup>17</sup> The relevant issue is whether OWCP properly suspended her compensation benefits under 5 U.S.C. § 8123(d) due to her obstruction of the medical examinations conducted on May 16 and July 1, 2011. Appellant did not submit sufficient evidence to establish that she was incapable of undergoing the examinations and attendant evaluations when directed. The fact that she complied with a March 26, 2013 FCE does not support her prior refusal to cooperate with the prior examinations. The Board finds that OWCP properly suspended appellant's compensation benefits effective May 16 and August 17, 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.

### **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.

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<sup>17</sup> See *Atanacio G. Sambrano*, 51 ECAB 557 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 10, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 10, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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