

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

K.R., Appellant

and

**DEPARTMENT OF LABOR, JOB CORPS
CENTERS, Astoria, OR, Employer**

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**Docket No. 13-1756
Issued: January 8, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 18, 2013 appellant filed a timely appeal from the May 30 and 31, 2013 merit decisions of the Office of Workers' Compensation Programs (OWCP) suspending her compensation for obstructing a medical examination. 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 30, 2013 based on her obstruction of a May 6, 2013 medical examination, pursuant to 5 U.S.C. § 8123(d); and (2) whether it properly suspended her compensation benefits

¹ 20 C.F.R. § 8101 *et seq.*

² The Board notes that, following the issuance of the May 31, 2013 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).

effective June 2, 2013 based on her obstruction of a May 6, 2013 medical examination, pursuant to 5 U.S.C. § 8123(d).

On appeal, appellant contents that she showed good cause for her failure to report to the scheduled appointment.

FACTUAL HISTORY

On December 14, 2012 appellant, then a 21-year-old training student, filed a traumatic injury claim (Form CA-1) alleging a head injury as a result of being assaulted by another student in the performance of duty on December 8, 2012. OWCP accepted the claim for contusion of the face, scalp and neck except eyes and traumatic subdural hematoma without open wound, no coma. Appellant received compensation for temporary total disability.

OWCP referred appellant, together with a statement of accepted facts and the case record, for a second opinion evaluation to determine her disability due to her employment-related conditions. It informed her of her responsibility to attend the appointment 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 In an April 14, 2013 letter, OWCP advised appellant that an appointment was scheduled for May 6, 2013 at 12:00 p.m. with Dr. John Wendt, a Board-certified neurologist.

On May 8, 2013 Dr. Wendt informed OWCP that appellant failed to report for her examination.

In an e-mail correspondence dated May 8, 2013, OWCP noted that on May 6, 2013 appellant requested that the second opinion examination be rescheduled as she received the appointment letter that day and was not able to attend the appointment on such short notice. It acknowledged that the wrong claim number had been entered and the message had been sent to the incorrect claims examiner for processing. Therefore, the examination had not yet been rescheduled. OWCP had advised appellant that she would not be held responsible for the error in directing her call.

By letter dated May 8, 2013, OWCP proposed to suspend appellant's compensation benefits on the grounds that she failed to report for a medical examination scheduled for May 6, 2013. It allowed her 14 days to provide good cause for her failure to submit or cooperate with the examination and informed her of the penalty provision of section 8123(d) of FECA.

In a telephone memorandum dated May 13, 2013, appellant informed OWCP that her mail had been delayed and she did not intend to obstruct the May 6, 2013 appointment. On May 20, 2013 she informed OWCP that her address had changed from Auburn to Tacoma, Washington. OWCP allowed appellant until May 29, 2013 to respond to the May 8, 2013 letter.

In a narrative statement received by OWCP on May 29, 2013, appellant reiterated that she had delayed mail at her old address in Auburn, Washington and did not receive her

³ 5 U.S.C. § 8123(d).

appointment letter until May 6, 2013. She noted that she had contacted OWCP and Dr. Wendt's office as soon as she received the letter to advise that she was unable to attend the examination on such short notice. OWCP assured appellant that her information would be placed in her file and she would receive a letter rescheduling her appointment.

By decision dated May 30, 2013, OWCP finalized the proposed suspension of compensation effective that day, finding that appellant failed to attend the medical examination scheduled for May 6, 2013 and did not establish good cause for refusing to submit to the examination. It noted that no response had been received to the May 8, 2013 letter.

By decision dated May 31, 2013, OWCP reissued its May 30, 2013 decision making the suspension effective June 2, 2013.

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

ANALYSIS -- ISSUES 1 & 2

The Board finds that OWCP improperly determined that appellant obstructed the May 6, 2013 medical examination with Dr. Wendt within the meaning of section 8123(d) of FECA.

OWCP accepted appellant's claim for multiple injuries sustained at work on December 8, 2012. It referred her to Dr. Wendt, a Board-certified neurologist, for a second

⁴ *Id.* at § 8123(a).

⁵ See *James C. Talbert*, 42 ECAB 974, 976 (1991); *J.T.*, 59 ECAB 293 (2008).

⁶ 20 C.F.R. § 10.320.

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

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000); *J.T.*, *supra* note 5.

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

opinion examination in order to determine the nature and extent of any remaining disability related to appellant's accepted conditions. OWCP's request that appellant to undergo an examination to determine the nature and extent of any employment-related residuals was reasonable and did not constitute an abuse of discretion. In an April 14, 2013 referral letter, OWCP advised her that it had scheduled a May 6, 2013 appointment with Dr. Wendt and notified her of the penalty for a refusal or obstruction of a medical examination under 5 U.S.C. § 8123(d). Appellant did not attend the May 6, 2013 examination. OWCP asked her, by letter dated May 8, 2013, to provide good cause as to why she failed to keep the scheduled appointment with Dr. Wendt.

In a telephone memorandum dated May 13, 2013, appellant noted that she did not intend to obstruct the May 6, 2013 appointment. She informed OWCP on May 20, 2013 that her address had changed from Auburn to Tacoma, Washington. Appellant stated that the mail forwarded to her new address was delayed and she did not receive her appointment letter until May 6, 2013. She contacted OWCP and Dr. Wendt's office to advise that she was unable to attend the examination on such short notice. The record and an e-mail correspondence of May 8, 2013 confirmed that OWCP received a telephone call from appellant on May 6, 2013 requesting that her examination be rescheduled. OWCP acknowledged that the wrong claim number had been entered directing the communication to the incorrect claims examiner. Therefore, the examination had not yet been rescheduled. OWCP advised appellant that she would not be held responsible for the error. The record establishes that it did not reschedule the appointment with Dr. Wendt.

The Board finds that appellant demonstrated good cause for her failure to report to the scheduled appointment.¹⁰ Appellant expressed her willingness to be examined by Dr. Wendt and OWCP advised her that the examination would be rescheduled but delayed rescheduling due to entering an incorrect file number. The Board finds that the suspension of her compensation benefits was improper.¹¹

CONCLUSION

The Board finds that OWCP improperly suspended appellant's compensation benefits, pursuant to 5 U.S.C. § 8123(d), based on her obstruction of a May 6, 2013 medical examination.

¹⁰ Cf. *M.M.*, Docket No. 12-1892 (March 25, 2013) (where the Board held that appellant did not demonstrate good cause for her failure to report to a scheduled appointment because it was too far from her home, she did not have any money for transportation which involved a two-mile walk to public transportation and she did not like the doctor).

¹¹ See *Lynn C. Huber*, 54 ECAB 281 (2002).

ORDER

IT IS HEREBY ORDERED THAT the May 31 and 30, 2013 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: January 8, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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