

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

C.G., Appellant

and

**U.S. POSTAL SERVICE, LOGISTICS &
DISTRIBUTION CENTER, Tampa, FL,
Employer**

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**Docket No. 14-315
Issued: May 21, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 21, 2013 appellant filed a timely appeal of a September 11, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying wage-loss compensation and an August 19, 2013 decision suspending her entitlement to compensation. 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.

ISSUES

The issues are: (1) whether appellant established that she is entitled to wage-loss compensation for the period September 9 to October 8, 2011 causally related to a February 9, 2009 employment-related injury; and (2) whether OWCP met its burden of proof to suspend appellant's compensation benefits in accordance with 5 U.S.C. § 8123 of FECA on the grounds

¹ 5 U.S.C. § 8101 *et seq.*

that she refused to cooperate with a scheduled medical examination scheduled for December 21, 2012.

On appeal appellant argues that OWCP erred in adjudicating her claim and requested transfer of jurisdiction of her claim. She also argues that OWCP is prohibited from issuing any decisions under either claim file as the Board has sole jurisdiction

FACTUAL HISTORY -- ISSUE 1 -- OWCP FILE NO. xxxxxx098

On February 18, 2009 appellant, then a 34-year-old mail handler operator, filed a traumatic injury claim alleging that on February 9, 2009 she injured her left arm and back due to moving a bulk mail cart. OWCP accepted the claim for lumbar strain and left shoulder and arm strain.²

Appellant did not stop work and accepted a modified job offer on June 15, 2009. She returned to her regular job duties on October 15, 2009. The report of her physician, Dr. James Billings, noted that she was at maximum medical improvement. He returned appellant to work at full duty without restriction.

In a September 8, 2011 disability statement, Dr. Sara C. Vizcay, a treating physician, indicated that appellant was disabled for work from September 8 to October 6, 2011. She diagnosed cervical strain/sprain and lumbar strain/sprain with left shoulder and right knee complaints.

In a September 8, 2011 duty status form report, Dr. Vizcay stated that appellant was unable to work for the next four weeks. She listed an injury date of February 9, 2009 and diagnoses of cervical, lumbar and left shoulder sprains/strains.

On September 8, 2011 Dr. Vizcay performed a physical examination and provided findings from her examination. Under history she noted that in 2011 appellant "injured low back and right lower extremity with aggravation of the 2009 injured (sic)." Diagnoses included cervical, lumbar and right shoulder strains. Dr. Vizcay recommended physical therapy and that appellant avoid pushing, climbing, crawling, pulling and extended sitting, walking or standing without frequent breaks.

On October 12, 2011 appellant filed claims for wage-loss compensation for the period September 8 to October 8, 2011.

By letter dated October 18, 2011, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised as to the medical and factual evidence required to support her claim and given 30 days to provide this information.

In a November 8, 2011 report, Dr. Samy F. Bishai, a treating orthopedic surgeon, noted the date of injury as February 9, 2011 and indicated that appellant was disabled for working from

² OWCP assigned claim number xxxxxx098.

September 9 to October 8, 2011. Further, he opined that appellant's disability was due to an aggravation of a preexisting condition and not to a spontaneous worsening of her condition.

By decision dated November 29, 2011, OWCP denied appellant's wage-loss compensation claim for the period September 9 to October 8, 2011. It noted that her treating physician advised that her disability was not spontaneous, but was due to an aggravation of her condition. OWCP noted that appellant's physician did not identify the cause of the aggravation.

Subsequent to OWCP's decision, it received an additional November 8, 2011 report from Dr. Bishai. Diagnoses included chronic lumbosacral strain, lumbar disc syndrome, bulging lumbosacral spinal discs, upper back muscle strain, right leg radiculopathy, left shoulder tendinitis and bursitis and left shoulder internal derangement. Dr. Bishai reiterated his opinion that appellant's disability was due to an additional aggravation of the February 9, 2011 injury. He noted that appellant sustained an aggravation of the February 9, 2011 injury and second work injury on June 9, 2011.

In a January 31, 2012 report, Dr. Bishai provided a history of appellant's injuries on February 9 and June 9, 2011. He stated that she sustained an aggravation of her accepted condition on June 9, 2011. Dr. Bishai opined that appellant was entitled to receipt of wage-loss compensation for the period September 9 to October 8, 2011.

On November 27, 2012 appellant requested reconsideration.

By decision dated February 15, 2013, OWCP denied modification.

On July 21, 2013 appellant requested reconsideration. She argued that OWCP's findings were clearly erroneous and that she was entitled to wage-loss compensation for the period claimed. Appellant also contended that OWCP failed to comply with its procedures in managing her claims.

By decision dated September 11, 2013, OWCP denied modification.³ It found that appellant had been paid wage-loss compensation for the period in question under File No. xxxxxx258, *i.e.*, July 29, 2011 to March 9, 2013, and that any disability was due to injuries sustained under that claim. OWCP further found that, even if appellant established disability under the current claim, she would not be entitled to wage-loss compensation as "FECA does not allow concurrent payment of total disability compensation" where disability stems from multiple files and injuries.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his claim by the weight of the evidence.⁵ For each period of disability

³ On September 17, 2013 OWCP combined File Nos. xxxxxx098, xxxxxx258 and xxxxxx723. File No. xxxxxx098 was listed as the master file number. Under File No. xxxxxx723 OWCP accepted that appellant sustained neck, left shoulder and left upper arm strains on March 31, 2009 due to pulling a heavy tray of mail off a pallet of high heavy letter trays.

⁴ 5 U.S.C. §§ 8101-8193

claimed, the employee has the burden of establishing that he was disabled for work as a result of the accepted employment injury.⁶ Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.⁷

Under FECA the term “disability” means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁸ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁹ An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.¹⁰ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wages.

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.¹¹

ANALYSIS -- ISSUE 1

Appellant claimed that she was totally disabled for work during the period September 9 to October 8, 2011 and thereby entitled to wage-loss compensation. OWCP denied the claim by decisions dated November 29, 2011, February 15 and September 11, 2013 based on a lack of medical evidence establishing that her disability was due to her accepted February 9, 2009 employment injury. OWCP, in its September 11, 2013 decision, also found that appellant had received wage-loss compensation for this period under File No. xxxxxx258. To the extent that she is claiming compensation for a period in which she was already paid compensation, the Board finds that appellant is not entitled to be paid twice for the same period of wage loss.¹² For any claimed time in this period for which appellant has not already received compensation, she

⁵ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

⁶ See *Amelia S. Jefferson*, *supra* note 5; see also *David H. Goss*, 32 ECAB 24 (1980).

⁷ See *Edward H. Horton*, 41 ECAB 301 (1989).

⁸ *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

⁹ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

¹⁰ *Merle J. Marceau*, 53 ECAB 197 (2001).

¹¹ See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹² See *N.F.*, Docket No. 10-1399 (issued February 9, 2011); *J.M.*, Docket No. 08-2244 (issued June 10, 2009); *E.B.*, Docket No. 06-1585 (issued February 22, 2007); *Amos Mack*, 39 ECAB 1364 (1988).

must provide reasoned medical evidence supporting that her disability is causally related to her February 9, 2009 employment injury.

In support of her claim, appellant submitted reports from Drs. Bishai and Vizcay. In various reports, Dr. Bishai attributed appellant's disability for the period September 9 to October 8, 2011 to an aggravation of her February 9, 2009 employment injury. He noted that this was not a spontaneous worsening of her condition, but was due to an aggravation on June 9, 2011. Similarly, Dr. Vizcay attributed appellant's disability to an aggravation of 2009 injury. Neither physician provided any medical rationale explaining how or why the February 9, 2009 employment injury was the cause of appellant's disability for work during the period in question. Without such rationale explaining why appellant's inability to work is attributable to the accepted February 9, 2009 work injury, the reports of Drs. Bishai and Vizcay are insufficient to meet appellant's burden of proof to establish disability for the period claimed.¹³ Furthermore, both physicians attributed appellant's disability to an aggravation of the February 9, 2009 employment injury at work on June 9, 2011, a period not the subject of the current appeal.

On appeal appellant contends that OWCP erred in the manner in which it combined her three claims (File Nos. xxxxxx098, xxxxxx723 and xxxxxx258) and that it erred in not making File No. xxxxxx098, as the oldest claim, the master file number. She also contends that OWCP erred in failing to properly update the injury codes when it combined her claims. Next appellant argues that all decisions should be set aside as OWCP improperly combined her claims. Under OWCP procedures, cases should be combined when claims are reported for a similar condition or part of the body, two or more separate injuries occurred on the same date or correct adjudication of the issues depends on frequent cross-reference between files.¹⁴ Thus, OWCP followed the procedure manual when it combined File Nos. xxxxxx098, xxxxxx723 and xxxxxx258. As to updating the injury codes, appellant has submitted no evidence showing that OWCP erred in the injury codes it assigned to her claims.

Appellant also argues that OWCP erred in denying medical authorization for an orthopedic mattress and physical therapy. The Board's jurisdiction is limited to reviewing final adverse decisions of OWCP issued under FECA within 180 days of an appeal to the Board.¹⁵ OWCP has not issued a final decision regarding denying authorization for physical therapy or an orthopedic mattress within 180 days of appellant's appeal to the Board. Thus, these issues are not before the Board at this time.

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.

¹³ *Deborah L. Beatty*, 54 ECAB 340 (2003).

¹⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c) (February 2000).

¹⁵ 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY -- ISSUE 2 -- OWCP FILE NO. xxxxxx258

On June 9, 2011 appellant filed a traumatic injury claim alleging that on that date she injured her back, right knee and ankle while pushing an automated postal cart. She stopped work that day. OWCP accepted the claim for cervical and lumbosacral sprains.¹⁶

By letter dated November 13, 2012, appellant was informed that an appointment for a second opinion evaluation had been scheduled with Dr. William Dinenberg, a Board-certified orthopedic surgeon, for November 30, 2012 at 10:30 a.m. On November 30, 2012 OWCP was informed that appellant did not show up for the appointment with Dr. Dinenberg.

On December 5, 2012 OWCP informed appellant that an appointment for a second opinion evaluation had been rescheduled with Dr. Dinenberg for December 21, 2012 at 11:30 a.m.

On December 7, 2012 OWCP placed appellant on the periodic rolls for temporary total disability effective December 16, 2012. It informed her that payments had been issued for the periods July 29, 2011 to May 30, 2012 and May 31 to December 15, 2012.

On December 21, 2012 OWCP was informed that appellant did not show up for the appointment with Dr. Dinenberg.

On January 16, 2013 OWCP issued a notice proposing to suspend appellant's compensation on the grounds that she failed to appear for the examination scheduled with Dr. Dinenberg on December 21, 2012. Appellant was informed of the penalty provision of section 8123(d) of FECA and was given 14 days to provide in writing good cause for her failure to appear. She was also advised to contact OWCP immediately if she intended to report for a rescheduled examination with Dr. Dinenberg.

On January 28, 2013 appellant disagreed with the proposal to suspend her benefits. She argued that there was no need for a second opinion evaluation as it was not mentioned in the October 18, 2012 decision accepting her claim. Appellant alleged that OWCP's referral for a second opinion evaluation was illegal, untimely and improper. She also argued that the referral subjected her to harassment, retaliation and hardship.

In a March 21, 2013 decision, OWCP finalized the proposed suspension, effective that day. It found that appellant did not attend the appointment scheduled for December 21, 2012. OWCP informed her that wage-loss compensation would be reinstated after she attended and fully cooperated with an examination.

On July 21, 2013 appellant requested OWCP to vacate the March 21, 2013 decision on the grounds that it was clearly erroneous.

By decision dated August 19, 2013, OWCP denied modification.

¹⁶ OWCP assigned claim number xxxxxx258.

LEGAL PRECEDENT -- ISSUE 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.¹⁷ 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.¹⁸ 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.¹⁹ Section 8123(d) of FECA and section 10.323 of OWCP's regulations provide that, if an employee refused to submit to or obstructs a directed medical examination, his or her compensation is suspended until the refusal or obstruction ceases.²⁰ 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.²¹ If good cause for the refusal or obstruction is not established entitlement to compensation is suspended in accordance with section 8123 of FECA.²²

ANALYSIS -- ISSUE 2

The Board finds that appellant refused to submit to the scheduled December 21, 2012 second opinion examination with Dr. Dinenberg and thus OWCP properly suspended appellant's compensation benefits pursuant to section 8123 of FECA. OWCP directed appellant to attend a second opinion evaluation with Dr. Dinenberg, a Board-certified orthopedic surgeon. It properly determined that it required an assessment of appellant's employment-related condition, medical treatment and whether any continuing disability was causally related to her accepted employment injuries.

By letter dated November 13, 2012, OWCP informed appellant that a second opinion evaluation was needed and scheduled the appointment for November 30, 2012. After appellant failed to appear, on December 5, 2012 OWCP informed appellant that a second opinion evaluation was needed and that her appointment with Dr. Dinenberg had been rescheduled for December 21, 2012. These notices were sent to her address of record.

¹⁷ 5 U.S.C. § 8123(a).

¹⁸ *C.S.*, Docket No. 09-1597 (issued February 4, 2010); *J.T.*, 59 ECAB 293 (2008). *Dana D. Hudson*, 57 ECAB 298 (2006); *James C. Talbert*, 42 ECAB 974 (1991).

¹⁹ 20 C.F.R. § 10.320; *see J.C.*, Docket No. 09-609 (issued January 5, 2010); *J.T.*, *supra* note 18; *Walter L. Jordan*, 57 ECAB 218 (2005).

²⁰ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323. *See J.C.*, *supra* note 19; *Sharon Handy*, 57 ECAB 446 (2006); *Maura D. Fuller (Judson H. Fuller)*, 56 ECAB 383 (2005).

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluation Medical Evidence*, Chapter 2.810.13(d) (September 2010). *See J.C.*, *supra* note 19; *Dana D. Hudson*, *supra* note 18; *Lynn C. Huber*, 54 ECAB 281 (2002).

²² *See J.C.*, *supra* note 19; *Dana D. Hudson*, *supra* note 18; *Scott R. Walsh*, 56 ECAB 353 (2005).

Appellant did not attend the scheduled appointment on December 21, 2012. In a January 16, 2013 notice, OWCP afforded her 14 days to provide good cause in writing for her failure to attend the rescheduled December 21, 2012 examination. Appellant was advised of the penalty provision of section 8123(d) of FECA for failure to attend such an examination.

The Board has recognized OWCP's responsibility in developing claims.²³ Section 8123 authorizes 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.²⁴

The referral to an appropriate specialist in appellant's area at OWCP's expense was not unreasonable. The Board finds that appellant failed to attend the scheduled medical examination on December 21, 2012 and did not provide good cause for her failure within 14 days of OWCP's January 16, 2013 notice of proposed suspension as she stated that she did not need an examination and it was illegal for OWCP to schedule one. Additionally, she stated that the referral subjected her to, *inter alia*, harassment. In this case, OWCP acted within its discretion by referring appellant for a second opinion examination to assess residuals and disability related to her employment-related conditions.

On appeal appellant contends that OWCP erred in suspending her benefits as it failed to include all her accepted conditions under File Nos. xxxxxx098 and xxxxxx723. She also asserts that the statement of accepted facts (SOAF) created on November 9, 2012 and September 5, 2013 is incorrect as it was only based on File No. xxxxx258 and did not include her injuries under File Nos. xxxxxx098 and xxxxxx723. Appellant also argues that OWCP erred in failing to combine all of her claims, failed to properly update the injury codes for her claims and failed to include all of her accepted conditions in the SOAF. Contrary to appellant's contentions, the SOAF was correct as OWCP was determining the extent of any disability appellant sustained from her June 9, 2011 employment injury. Appellant has provided no evidence supporting that OWCP failed to properly update the injury codes or include all of her accepted conditions in the SOAF. Thus, these arguments are found to be without merit.

Next appellant presents arguments regarding her pay rate, the alleged failure to apply cost-of-living adjustments, that OWCP incorrectly deducted health and insurance benefits from her wage-loss compensation. She requests OWCP be instructed to pay interest on her compensation for improperly withholding benefits. None of these issues are before the Board. The decisions appellant appealed concerned the suspension of her wage-loss compensation benefits for failing to attend a scheduled medical examination and the denial of her claim for wage-loss compensation for the period September 9 to October 8, 2011. As these issues are not

²³ *Scott R. Walsh, id.*

²⁴ 20 C.F.R. § 10.320; *see J.T., supra* note 18.

in any final OWCP decision issued within 180 days of appellant's appeal to the Board, they are not within the Board's jurisdiction.²⁵

Appellant also argues that OWCP did not have jurisdiction to schedule a second opinion evaluation for her to attend on March 24, 2014 as the Board and OWCP cannot have simultaneous jurisdiction. OWCP cannot issue decisions on issues that are before the Board.²⁶ However, the issue before the Board is whether OWCP properly suspended appellant's entitlement to compensation benefits for failing to undergo the December 21, 2012 scheduled medical examination. As was noted above, the August 19, 2013 OWCP decision encompassed this issue from which appellant timely filed an appeal within 180 days of its issuance. This is the only suspension decision properly before the Board. Thus, the Board has no jurisdiction over any subsequently-acquired examinations on this appeal.²⁷

Appellant requests that the Board to transfer jurisdiction of her case. As discussed previously, the Board's jurisdiction is limited to final decisions of OWCP issued with 180 days of an appeal to the Board. Thus, the Board does not have the jurisdiction to instruct OWCP to transfer her claim.

CONCLUSION

The Board finds that appellant failed to establish entitlement to wage-loss compensation for the period September 9 to October 8, 2011 causally related to her accepted February 9, 2011 employment injury. The Board further finds that OWCP met its burden of proof to suspend appellant's compensation benefits in accordance with 5 U.S.C. § 8123 of FECA on the grounds that she refused to cooperate with a scheduled medical examination on December 21, 2012.

²⁵ See 20 C.F.R. § 501.3(e).

²⁶ See *Douglas E. Billings*, 41 ECAB 880 (1990); see also 20 C.F.R. § 501.2(c)(3).

²⁷ See 20 C.F.R. § 501.2(c). Appellant has 180 days from the issuance of any final adverse decisions issued by OWCP.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 11 and August 19, 2013 are affirmed.

Issued: May 21, 2014
Washington, DC

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

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

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