



the grounds that she refused to cooperate with a scheduled medical examination under OWCP File No. xxxxxx368 in Docket No. 15-92.

On appeal, counsel asserts in OWCP File No. xxxxxx238, Docket No. 14-933, that the impartial medical examiner's opinion is insufficiently rationalized to constitute the special weight of the medical opinion evidence and resolve the conflict. In OWCP File No. xxxxxx368, Docket No. 15-92, he asserts that appellant provided medical evidence showing that she was medically unable to travel to the scheduled medical appointment.

### **FACTUAL HISTORY**

These matters have previously been before the Board. On November 17, 2000 appellant, then a 34-year-old clerk, filed an occupational disease claim alleging that on October 23, 2000 she experienced cervical and shoulder problems secondary to her clerk duties. OWCP assigned OWCP File No. xxxxxx368 and accepted the condition of cervical radiculopathy and approved right shoulder arthroscopy, which was performed on November 19, 2002 and an anterior cervical discectomy, which was performed on August 31, 2004.

Appellant suffered a second employment injury on October 20, 2007. OWCP assigned OWCP File No. xxxxxx238 and accepted aggravation of cervical radiculopathy. On February 14, 2008 OWCP combined the two file numbers, with File No. xxxxxx238 serving as the master file number.

Under OWCP File No. xxxxxx238, the Board, in a December 12, 2011 decision, set aside a September 28, 2010 OWCP decision denying a recurrence claim.<sup>2</sup> The Board found an unresolved conflict in the medical opinion evidence between appellant's treating physicians, Drs. Gordon D. Donald and Cary D. Glastein, Board-certified orthopedic surgeons, and OWCP's referral physician, Dr. David I. Rubinfeld, a Board-certified orthopedic surgeon, as to whether appellant's claim should be expanded to include a lumbar condition and whether she sustained a recurrence of disability beginning May 10, 2008.

Thereafter, in a June 17, 2013 decision, the Board set aside a July 17, 2012 OWCP decision denying authorization for right shoulder surgery.<sup>3</sup> The Board also found there was an unresolved conflict in the medical opinion evidence between appellant's physician, Dr. Daniel J. Mulholland, a Board-certified orthopedic surgeon, and OWCP's physicians, Dr. Kenneth P. Heist, a Board-certified osteopathic orthopedic surgeon, and Dr. Aldo Iulo, a Board-certified orthopedic surgeon, regarding whether appellant's request for right shoulder surgery should be authorized. The facts and circumstances of the case as set forth in the Board's prior decisions under both OWCP file numbers are incorporated herein by reference.

On March 8, 2012 OWCP, under OWCP File No. xxxxxx238, referred appellant to Dr. Ian Fries, a Board-certified orthopedic surgeon, to resolve the conflict between Drs. Donald

---

<sup>2</sup> Docket No. 11-565 (issued December 12, 2011).

<sup>3</sup> Docket No. 13-230 (issued June 17, 2013).

and Glastein, appellant's physicians, and Dr. Rubinfeld, an OWCP referral physician, as to whether appellant's claim should be expanded to include a lumbar condition and whether she sustained a recurrence of disability beginning May 10, 2008.

On March 20, 2012 Dr. Fries recommended a functional capacity evaluation (FCE), which was performed on April 2, 2012. In a subsequent May 17, 2012 report, he based his opinion upon a review of the medical evidence, FCE, statement of accepted facts (SOAF) and physical examination. Dr. Fries provided a summary of appellant's claimed recurrence and injury history as well as a detailed summary of the medical reports and objective tests he reviewed. He also reviewed and provided a summary of OWCP's decisions and appellant's request for reconsideration. Diagnoses included: resolved C5-6 radiculopathies; anterior C3-4 and C4-5 decompression and fusion for multilevel degenerated cervical spondylosis; right shoulder arthroscopic surgery for frayed rotator cuff, impingement and a hypermobile and arthritic acromioclavicular joint with residual acromioclavicular clicking; right interscapular and trapezius myalgias, chronic opioid pain maintenance; and isthmic spondylolisthesis and degeneration. Physical examination revealed tenderness on palpation of right distal clavicle and right interscapular tenderness. Range of motion for cervical flexion was 30 degrees, 10 degrees cervical extension, 40 degrees right rotation, 60 degrees left rotation, 20 degrees left bending, and 30 degrees right bending. Dr. Fries reported appellant's bilateral shoulder range of motion as 150 degrees forward flexion while complaining of low back pain, 170 degrees reaching in abduction, 30 degrees extension, 90 degrees external rotation, 100 degrees abduction, 50 degrees right internal rotation, 70 degrees left internal rotation, 30 degrees right adduction, and 40 degrees left adduction. An examination of appellant's lumbar spine revealed tenderness over the superior posterior iliac crest mid scapular line, some lumbosacral area soreness, pain pointing in the right lower paralumbar area, and generalized soreness over lower lumbar spine and posterior pelvis, more somewhat on the left rather than the right sacroiliac joint area. Dr. Fries reviewed the April 2, 2012 FCE report and noted that she exhibited overall decreased strength and better range of neck motion and lifting.

A May 14, 2012 electromyographic test of appellant's upper extremities and neck were normal as there were no abnormalities in the paracervical muscles or bilateral upper extremities. Dr. Fries opined that appellant's L5-S1 spondylolisthesis back pain was not work related as this is a spontaneous condition and was first documented in 1999. He also opined that any work-related aggravation was speculative. In concluding, Dr. Fries opined that appellant no longer had any residuals of her accepted cervical radiculopathy or any aggravation of cervical radiculopathy. He also opined that her lumbar spine condition and symptoms were not caused or aggravated by her employment.

By decision dated June 22, 2012, OWCP denied appellant's recurrence claim under OWCP File No. xxxxxx238. It also denied her request to expand her claim to include a lumbar condition. In reaching these determinations, OWCP found that Dr. Fries' opinion as the impartial medical examiner constituted the special weight of the evidence.

In a letter dated June 29, 2012, counsel requested an oral hearing before an OWCP hearing representative of the June 22, 2012 OWCP decision under File No. xxxxxx238. The oral hearing was held on October 24, 2012.

By decision dated January 15, 2013, under OWCP File No. xxxxxx238, the hearing representative vacated the June 22, 2012 decision and remanded for further development of the evidence. He found that, while Dr. Fries provided a lengthy analysis of the medical and factual evidence, his report contained very little analysis on the issues posed to him by OWCP.

In a February 15, 2013 supplemental report, Dr. Fries opined that appellant's lumbar condition was not caused or aggravated by her work injury based on the lack of supporting objective or subjective findings. He also concluded that her recurrence of disability beginning May 10, 2008 was unrelated to her accepted work injury.

By decision dated May 15, 2013, OWCP denied recurrence under OWCP File No. xxxxxx238.

By letter dated May 17, 2013, counsel requested an oral hearing before the hearing representative under OWCP File No. xxxxxx238. The hearing was held on August 29, 2013.

On July 24, 2013, under OWCP File No. xxxxxx368, OWCP referred appellant to Dr. Michael Gordon, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Mulholland, appellant's physician, and Drs. Heist and Iulo, for OWCP, on the issue of whether appellant's request for right shoulder surgery should be authorized.<sup>4</sup> The appointment was for August 5, 2013 at 2:00 p.m.

By letter dated June 25, 2013, under OWCP File No. xxxxxx368, counsel requested proof that OWCP followed its procedures in the selection of the physician to serve as an impartial medical examiner.

In a letter dated July 30, 2013, counsel submitted a July 22, 2013 report from Dr. Donald indicating that appellant was unable to attend the appointment with Dr. Gordon under OWCP File No. xxxxxx368. He noted that her health problems precluded her from attending the appointment as she was unable to travel such a distance although no actual distance was specified. Counsel requested OWCP to reschedule the appointment with a physician closer to appellant's residence in New Jersey.

In a July 22, 2013 report, Dr. Donald indicated that appellant was unable to travel the distance from her home to Dr. Gordon's office due to her medical conditions. He requested OWCP to reschedule with a physician closer to her home in New Jersey.

In a July 31, 2013 letter, OWCP informed appellant that Dr. Donald's report was insufficient to establish that she was unable to attend the scheduled appointment. It stated that he did not identify her medical conditions nor provide a rationalized opinion explaining her inability to travel to the appointment.

---

<sup>4</sup> Initially OWCP, in a July 17, 2013 letter, had scheduled appellant's appointment with Dr. Gordon for August 5, 2013 at 9:30 a.m. The location noted in the July 17, 2013 letter was 11 Broadway, Suite 540, New York, NY 10004 while the address in the July 24, 2013 letter was 150 Broadway, Suite 1817, New York, NY 10038.

On August 6, 2013 OWCP was informed that appellant did not show up for the appointment with Dr. Gordon.

On August 7, 2013 OWCP, in OWCP File No. xxxxxx368, issued a notice proposing to suspend appellant's compensation on the grounds that she failed to appear for the examination with Dr. Gordon on August 5, 2013. 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. Gordon.

Under OWCP File No. xxxxxx368, OWCP issued a decision on August 22, 2013 which finalized the proposed suspension effective that day. It found that appellant did not attend the scheduled appointment on August 5, 2013. OWCP informed her that wage-loss compensation would be reinstated after attendance and full cooperation with an examination.

On August 26, 2013 OWCP, in OWCP File No. xxxxxx368, received an August 22, 2013 report from Dr. Donald responding to its July 31, 2013 letter. Dr. Donald stated that appellant did not attend the scheduled examination with Dr. Gordon as she believed his opinion that she was unable to travel to an appointment was sufficient to warrant the rescheduling of an appointment closer to her home. He noted that it would take her approximately an hour and a half to travel the 70 miles from her home to Dr. Gordon's Manhattan office. Dr. Donald noted that appellant was only able to tolerate sitting for 30 to 45 minutes. Diagnoses included cervical herniated disc with radiculopathy and lumbar internal disc disruption superimposed on spondylolisthesis and radiculopathy as well as spinal lumbar stenosis. Dr. Gordon related that appellant had L4-5 herniated discs and a titanium plate in her neck.

By letter dated August 27, 2013, counsel requested an oral hearing before an OWCP hearing representative on the August 22, 2013 decision under OWCP File No. xxxxxx368, which was held on January 13, 2014.

On November 21, 2013 under OWCP File No. xxxxxx238, the hearing representative affirmed the denial of appellant's claim for a recurrence of disability beginning May 10, 2008.<sup>5</sup>

In a January 8, 2014 report, Dr. Donald reiterated his opinion that appellant's medical restrictions precluded her from attending the scheduled appointment with Dr. Gordon. He stated that appellant was unable to tolerate prolonged periods of sitting particularly driving, due to increased lower back and neck pain which was attributable to her accepted employment injuries.

By decision dated March 11, 2014, the hearing representative affirmed the August 22, 2013 decision in OWCP File No. xxxxxx368.

---

<sup>5</sup> The Board notes that, following the November 21, 2013 decision in OWCP File No. xxxxxx238, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

## LEGAL PRECEDENT -- ISSUE 1

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish, by the weight of the reliable, probative, and substantial evidence, a recurrence of disability and to show that he or she cannot perform such light duty.<sup>6</sup> As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.<sup>7</sup>

A recurrence of disability is defined as the inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>8</sup> The Board has held that whether a particular injury causes an employee to be disabled for work is a medical question that must be resolved by competent and probative medical evidence.<sup>9</sup> The weight of medical opinion is determined on the report of a physician, who provides a complete and accurate factual and medical history, explains how the claimed disability is related to the employee's work and supports that conclusion with sound medical reasoning.<sup>10</sup>

For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship.<sup>11</sup>

Section 8123(a) of FECA<sup>12</sup> provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>13</sup> The implementing regulations provide in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint

---

<sup>6</sup> *K.C.*, Docket No. 08-2222 (issued July 23, 2009); *Richard A. Neidert*, 57 ECAB 474 (March 10, 2006).

<sup>7</sup> *C.S.*, Docket No. 08-2218 (issued August 7, 2009); *Joseph D. Duncan*, 54 ECAB 471 (2003); *Roberta L. Kaamoana*, 54 ECAB 150 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>8</sup> 20 C.F.R. § 10.5(x). *See S.F.*, 59 ECAB 525 (2008); *Albert C. Brown*, 52 ECAB 152 (2000); *Terry R. Hedman*, *id.*

<sup>9</sup> *See R.C.*, 59 ECAB 546 (2008); *Carol A. Lyles*, 57 ECAB 265 (2005); *Donald E. Ewals*, 51 ECAB 428 (2000).

<sup>10</sup> *See C.S.*, *supra* note 7; *Sandra D. Pruitt*, 57 ECAB 126 (2005).

<sup>11</sup> *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

<sup>12</sup> 5 U.S.C. § 8123(a).

<sup>13</sup> *Id.*; *see J.J.*, Docket No. 09-27 (issued February 10, 2009); *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Geraldine Foster*, 54 ECAB 435 (2003).

a third physician who shall make an examination.”<sup>14</sup> Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.<sup>15</sup>

### ANALYSIS -- ISSUE 1

As the prior Board decision found, there was a conflict in the medical evidence as to the issue of an employment-related recurrence of disability on and after May 10, 2008 and whether appellant’s claim should be expanded to include a lumbar condition.

In the Board’s prior decision, the requirement that a physician’s opinion must be accompanied by medical rationale was clearly stated. With respect to a recurrence of disability as of May 10, 2008, Dr. Fries stated in his May 17, 2012 report that appellant’s recurrence of May 10, 2008 was unrelated to her accepted employment injury and that her lumbar condition was not employment related. However, his opinions were not accompanied by any supporting explanation or discussion of evidence that would constitute medical rationale. Dr. Fries did not refer to evidence as to the time period in question or explain why he did not believe there was a recurrence of total disability. OWCP requested that he provide a supplemental report with supporting rationale. In his February 15, 2013 supplemental report, Dr. Fries briefly stated that appellant’s lumbar condition was not employment related due to the lack of objective and subjective findings with no discussion or supporting rationale. While he provided a detailed summary of the medical and factual evidence in his May 12, 2012 report, the Board finds that his brief remarks are insufficiently rationalized. Dr. Fries also failed to provide any supporting rationale or clarification in his supplemental report as to why he believed appellant did not sustain a recurrence of disability on May 10, 2008 or why her claim should not be expanded to include a lumbar condition.

As Dr. Fries’ clarification of his opinion was insufficient to resolve the conflict evidence on this issue, the case will be referred to a new impartial medical specialist to obtain a reasoned opinion as to whether appellant sustained a recurrence of total disability on May 10, 2008 as claimed and whether her claim should be expanded to include a lumbar condition.<sup>16</sup> As the Board stated in its prior decision, resolving this issue is essential to the proper adjudication of this claim. Following this and any other development deemed necessary, OWCP will issue a *de novo* decision in the case.

On appeal, counsel argues that the reports by Dr. Fries are insufficiently rationalized and thus cannot constitute the weight of the medical opinion evidence. As discussed above, the Board agrees that Dr. Fries’ opinion does not constitute the special weight of the medical opinion

---

<sup>14</sup> 5 U.S.C. § 8123(a); *see also R.H.*, 59 ECAB 382 (2008); *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

<sup>15</sup> *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

<sup>16</sup> *Guiseppe Aversa*, 55 ECAB 164 (2003).

evidence generally afforded to an impartial medical examiner due to his lack of clarity and supporting rationale.

### **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.<sup>17</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>18</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>19</sup> 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.<sup>20</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>21</sup> If good cause for the refusal or obstruction is not established entitlement to compensation is suspended in accordance with section 8123 of FECA.<sup>22</sup>

### **ANALYSIS -- ISSUE 2**

OWCP scheduled an impartial medical examination on August 5, 2013 at 2:00 p.m. in New York, NY with Dr. Gordon. Appellant did not appear for the scheduled examination. By decision dated August 22, 2013, OWCP suspended her compensation effective August 22, 2013 for failure to attend the scheduled examination. On March 11, 2014 the hearing representative affirmed the August 22, 2013 decision. The Board finds that OWCP properly suspended appellant's compensation for failure to attend a medical examination on August 5, 2013.

On July 24, 2013 OWCP notified appellant that she was being referred for an impartial medical examination to resolve an existing conflict of medical opinion evidence as directed by the Board. It informed her of her obligations to attend and cooperate. The notice clearly explained that appellant's compensation benefits would be suspended for failure to report to or

---

<sup>17</sup> *Supra* note 14.

<sup>18</sup> *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).

<sup>19</sup> 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).

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

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

<sup>22</sup> *See J.C.*, *supra* note 19; *Dana D. Hudson*, *id.*; *Scott R. Walsh*, 56 ECAB 353 (2005).

for obstruction of the examination. OWCP advised her of the date and time of her scheduled August 5, 2013 appointment with Dr. Gordon. Appellant was also provided with Dr. Gordon's address and telephone number. As noted, she did not appear for the appointment nor did she attempt to reschedule the appointment prior to the designated time. Appellant's refusal to submit to the medical examination warrants suspension of entitlement to compensation unless she can establish good cause for her failure to report at the scheduled time.<sup>23</sup>

The Board finds that appellant did not establish good cause for her failure to report to the scheduled examination with Dr. Gordon. By letter dated July 31, 2013, OWCP informed her that Dr. Donald's report was insufficient to establish that she was unable to attend the scheduled appointment. It notified appellant on August 7, 2013 that it proposed a suspension of her entitlement to compensation benefits. Appellant was given 14 days to submit a valid reason for her failure to attend the scheduled medical appointment. No evidence was submitted within the 14 days.

Appellant argued that Dr. Donald's July 22 and August 22, 2013 reports are sufficient to establish that she was medically unable to travel the 70 miles to see Dr. Gordon as she should not sit for more than 30 to 45 minutes at a time. The Board finds that Dr. Donald's objection to appellant driving 70 miles to the scheduled examination is not a valid excuse to refuse to attend an impartial medical examination. Appellant did not submit any medical or factual showing her inability to get to the appointment by any other mode of transportation or that she could take breaks in her driving to the scheduled appointment.

Appellant has not submitted sufficient evidence to establish that she was incapable of attending the scheduled medical examination. The Board, therefore, finds that OWCP properly suspended her right to compensation benefits effective August 22, 2013.

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.

On appeal, counsel argues that OWCP erred in suspending her compensation benefits pursuant to section 8123(d) as she provided medical evidence showing that the scheduled appointment was outside her ability to travel. As noted above there was no evidence showing that appellant was unable to take breaks in traveling or could not take some other mode of transportation to the schedule appointment.

### **CONCLUSION**

The Board finds that the case in OWCP File No. xxxxxx238, in Docket No. 14-933, is not in posture for decision on the issues of appellant's recurrence claim and expansion of her claim to include a lumbar condition. The Board further finds that in OWCP File No. xxxxxx368, in Docket No. 15-92, OWCP met its burden of proof to suspend appellant's compensation

---

<sup>23</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluation Medical Evidence*, Chapter 2.810.13(e) (September 2010); 20 C.F.R. § 10.320.

benefits due to her refusal to cooperate with a scheduled medical examination, pursuant to 5 U.S.C. § 8123(d).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 21, 2013 in OWCP File No. xxxxxx238, Docket No. 14-933, is set aside and the case remanded for further proceedings consistent with the above opinion. The decision of OWCP dated March 11, 2014 in OWCP File No. xxxxxx368, Docket No. 15-92, is affirmed.

Issued: April 15, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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