

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

P.B., Appellant	)	
	)	
and	)	Docket No. 17-1426
	)	Issued: June 19, 2018
U.S. POSTAL SERVICE, POST OFFICE,	)	
Iselin, NJ, Employer	)	
	)	

*Appearances:*  
Russell T. Uliase, Esq., for appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On June 16, 2017 appellant through counsel, filed a timely appeal from a February 22, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether OWCP properly suspended appellant's wage-loss compensation and medical benefits, effective September 22, 2016, due to her failure to cooperate with a directed second opinion medical examination.

## FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

OWCP accepted that, on April 3, 2002 appellant, then a 44-year-old letter carrier, sustained internal derangement of the right knee while evading a dog. Following right knee arthroscopy on September 13, 2002 to repair a partial anterior cruciate ligament (ACL) tear, she returned to work in a limited-duty position in October 2002. Dr. Hitesh Patel, an attending Board-certified family practitioner, submitted reports from 2006 through 2009 limiting lifting to 10 pounds and standing to four hours a day.

OWCP subsequently accepted that on September 24, 2009 appellant sustained a closed dislocation of the right shoulder and cervical radiculopathy when she tripped and fell on a floor mat. Appellant stopped work on September 24, 2009, and received compensation for total disability as of November 3, 2009. She returned to light duty for four hours a day on August 31, 2010. Appellant received wage-loss compensation for four hours a day through June 27, 2011. Dr. Patel continued limiting her to working four hours a day, with lifting limited to 10 pounds.

On December 5, 2010 OWCP obtained a second opinion from Dr. David Rubinfeld, a Board-certified orthopedic surgeon, who diagnosed cervical radiculitis and a dislocated right shoulder. In a January 15, 2011 report, Dr. Rubinfeld found appellant able to work eight hours a day, with kneeling limited to three hours, climbing limited to two hours, and lifting to 30 pounds.

In an April 26, 2011 report, Dr. Patel diagnosed internal derangement of the right knee with a meniscal and ACL tear. He found appellant able to work four hours a day, with walking, climbing, and kneeling for up to one hour, and lifting limited to 10 pounds.

On April 28, 2011 the employing establishment offered appellant a full-time job as a modified letter carrier. The position required three hours standing and reaching, six hours walking, four hours lifting, and up to eight hours driving. Lifting was limited to 30 pounds and pushing and pulling to 40 pounds. The employing establishment advised OWCP that appellant refused the position.

By notice dated May 3, 2011, finalized June 28, 2011, OWCP terminated appellant's wage-loss compensation benefits and schedule award entitlement effective that date under 5 U.S.C. § 8106(c) due to her refusal of an offer of suitable work.

Following an oral hearing, by decision dated December 2, 2011, an OWCP hearing representative set aside OWCP's June 28, 2011 termination decision in part. He affirmed the

termination of compensation, but also found a conflict of medical opinion between Dr. Rubinfeld, for the government, and Dr. Patel, for appellant, regarding her injury-related conditions and her work capacity.

On January 20, 2012 OWCP selected Dr. Edward Krisiloff, a Board-certified orthopedic surgeon, as impartial medical examiner. Dr. Krisiloff submitted a March 13, 2012 report, noting a dropped right shoulder, a stable right knee with pain on flexion, and painful cervical spine motion. He found appellant able to work eight hours a day with walking, standing, reaching, and twisting up to six hours, pushing, pulling, and lifting up to 20 pounds for up to four hours, and no climbing. Dr. Krisiloff noted that these restrictions were permanent and pertained to the accepted right knee injury.

On May 2, 2012 the employing establishment offered appellant a full-time position as a modified city carrier, with walking, standing, and reaching up to six hours, and lifting up to 20 pounds for four hours a day. Appellant responded that the position violated her physician's restrictions limiting her to working four hours a day. She submitted a May 2, 2012 duty status report from Dr. Patel, limiting her to four hours of light-duty work per day with lifting up to 10 pounds, sitting and standing for four hours, and walking for one hour.

By decision dated May 29, 2012, OWCP affirmed the termination of appellant's wage-loss compensation benefits and schedule award entitlement as she refused the April 28, 2011 offer of suitable work.

Appellant subsequently requested an oral hearing, held on October 5, 2012. During the hearing, counsel submitted a June 8, 2012 report from Dr. Patel renewing prior restrictions.

By decision dated November 26, 2012, OWCP's hearing representative affirmed the May 29, 2012 termination decision, based on Dr. Krisiloff's opinion as the weight of the medical evidence. Appellant subsequently appealed to the Board.

By decision dated September 18, 2013,<sup>3</sup> the Board reversed OWCP's November 26, 2012 decision, finding that OWCP did not afford appellant's proper due process in terminating her monetary compensation benefits. The Board found that OWCP failed to issue a second notice, after she submitted reasons for refusal on May 2, 2012, affording her 15 days to accept the offered position without penalty.

On remand of the case, OWCP restored payment of appellant's wage-loss compensation, with retroactive payments to May 5, 2012.

Dr. Patel submitted periodic duty status reports from November 15, 2013 to June 27, 2014 restricting sitting, standing, kneeling, bending, and twisting to four hours a day, sitting, walking, and climbing to one hour a day, and no reaching above shoulder level.

Appellant returned to work for six hours a day on June 27, 2014, then stopped work on June 28, 2014. On June 28, 2014 she filed a claim (Form CA-2a) for a recurrence of disability

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<sup>3</sup> Docket No. 13-0803 (issued September 18, 2013).

commencing November 19, 2007. Appellant contended that the employing establishment withdrew a light-duty assignment. In support of her claim, she submitted duty status reports (Form CA-17) from Dr. Patel holding her off work from June 27 to July 7, 2014. Dr. Patel recommended unspecified surgery.

In a June 30, 2014 letter, appellant alleged that her supervisor forced her to fill out a Form CA-2a although she did not wish to claim a recurrence of disability.

By decision dated October 22, 2014, OWCP denied appellant's claim for recurrence of disability, finding that the medical evidence of record did not establish a spontaneous worsening of her condition while she was on light duty. On April 20, 2015 appellant resumed work for six hours a day.

In a May 28, 2015 letter, Dr. Patel restricted appellant from performing any outdoor work, including walking, pushing a cart, driving a postal vehicle, or carrying a postal satchel. He provided periodic duty status reports through December 2015, indicating that she could work four hours a day with restrictions.

To assess the nature and extent of appellant's accepted conditions and her work capacity, on August 22, 2016, OWCP obtained a second opinion from Dr. Donald Heitman, a Board-certified orthopedic surgeon. Dr. Heitman reviewed the medical record and a statement of accepted facts. He noted that appellant was "very aggressive in the room and very loud with [him] at the time of History of Present Illness" and that she "is refusing to answer my questions and that everything is in the documents." On examination, Dr. Heitman assessed normal capillary refill in the extremities and symmetric sensation through the upper extremities. Appellant performed cervical spine range of motion maneuvers, with flexion at 20 degrees, extension at 10 degrees, lateral bending at approximately 5 degrees, and axial rotation at 0 degrees. She "refused to demonstrate any rotation of the neck whatsoever." In assessing appellant's right shoulder, Dr. Heitman found 55 degrees forward elevation, 30 degrees external rotation, and passive forward elevation to 95 degrees or more. Appellant refused to perform active internal rotation due to pain, but permitted him to manipulate her arm for her. Dr. Heitman observed 30 degrees passive internal rotation, and 55 degrees passive external rotation. He noted that appellant refused further provocative tests. Dr. Heitman commented that he was unable to ascertain whether she had active residuals of the accepted injury as she "refused many elements of the examination." He recommended obtaining a magnetic resonance imaging (MRI) scan of the right shoulder to help fully characterize what could be going on due to the challenge when examining her. Dr. Heitman reiterated that he was unable to assess any work-related or nonoccupational disability or whether appellant could perform her date-of-injury position "given the lack of cooperation" during the examination.

In an August 22, 2016 work capacity evaluation for musculoskeletal conditions (Form OWCP-5c), Dr. Heitman noted that he could not assess whether appellant was capable of performing her usual job without restriction as she "was being uncooperative." He further noted that it was "unknown" whether appellant had any work restrictions as appellant "was being uncooperative."

By letter dated September 2, 2016, OWCP notified appellant that it proposed to suspend her compensation under section 8123(d) of FECA<sup>4</sup> as she obstructed Dr. Heitman's examination by refusing to cooperate during the physical exam[ination].

On August 29, 2016 Dr. Patel restricted appellant to four hours a day limited duty, with lifting restricted to 10 pounds.

In a September 13, 2016 statement, appellant asserted that Dr. Heitman's staff refused to let her friend accompany her into the examination room. She cooperated by entering the room alone. Appellant contended that a nurse became "extremely nasty" to her when appellant pointed out that Dr. Heitman was a knee specialist although he was selected to assess her shoulder. When Dr. Heitman entered the room, he misstated that appellant "slipped on a rug," whereas she had "tripped on a mat." Appellant demonstrated her range of motion, "showed him the difference in [her] two hands and the indent in [her] shoulder." Dr. Heitman completed his examination, then noted that he would order a right shoulder MRI scan examination. Appellant remarked "good luck in getting it approved." Her friend provided a September 13, 2016 statement generally corroborating appellant's account of events.

By decision dated September 22, 2016, OWCP suspended appellant's compensation under section 8123(d) of FECA<sup>5</sup> effective September 19, 2016, finding that she obstructed Dr. Heitman's examination, based on his comments that he was unable to answer many of OWCP's questions as appellant refused elements of the examination.

In September 28 and 29, 2016 letters, appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearing and Review. Counsel later modified this request to a review of the written record.

In a January 5, 2017 letter to counsel, appellant asserted that she was "willing to be reexamined by the Doctor with respect to [her] injuries."

By decision dated February 22, 2017, an OWCP hearing representative affirmed the September 22, 2016 decision suspending appellant's compensation, finding that she refused to cooperate with Dr. Heitman's examination such that he could not determine whether she continued to have residuals of the accepted injuries. The hearing representative directed that OWCP schedule a new second opinion examination, based on appellant's January 5, 2017 assertion to counsel that she would cooperate with the new referral.

### **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.<sup>6</sup> The determination of the need for an examination, the type of examination, the choice of locale, and

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<sup>4</sup> 5 U.S.C. § 8123(d).

<sup>5</sup> *Id.*

<sup>6</sup> 5 U.S.C. § 8123.

the choice of medical examiners are matters within the province and discretion of OWCP.<sup>7</sup> OWCP regulations 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.<sup>8</sup> 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.<sup>9</sup> OWCP procedures provide that, before OWCP may invoke these provisions, the employee is to be provided a period for 14 days within which to present in writing her reasons for the refusal or obstruction.<sup>10</sup> If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.<sup>11</sup>

### ANALYSIS

The Board finds that, within the meaning of section 8123 of FECA, appellant obstructed Dr. Heitman's second opinion examination on August 22, 2016. OWCP directed her to attend the examination by him after it determined that an evaluation was necessary to determine the nature and extent of her accepted right shoulder conditions and her work capacity.

By letter dated August 1, 2016, appellant was notified that an additional expert medical appointment had been arranged under the authority of FECA. She was notified that the second opinion examination was to occur on August 22, 2016 at 10:15 a.m. The correspondence noted that the examination should take approximately 60 minutes and that additional time could be required should the provider request additional testing.

The record supports that appellant attended Dr. Heitman's examination on August 22, 2016. Dr. Heitman advised, however, that the results of his examination were not a valid reflection of her continuing disability as she was uncooperative during the examination and refused many elements of the examination. He specifically noted that appellant was "very aggressive in the room and very loud with [him] at the time of History of Present Illness" and that she "is refusing to answer my questions and that everything is in the documents." Dr. Heitman noted that she refused several elements of the physical examination including that she "refused to demonstrate any rotation of the neck whatsoever" and that she refused to perform active internal rotation due to pain. He indicated that appellant refused all further provocative testing. Due to her actions Dr. Heitman concluded that he was unable to ascertain whether she had active residuals of the accepted injury as she "refused many elements of the examination." In an August 22, 2016 work capacity evaluation for musculoskeletal conditions (Form OWCP-5c), he also noted that he could not assess whether appellant was capable of performing her usual job without restriction as

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<sup>7</sup> *T.W.*, Docket No. 16-1524 (issued February 6, 2017); *J.T.*, 59 ECAB 293 (2008); *S.B.*, 58 ECAB 267 (2007); *James C. Talbert*, 42 ECAB 974 (1991).

<sup>8</sup> 20 C.F.R. § 10.320.

<sup>9</sup> *Supra* note 6; *id.*, at § 10.323; *Dana D. Hudson*, 57 ECAB 298 (2006).

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

<sup>11</sup> *Id.*

she “was being uncooperative.” Dr. Heitman concluded that it was “unknown” if she had any work restrictions as she “was being uncooperative.”

The Board has recognized OWCP’s responsibility in developing claims.<sup>12</sup> Section 8123(a) authorizes it to require 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.<sup>13</sup> The referral to an appropriate specialist in appellant’s area at OWCP’s expense cannot be considered unreasonable. In this case, OWCP acted within its discretion by referring appellant for neuropsychological testing by Dr. Perez to assess his employment-related conditions.

The Board finds that appellant’s refusal to fully cooperate with Dr. Heitman’s second opinion examination constituted obstruction of an OWCP-directed examination. While appellant attended the scheduled examination, she did not fully cooperate with the examination as she refused to fully participate with the physical testing and refused to answer questions. Moreover, she was noted to exhibit aggression toward Dr. Heitman and his staff. Although appellant maintains that Dr. Heitman and his staff were unprofessional toward her, this has not been established. She further maintains that Dr. Heitman was an inappropriate specialist and that he refused to allow her friend to observe the examination. The Board finds that these contentions are of insufficient merit to absolve appellant of her failure to fully cooperate with the examination.<sup>14</sup> For purposes of invoking the penalty provision of section 8123(d), it is sufficient that appellant refused to fully cooperate with Dr. Heitman’s examination. The Board, therefore, finds that OWCP properly suspended her monetary compensation pursuant to section 8123(d) of FECA.<sup>15</sup> Appellant is, therefore, not entitled to wage-loss compensation and medical benefits effective September 22, 2016 until the obstruction ends.<sup>16</sup>

### CONCLUSION

The Board finds that OWCP properly suspended appellant’s wage-loss compensation and medical benefits, effective September 22, 2016, as she failed to cooperate with a scheduled second opinion examination.

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<sup>12</sup> *Scott R. Walsh*, 56 ECAB 353 (2005).

<sup>13</sup> 20 C.F.R. § 10.320; *see J.T.*, 59 ECAB 293 (2008).

<sup>14</sup> *See Edward Burton Lee*, 53 ECAB 183 (2001).

<sup>15</sup> *R.T.*, Docket No. 14-0095 (issued May 22, 2014).

<sup>16</sup> *Supra* note 4.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 22, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 19, 2018  
Washington, DC

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

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

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