

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

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M.P., Appellant)	
)	
and)	
)	Docket No. 17-1747
)	Issued: April 18, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
London, KY, Employer)	
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Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 9, 2017 appellant, through counsel, filed a timely appeal from a May 23, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has established more than nine percent permanent impairment of the right upper extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On October 4, 2006 appellant, then a 50-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that she injured her back, neck, shoulders, and head on September 22, 2006 when her vehicle was rear-ended while in the performance of duty. She stopped work on the date of injury. Appellant returned to part-time modified duty on November 13, 2006. OWCP accepted the claim for sprain of neck and sprain of back, lumbar region and paid intermittent compensation on the supplemental rolls from November 7, 2006 and on the periodic rolls from July 29, 2012. It subsequently accepted the conditions of sprain of back, thoracic, degeneration of thoracic or thoracolumbar, intervertebral disc, sprain of shoulder and upper arm, unspecified site, right, thoracic outlet compression, mononeuritis multiplex, myofasciitis, and shoulder bursitis, right.

On September 29, 2011 Dr. Erdogan Atasoy, a Board-certified general surgeon, performed authorized right upper extremity surgery including carpal and cubital tunnel releases. Appellant returned to modified duty four hours daily on March 14, 2012. She stopped work on June 20, 2012 and was placed on the periodic compensation rolls. In a July 19, 2012 report, Dr. Atasoy diagnosed thoracic outlet syndrome and recommended additional surgery. A September 24, 2013 right upper extremity electromyograph and nerve conduction velocity study was essentially normal with no supportive evidence for median or ulnar nerve neuropathy on the right side.

By decision dated November 20, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits effective that day.³ Appellant, through counsel, timely requested a hearing before an OWCP hearing representative.

On February 20, 2014 appellant filed a schedule award claim (Form CA-7).

By development letter dated May 15, 2014, OWCP informed appellant of the evidence needed to support her claim. Appellant was afforded 30 days to submit the necessary evidence.

In a May 6, 2014 report, received by OWCP on June 4, 2014, Dr. Atasoy noted that he last saw appellant on March 26, 2013 at which time she continued to have symptoms of thoracic outlet compression and distal nerve irritation, and evidence of degenerative disc disease. He noted that an electrodiagnostic study done in 2013 demonstrated cubital tunnel syndrome and he recommended a second opinion consultation. Dr. Atasoy also forwarded treatment notes dated November 13, 2009 to March 26, 2013.

³ OWCP credited the opinion of Dr. Kirpal S. Sidhu, a Board-certified orthopedic surgeon, who provided a second-opinion evaluation.

On June 5, 2014 counsel requested that the acceptance of the claim be expanded to include bilateral thoracic outlet compression, multiple distal nerve irritation, and associated upper back myofascitis.⁴

In a July 11, 2014 report, Dr. James W. Dyer, a Board-certified orthopedic surgeon and OWCP's medical adviser, advised that, due to the complex issues with the upper extremity, appellant should undergo a second-opinion evaluation. He suggested various physicians by name to conduct a second-opinion examination.

By decision dated August 1, 2014, OWCP denied appellant's schedule award claim.

In an August 5, 2014 decision, an OWCP hearing representative affirmed the November 20, 2013 decision terminating appellant's medical benefits and wage-loss compensation.

On August 11, 2014 appellant, through counsel, requested a hearing before an OWCP hearing representative from the August 1, 2014 decision denying her schedule award claim.

In a February 6, 2015 decision, an OWCP hearing representative noted that she had conducted a preliminary merit review. She set aside the August 1, 2014 decision and remanded the case for OWCP to obtain a supplemental report from its medical adviser, Dr. Dyer, for an opinion as to whether appellant had permanent impairment to a scheduled member, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009).⁵

In a February 17, 2015 report, Dr. Dyer advised that, in accordance with Tables 15-3 and 15-23, of the A.M.A., *Guides*, appellant had nine percent right upper extremity permanent impairment with July 19, 2012 the date of maximum medical improvement.

By letter dated March 17, 2015, OWCP informed appellant that it had also accepted right carpal tunnel syndrome and ulnar nerve (cubital) release as resulting from the September 22, 2006 employment injury. On March 24, 2015 it granted her a schedule award for nine percent permanent impairment of the right upper extremity.

On April 15, 2015 appellant, through counsel, requested a hearing before an OWCP hearing representative from the March 24, 2015 schedule award decision. By decision dated January 28, 2016, the hearing representative noted that she had submitted no additional evidence and affirmed the March 24, 2015 decision.

Counsel requested reconsideration and forwarded a March 4, 2016 permanent impairment evaluation from Dr. Martin Fritzhand, a Board-certified urologist. He advised that, in accordance with Table 15-7, range of motion impairment, for the accepted diagnosis of right shoulder sprain, appellant had five percent permanent impairment due to loss of shoulder motion. Dr. Fritzhand utilized Table 15-23 to assess the accepted right carpal tunnel syndrome and ulnar nerve lesion,

⁴ A hearing was held on June 4, 2014. Appellant submitted additional medical evidence.

⁵ A.M.A., *Guides* (6th ed. 2009).

finding 3 percent permanent impairment for carpal tunnel syndrome and 1.5 percent permanent impairment for lesion of ulnar nerve. He used the Combined Values Chart and concluded that appellant had 10 percent permanent total right upper extremity impairment. Dr. Fritzhand also indicated that, for the accepted lumbar spine conditions, under Table 16-11 she had a severity level of 3 sensory deficit. He then used proposed Table 2, finding a class 1 impairment of S1, for four percent permanent impairment of each lower extremity.

On November 14, 2016 OWCP asked its medical adviser to review Dr. Fritzhand's report and provide an opinion regarding appellant's employment-related impairment. In a November 27, 2016 report, Dr. David Slutsky, Board-certified in orthopedic and hand surgery, OWCP's district medical adviser, related that he could not provide an impairment rating for any of the accepted conditions because he needed additional medical information.

On December 19, 2016 OWCP notified appellant that a second-opinion evaluation would be scheduled for a permanent impairment evaluation. The letter advised appellant that, under section 8123(d) of FECA, an employee's right to compensation was subject to suspension if the employee refused to submit to or obstructed a medical examination. Counsel was provided a copy of the letter. On December 23, 2016 QTC Medical Services notified appellant that an appointment had been scheduled for January 6, 2017 at 3:00 p.m. with Dr. Sidhu. Counsel was copied on the letter. By letter dated January 9, 2017, QTC informed OWCP that appellant did not attend the appointment.

In a merit decision dated January 11, 2017, OWCP denied modification of the prior decisions. It noted that appellant did not attend the scheduled impairment evaluation and concluded that the evidence of record was insufficient to modify the prior schedule award decision.

In correspondence dated February 6, 2017, counsel notified OWCP that appellant did not receive the notice of appointment with Dr. Sidhu until January 19, 2017. He further stated that, as appellant had previously seen Dr. Sidhu, "the law did not permit [appellant's] to see the same [physician] on the same case twice." Counsel asked that QTC select another physician. On February 22, 2017 appellant, through counsel, requested reconsideration. Counsel reiterated that she had not received the notice of appointment until January 19, 2017 and his argument that Dr. Sidhu had not been properly selected.

In a merit decision dated May 23, 2017, OWCP noted that a review of the record showed that medical evidence submitted with a prior reconsideration request was reviewed by its OWCP medical adviser who explained that the record contained insufficient documentation to support entitlement to an additional schedule award. It found that, for further consideration, appellant should provide medical evidence which contained a complete and accurate medical and factual history from a physician, physical examination findings, and provide an impairment rating using *The Guides Newsletter* July/August 2009 for spinal impairments, if the physician believed that she had permanent impairment of her extremities due to her work injury. OWCP concluded that the medical evidence submitted did not support permanent impairment greater than the nine percent previously awarded.

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.⁶ 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.⁷ 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.⁸ 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 stops.⁹ OWCP procedures provide that, before it may invoke these provisions, the employee should be provided a period of 14 days within which to present in writing her reasons for the refusal or obstruction.¹⁰ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.¹¹

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.¹²

ANALYSIS

The Board finds that this case is not in posture for decision.

In this case, by decision dated March 24, 2015, appellant was granted a schedule award for nine percent permanent impairment of the right upper extremity. Dr. Slutsky, the district medical adviser, related on November 27, 2016 that he could not review her permanent impairment rating as further medical evidence was required. OWCP notified appellant that a second-opinion evaluation would be scheduled based upon Dr. Slutsky's finding.

OWCP apprised appellant of the requirements for examination under section 8123(d), which provides that, if an employee refuses to submit to or obstructs an examination, her right to compensation under this subchapter is suspended until the refusal or obstruction stops.¹³ Counsel was provided a copy of the letter. On December 23, 2016 QTC Medical Services, OWCP's scheduling service, notified appellant that an appointment had been scheduled for January 6, 2017

⁶ 5 U.S.C. § 8123.

⁷ *J.T.*, 59 ECAB 193 (2008).

⁸ 20 C.F.R. § 10.320.

⁹ *Id.* at § 10.323; *Dana D. Hudson*, 57 ECAB 298 (2006).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13 (September 2010).

¹¹ *Id.*

¹² *E.K.*, Docket No. 14-1600 (issued August 11, 2015).

¹³ 5 U.S.C. § 8123(d).

at 3:00 p.m. with Dr. Sidhu. Counsel was copied on the letter. By letter dated January 9, 2017, QTC informed OWCP that appellant did not attend the appointment.¹⁴

OWCP procedures provide that, if a claimant does not report for a scheduled appointment, he or she should be asked in writing to provide an explanation within 14 days. If good cause is not established, entitlement to compensation should be suspended in accordance with section 8123(d) of FECA, until the claimant agrees to attend the examination.¹⁵

The Board finds that OWCP improperly denied appellant's request for an additional schedule award. In this case, OWCP did not follow its procedures pursuant to 8123(d) which includes to inform appellant in writing that she had 14 days to explain her failure to attend the examination before denying her claim for an increased schedule award, and suspending compensation until the refusal or obstruction stops.¹⁶ As previously noted, it cannot deny a claim based on failure to attend a scheduled medical examination.¹⁷

While OWCP had determined that a second-opinion evaluation was necessary to determine whether appellant was entitled to an additional schedule award, OWCP in its May 23, 2017 decision denied her schedule award claim based on the evidence of current record. This case will therefore be remanded for OWCP to further develop the record and thereafter issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁴ As a preliminary matter, although counsel asserted that OWCP could not reschedule an appointment with Dr. Sidhu because he had previously examined appellant, there is no prohibition in scheduling multiple second-opinion evaluations with the same physician. Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.810.9 (June 2015).

¹⁵ *Supra* note 10.

¹⁶ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323(a)

¹⁷ *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this opinion.

Issued: April 18, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board