

repetitive federal employment duties. OWCP accepted the claim for bilateral tenosynovitis of hand and wrist, and bilateral sprain of wrist. Appellant stopped work in December 2002.

On January 28, 2008 appellant filed a claim for a schedule award (Form CA-7).

In support of his claim, appellant submitted an April 8, 2008 medical report from Dr. James Templin, his treating physician, who performed a medical evaluation and calculated 20 percent impairment of the right upper extremity and 11 percent impairment of the left upper extremity according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*).² The date of maximum medical improvement (MMI) was noted as December 12, 2005.

OWCP routed Dr. Templin's report, a statement of accepted facts and the case file to Dr. Robert W. Wysocki, an OWCP medical adviser and Board-certified orthopedic surgeon, for an opinion on permanent impairment of the upper extremities. In a May 16, 2008 medical report, Dr. Wysocki reported that appellant had not reached MMI as surgery had been recommended.

By decision dated May 29, 2008, OWCP denied appellant's claim for a schedule award finding that the evidence was insufficient to establish that he had reached maximum medical improvement. Appellant requested reconsideration of the decision by letter dated June 17, 2008, claiming that maximum medical improvement could be declared even if appellant refused surgery.

By letter dated June 25, 2008, OWCP vacated the May 29, 2008 decision and routed the case file to an OWCP medical adviser for an opinion on permanent impairment. Appellant submitted a request for oral hearing on June 29, 2008, but by letter dated August 6, 2008 the Branch of Hearings and Review denied the request for hearing as it was not in posture for decision.

In a July 2, 2008 report, Dr. Amon Ferry, an OWCP medical adviser and Board-certified orthopedic surgeon, opined that appellant had reached MMI on December 12, 2005 and sustained 14 percent impairment of the right upper extremity and 5 percent impairment of the left lower extremity based on the fifth edition of the A.M.A., *Guides*.

Appellant submitted a January 22, 2009 report from Dr. John W. Ellis, Board-certified in family medicine. Using the fifth edition of the A.M.A., *Guides*, Dr. Ellis calculated 27 percent impairment of the right upper extremity and 29 percent impairment of the left lower extremity. He stated that the date of MMI was December 2003, one year after appellant stopped work.

In an August 13, 2009 report, Dr. Joshua D. Warach, a Board-certified neurologist, provided electromyography (EMG) and nerve conduction velocity (NCV) findings pertaining to appellant's neurologic examination on that date.

² (5th ed. 2001).

OWCP referred appellant and the case file to Dr. Joseph Newcomer, a Board-certified orthopedic surgeon, for a second opinion examination to determine the extent of permanent partial impairment according to the sixth edition of the A.M.A., *Guides*.³ In his December 11, 2009 second opinion evaluation, Dr. Newcomer opined that appellant had no permanent impairment to the left and right upper extremities because his condition had not reached maximum medical improvement. He found that appellant's condition was not permanent as there remained the possibility of improvement. Dr. Newcomer further found appellant's complaints during examination to be an exaggeration of his condition.

OWCP routed the case file to Dr. David H. Garelick, an OWCP medical adviser and Board-certified orthopedic surgeon, for an opinion on permanent impairment. In an August 16, 2010 medical report, Dr. Garelick recommended a functional capacity evaluation to detect the validity of appellant's condition due to the contrary findings of Dr. Ellis and Dr. Newcomer. He determined that MMI and permanent impairment could not be determined until appellant submitted for an additional examination.

On September 17, 2010 OWCP referred appellant, a statement of accepted facts, the case file, a medical conflict statement and a series of questions to Dr. Stephen F. Weiss, a Board-certified orthopedic surgeon, for an impartial referee medical examination to resolve the conflict on permanent impairment between Dr. Ellis and Dr. Newcomer.

By letter dated October 13, 2010, OWCP informed appellant that his referee appointment was scheduled for November 16, 2010 at 9:00 a.m. at Dr. Weiss' office located at 2951 Montvale Drive, Suite A, Springfield, Illinois 62704. It informed appellant of the consequences of refusing or obstructing the examination.

On November 16, 2010 Dr. Weiss' office notified OWCP that appellant had cancelled his appointment.

By letters dated December 2 and 7, 2010, OWCP informed appellant that his appointment with Dr. Weiss had been rescheduled for January 4, 2011 at 10:00 a.m. It further informed him of the consequences of refusing or obstructing the examination.

By letter dated December 21, 2010, appellant reported that he would not be attending his appointment with Dr. Weiss, stating that OWCP did not have the medical authority to schedule his appointments.

By decision dated April 30, 2014, OWCP found that appellant failed to appear for the referee examination to resolve the conflict in medical opinion between Dr. Ellis and Dr. Newcomer. It found that his claim for a schedule award was therefore denied as he had not met the requirements to receive a schedule award.

³ A.M.A., *Guides* (2009).

LEGAL PRECEDENT

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 regulations provide that a claimant must submit to an examination by a qualified physician as often and at such times and places as it considers reasonably necessary.⁶ Section 8123(d) of FECA and OWCP regulations provide that, if an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction ceases.⁷ OWCP procedures provide that, before it may invoke these provisions, the employee is to be provided a period for 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

The Board has previously found that these sections of FECA and the regulations do not provide a basis for the rejection of a claim for compensation; rather they suspend the right of an employee to compensation during the period he refuses to submit to an examination.¹⁰

ANALYSIS

OWCP directed appellant to attend a referee medical evaluation with Dr. Weiss, a Board-certified orthopedic surgeon. It found a conflict of medical opinion evidence between Dr. Ellis, appellant's physician and Dr. Newcomer, the second opinion physician, regarding the extent of appellant's impairment for schedule award purposes. OWCP referenced the August 16, 2010 report from Dr. Garelick, serving as OWCP medical adviser, who opined that a separate examination was required due to conflicting opinions between Dr. Ellis and Dr. Newcomer.

OWCP referred appellant to Dr. Weiss on September 17, 2010. By letter dated October 13, 2010, it informed appellant that his appointment was scheduled for November 16,

⁴ 5 U.S.C. § 8123.

⁵ *J.T.*, 59 ECAB 293 (2008); *S.B.*, 58 ECAB 267 (2007); *James C. Talbert*, 42 ECAB 974 (1991).

⁶ 20 C.F.R. § 10.320.

⁷ 5 U.S.C. § 8123; 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 2.810.13 (September 2010).

⁹ *Id.*

¹⁰ *Karen K. Cassel*, 35 ECAB 1053, 1059 (1984). The Board has also noted that when a claimant refuses or obstructs a medical examination while a claim is under development, the effect of such obstruction merely delays the development of the claim for the period of the obstruction. *Vicki L. McOmber*, Docket No. 03-1031 (issued August 19, 2003).

2010 at 9:00 a.m. at Dr. Weiss' office located at 2951 Montvale Drive, Suite A, Springfield, Illinois 62704. OWCP further informed him of his obligation to attend the examination.

On November 12, 2010 appellant cancelled his scheduled appointment. By letters dated December 2 and 7, 2010, OWCP notified appellant that his appointment had been rescheduled for January 4, 2011 at 10:00 a.m. It further informed him of the consequences of refusing or obstructing the examination. By letter dated December 21, 2010, appellant reported that he would not be attending his appointment with Dr. Weiss, stating that OWCP did not have the medical authority to schedule his appointments.

By decision dated April 30, 2014, OWCP found that appellant failed to appear for the referee examination to resolve the conflict in medical opinion between Dr. Ellis and Dr. Newcomer. It denied his claim for a schedule award as he had not met the requirements to receive a schedule award.

The Board finds that appellant failed to provide good cause for his failure to appear at the referee medical examination with Dr. Weiss on November 16, 2010 and January 4, 2011.¹¹ Appellant argued that OWCP did not have the authority to schedule his medical examinations. However, section 8123 of FECA authorizes OWCP to require an employee to undergo a physical examination as it deems necessary.¹² OWCP regulations also provide that a claimant must submit to an examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary.¹³ Thus, appellant's reason for failing to attend the referee examination does not establish good cause.¹⁴

The Board finds, however, that OWCP did not have the authority to deny appellant's claim for a schedule award based on his obstruction of a scheduled medical examination.¹⁵ The Board has found that section 8123(d) of FECA does not provide a basis for the rejection of a claim for compensation.¹⁶ OWCP may only suspend the right of an employee to compensation during the period he refuses to submit to an examination.¹⁷ Thus, OWCP's denial of appellant's claim for a schedule award was improper. However, the development by OWCP of the schedule award claim is suspended until appellant attends the required referee medical examination.

¹¹ *Phillippe J. Jacquot*, Docket No. 05-480 (issued August 3, 2005).

¹² *Supra* note 4.

¹³ *Supra* note 6.

¹⁴ *See Raymond C. Dickinson*, 48 ECAB 646 (1997) (if good cause is not established for failure to attend a medical examination, entitlement to compensation should be suspended until the claimant reports for examination).

¹⁵ *Jeffrey E. Long*, Docket No. 05-1613 (issued April 7, 2006); *see also supra* note 11.

¹⁶ *See Karen K. Cassel*, *supra* note 10.

¹⁷ *Supra* note 11 and 15; *see also Silas Perkins*, Docket No. 05-1084 (issued December 2, 2005).

CONCLUSION

The Board finds that OWCP improperly denied appellant's claim for a schedule award based on his obstruction of a medical examination. The Board further finds that OWCP's development of appellant's schedule award claim is suspended until his obstruction of the referee medical examination has ended.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 11, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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