

FACTUAL HISTORY

This case has previously been before the Board. On June 17, 2004 appellant, then a 40-year-old clerk, filed an occupational disease claim, Form CA-2, alleging that she sustained right carpal tunnel syndrome due to her employment duties. She noted that she first became aware of this condition on April 7, 2004, but did not realize it was employment related until May 12, 2004. OWCP assigned File No. xxxxxx992 and accepted the claim for right carpal tunnel syndrome and authorized right carpal tunnel release surgery, which was performed on July 16, 2004.³

On May 3, 2010 appellant filed an occupational disease claim alleging that on July 10, 2007 she first became aware that her employment duties caused her carpal tunnel syndrome which had started in her right hand and now was in her left hand.⁴ OWCP assigned claim number xxxxxx374. In a decision dated November 22, 2011, it accepted appellant's claim for left carpal tunnel syndrome.

Appellant filed a claim for intermittent wage-loss compensation during the period April 16, 2010 through April 12, 2011. By decision dated March 19, 2012, OWCP denied the claim. Appellant requested a hearing and an OWCP hearing representative affirmed the denial on September 26, 2012.

Appellant appealed the September 26, 2012 OWCP hearing representative's decision to the Board and by decision dated November 21, 2013, the Board set aside the decision and remanded it for further development.⁵ The Board found that the case was not in posture for a decision as to whether appellant sustained disability for the period April 16, 2010, when she actually stopped work, to April 12, 2011 causally related to her accepted bilateral carpal tunnel syndrome.⁶ The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.

In a letter dated November 26, 2013, counsel requested to participate in the selection of an impartial medical specialist, including providing the names of three qualified physicians from which appellant could choose.

On March 6, 2014 OWCP referred appellant to Dr. Stuart Trager, a Board-certified orthopedic surgeon, to resolve the conflict in medical evidence between Dr. Frederick B. Vivino, an attending Board-certified internist with a subspecialty in rheumatology, and Dr. Robert Draper, a second opinion Board-certified orthopedic surgeon, on the issue of whether appellant

³ On November 13, 2006 OWCP granted appellant a schedule award for a 20 percent right upper extremity permanent impairment, which was affirmed by an OWCP hearing representative on May 23, 2007. Appellant appealed to the Board. The Board affirmed the schedule award determination on May 21, 2008, Docket No. 08-189 (issued May 21, 2008).

⁴ On March 3, 2011 OWCP combined claim numbers xxxxxx992 and xxxxxx374 with the latter number designated as the master file number.

⁵ Docket No. 13-578 (issued November 21, 2013).

⁶ Appellant retired from the employing establishment in April 2011.

was totally disabled due to her accepted employment conditions for the period April 16, 2010 through April 12, 2011. The referee examination was scheduled for April 9, 2014 at 4:45 p.m.

By correspondence dated March 20, 2014, counsel requested a response from OWCP to his November 26, 2013 letter.

In a letter dated March 21, 2014, counsel requested that OWCP provide proof that Dr. Trager was properly selected to serve as an impartial medical examiner. Specifically, he requested OWCP to provide copies of the letter to the referee physician, statement of accepted facts, the ME023 referral letter, and any bypass screen shots.

By letter dated March 26, 2014, appellant's counsel informed OWCP that appellant would be unable to attend the April 9, 2014 appointment with Dr. Trager as she would be in rehabilitation following major lumbar surgery. He requested that OWCP reschedule the appointment with Dr. Trager.

In a March 27, 2014 letter, OWCP provided counsel with a copy of the bypass screen shots and ME023 schedule appointment pages. It also informed him that it would reschedule the referee appointment once information regarding the type and date of surgery was provided.

In an April 10, 2014 memorandum to file, OWCP noted that appellant did not appear for her scheduled medical appointment on April 9, 2014 with Dr. Trager.

By letter dated April 16, 2014, OWCP proposed to suspend appellant's compensation benefits on the grounds that she failed to report for a medical examination scheduled for April 9, 2014. It allowed her 14 days to provide good cause for her failure to submit or cooperate with the referee examination and informed her of the penalty provision of section 8123(d) of FECA. This correspondence was also sent to appellant's counsel.

In a letter dated April 22, 2014, counsel informed OWCP that appellant underwent major lumbar surgery on March 26, 2014. He requested that OWCP reschedule appellant's appointment with Dr. Trager.

On April 30, 2014 OWCP sent appellant a letter notifying her that the referee examination was rescheduled for May 14, 2014 at 4:45 p.m.

In a May 21, 2014 memorandum to file, OWCP noted that appellant failed to attend the rescheduled appointment with Dr. Trager on May 14, 2014. Due to her failure, it indicated that "the remand of January 14, 2014 is closed."

By decision dated May 21, 2014, OWCP finalized the proposed suspension of compensation, finding that appellant failed to attend the medical examination scheduled for May 14, 2014 and did not establish good cause for refusing to submit to the examination. It noted that on March 3, 2014 appellant was directed to report for examination by Dr. Trager on April 9, 2014 but failed to attend the appointment. OWCP noted that, by letter dated April 16, 2014, appellant was provided with 14 days to provide written evidence justifying her failure to attend the examination. It rescheduled appellant's appointment with Dr. Trager based on counsel's April 22, 2014 request. By letter dated April 20, 2014, appellant was directed to report

for a rescheduled appointment with Dr. Trager on May 14, 2014 but failed to attend the appointment. The suspension was effective May 21, 2014. OWCP informed appellant that the remand from the Board was closed and no further action would be taken due to her failure to attend the scheduled examination to resolve the issue on remand.

In a letter dated May 15, 2014 and received on May 23, 2014, appellant related that she mistakenly wrote down May 15, 2014 and went to see Dr. Trager that day instead of May 14, 2014, which was the correct date of the appointment.

In correspondence dated May 27, 2014, counsel requested an oral hearing before an OWCP hearing representative, which was held on October 27, 2014.

By decision dated December 9, 2014, an OWCP hearing representative affirmed the May 21, 2014 decision.

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.⁷ 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.⁸ 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.⁹ Section 8123(d) of FECA and section 10.323 of OWCP regulations provide that, if an employee refused to submit to or obstructs a directed medical examination, her compensation is suspended until the refusal or obstruction ceases.¹⁰ However, before OWCP may invoke these provisions, the employee is provided a period of 14 days within which to present in writing her reasons for the refusal or obstruction.¹¹ If good cause for the refusal or obstruction is not established entitlement to compensation is suspended in accordance with section 8123 of FECA.¹²

⁷ 5 U.S.C. § 8123(a).

⁸ *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).

⁹ 20 C.F.R. § 10.320. *See J.C.*, Docket No. 09-609 (issued January 5, 2010); *J.T.*, *supra* note 8; *Walter L. Jordan*, 57 ECAB 218 (2005).

¹⁰ 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).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluation Medical Evidence*, Chapter 2.810.13(d) (September 2010). *See Dorothy Dillard*, 53 ECAB 688 (2002) (OWCP's failure to provide presuspension notification constitutes reversible error).

¹² *See J.C.*, *supra* note 9; *Dana D. Hudson*, *supra* note 8; *Scott R. Walsh*, 56 ECAB 353 (2005),

ANALYSIS

OWCP provided appellant with written notification on March 6, 2014 that she was scheduled to attend an impartial medical examination with Dr. Trager. On April 16, 2014 OWCP notified appellant that her appointment with Dr. Trager had been rescheduled for May 14, 2014.

Appellant did not attend the rescheduled May 14, 2014 examination. OWCP, however, suspended compensation effective May 21, 2014 without first providing appellant a written presuspension notification. While it previously advised appellant of the consequences under 5 U.S.C. § 8123(d) of refusing to submit to or obstructing an examination, the prior notification dated March 6, 2014 was vacated on April 30, 2014 when OWCP rescheduled appellant's April 9, 2014 appointment with Dr. Trager. The March 6, 2014 notice pertained to an April 9, 2014 examination that appellant did not attend, and which OWCP subsequently excused her failure to attend.

Based on the March 6, 2014 notice, appellant was aware of the potential consequences of her failure to attend the May 14, 2014 examination. However, the purpose of the presuspension notification is two-fold. It not only advises an employee of the potential consequences of her acts, but also provides the employee a prescribed timeframe (14 days) within which to explain her failure to appear. Assuming the employee responds in a timely fashion, OWCP must then determine if good cause exists for the failure to appear.

As cited by counsel, this case is similar to *R.C.*,¹³ where the Board found that OWCP failed to follow its procedures because it did not provide appellant with a presuspension notification when he did not appear for his rescheduled examination. The Board found that although the presuspension notification was not mandated either by FECA or its implementing regulations, OWCP afforded claimants certain procedural rights *via* the Federal (FECA) Procedure Manual.¹⁴ Thus, the Board pointed out that the issuance of a presuspension notice was a necessary action despite the fact that appellant was aware of the potential consequences for failing to appear for the scheduled examination as he did not attend the first scheduled examination.

Similarly, in the instant case, appellant was apprised of the potential consequences for failing to appear for the first scheduled examination on April 9, 2014. However, OWCP did not request that appellant provide an explanation for her May 14, 2014 absence. As stated above, although the presuspension notification is not specifically required either by FECA or the regulations, OWCP has committed to providing claimants certain procedural rights as outlined in its procedures.¹⁵ Because of OWCP's failure to abide by its own procedures, the Board finds that the May 21, 2014 suspension of compensation under 5 U.S.C. § 8123(d) was improper.

¹³ *Supra* note 2.

¹⁴ *See supra* note 11.

¹⁵ *Id.*

CONCLUSION

The Board finds that OWCP failed to provide appellant with a pre-suspension notification and an opportunity to explain her failure to attend the May 14, 2014 scheduled examination. Because of this procedural defect, OWCP improperly invoked the sanction provided under 5 U.S.C. § 8123(d).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 9, 2014 is reversed.

Issued: September 28, 2015
Washington, DC

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

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

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