

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

_____)	
B.C., Appellant)	
)	
and)	Docket No. 19-1058
)	Issued: November 15, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Meriden, CT, Employer)	
_____)	

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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 12, 2019 appellant, through counsel, filed a timely appeal from a December 20, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 The record also contains a July 20, 2018 decision suspending appellant's compensation effective July 22, 2018 as she failed to complete and return an EN1032 form. Counsel has not appealed this decision and thus it is not before the Board at this time. 20 C.F.R. § 501.3.

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d), effective June 6, 2018, due to her failure to attend a scheduled medical appointment.

FACTUAL HISTORY

On February 7, 2003 appellant, then a 39-year-old casual letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her right temple, right side of her neck, and right arm when she slipped and fell on ice while in the performance of duty. OWCP accepted the claim for cervical sprain and right shoulder tendinitis. Appellant performed modified employment following her injury until April 26, 2003, when her temporary appointment ended. OWCP paid her wage-loss compensation for total disability on the periodic rolls beginning July 11, 2004.⁵

By decision dated April 27, 2006, OWCP suspended appellant's compensation pursuant to 5 U.S.C. § 8123(d), effective April 16, 2006, as she had failed to attend a scheduled magnetic resonance imaging (MRI) scan of the cervical spine. By decisions dated July 7 and November 22, 2006, it denied modification of its April 27, 2006 decision.

Thereafter, on November 22, 2010, OWCP received an October 19, 2010 letter from appellant advising that she would cooperate with OWCP and vocational rehabilitation. It reinstated her wage-loss compensation effective November 22, 2010.⁶

On September 29, 2017 OWCP referred appellant to Dr. Steven A. Silver, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated October 2, 2017, Dr. Silver diagnosed resolved cervical strain and rotator cuff tendinitis causally related to the

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the December 20, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁵ By decision dated October 20, 2004, OWCP reduced appellant's wage-loss compensation to zero effective October 19, 2004 under 5 U.S.C. § 8113(b) due to her failure to participate in vocational rehabilitation. By decision dated February 9, 2005, it vacated its October 20, 2004 decision and reinstated wage-loss compensation.

⁶ In a report dated March 3, 2011, Dr. Balaz B. Somogyi, a Board-certified orthopedic surgeon, diagnosed chronic cervical syndrome with mild cervical degenerative arthritis and chronic right rotator cuff tendinitis causally related to the February 17, 2003 employment injury. He noted that there were no MRI scans of the neck or shoulder and recommended a right shoulder MRI scan. In an October 31, 2011 report, Dr. Joseph Tomanelli, a Board-certified internist, advised that appellant was unable to take medication to prevent moving during MRI scans due to her allergies. He indicated that he had not treated her since January 2008 and was unable to address her current condition.

February 7, 2003 employment injury. He found that appellant was unable to return to her usual employment, but could participate in vocational rehabilitation. Dr. Silver noted, “It is my opinion an MRI [scan] of both the right shoulder and cervical spine is both medically necessary and warranted to fully ascertain the etiology of her continued pain. [Appellant], however, states [that] she is unable to undergo these procedures.” He advised that he recommended a cervical MRI scan to “resolve the disparity between [appellant’s] subjective complaints and her examination.”

In a report dated October 25, 2017, a physician assistant evaluated appellant for low back pain. He advised that she could not lie supine for a prescribed MRI scan as a resting tremor prevented her from lying down flat. The physician assistant referred appellant for a standing MRI scan.

On February 28, 2018 OWCP referred appellant for the prescribed standing MRI scan on March 14, 2018.

In a March 9, 2018 telephone call, counsel informed OWCP that she was unable to sit for over four hours in a vehicle to travel to the scheduled MRI scan location. In response, OWCP advised that it had scheduled the MRI scan at the standing MRI scan facility that was the closest to her location. It noted that appellant had not submitted evidence supporting that she was unable to sit in a vehicle for that length of time. OWCP informed counsel that it could provide transportation if notified in advance.

In a March 12, 2018 telephone, appellant advised that she had located a provider closer to her location and questioned the type of transport available. OWCP informed her that its scheduler could arrange for transportation in either a van or a taxi. It provided appellant until the end of the day to state whether she required transportation to the appointment.

Appellant failed to attend the MRI scan scheduled for March 14, 2018. Counsel subsequently advised that she was unable to attend the appointment due to the weather and asked that the appointment be rescheduled.

On April 24, 2018 OWCP again referred appellant for the prescribed MRI scan on May 14, 2018.⁷

Appellant also failed to attend the MRI scan rescheduled for May 14, 2018.

In a May 21, 2018 notice, OWCP proposed to suspend appellant’s compensation benefits pursuant to 5 U.S.C. § 8123(d) as she failed to attend the standing MRI scan scheduled for May 14, 2018. It advised her that she should provide a written explanation of her reasons for failing to attend the scheduled examination, with substantive corroborating evidence, within 14 days. No response was received.

By decision dated June 6, 2018, OWCP finalized its proposed suspension, effective that date. It found that it had directed appellant on April 24, 2018 to attend the MRI scan scheduled

⁷ OWCP had referred appellant for the prescribed MRI scan on April 16, 2018. On April 17, 2018 counsel advised that the provider had cancelled the appointment as she did not have a prescription.

for May 14, 2018, but that she had not attended the appointment nor had she provided a reason why she had refused to attend the diagnostic study.

On June 14, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on November 13, 2018.⁸ Appellant testified that she was unable to attend the MRI scan due to her preexisting medical conditions of a fractured spine, torn meniscus, and hole in her right retina. She advised that remaining in a particular position for the standing MRI scan would cause significant pain and noted that she was unable to take pain medication. Appellant indicated that she would not attend a rescheduled MRI scan due to orders from her physician.

Thereafter, OWCP received the results of January 30, 2008 cervical x-rays that revealed mild facet arthritis at C5-6 and C6-7 and June 19, 2018 lumbar x-rays that showed an age-indeterminate fracture at L2 and mild degenerative changes.

Appellant further submitted progress reports from 2017 describing her treatment for an age-indeterminate compression fracture at L2, a medial cruciate ligament sprain of the left knee with a possible medial meniscus tear, and a mild right elbow contusion.

In an August 27, 2018 report, Dr. Amando Rafael, an optometrist, diagnosed a macular cyst, hole, or pseudo hole on the right eye.

On October 26, 2018 a nurse practitioner advised that appellant was unable to undergo the prescribed MRI scan due to her "current health conditions."

By decision dated December 20, 2018, OWCP's hearing representative affirmed the June 6, 2018 suspension decision. She found that appellant had not offered good cause for her failure to attend the May 14, 2018 MRI scan as ordered by OWCP.

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.⁹ 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.¹⁰ OWCP's 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.¹¹ Section 8123(d) of FECA and OWCP regulations provide that, if an employee refuses to submit

⁸ At the hearing, appellant specified that her name had changed to B.C. from B.P.

⁹ 5 U.S.C. § 8123.

¹⁰ *L.B.*, Docket No. 17-1891 (issued December 11, 2018); *J.T.*, 59 ECAB 293 (2008).

¹¹ 20 C.F.R. § 10.320.

to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction ceases.¹² OWCP's procedures provide that, before OWCP may invoke these provisions, the employee is to be provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.¹³ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.¹⁴

ANALYSIS

The Board finds that OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d), effective June 6, 2018, due to her failure to attend a scheduled medical appointment.

On October 12, 2017 Dr. Silver, an OWCP referral physician, opined that right shoulder and cervical spine MRI scans were "medically necessary and warranted" to determine the etiology of appellant's pain.

In a letter dated February 28, 2018, OWCP referred appellant for the prescribed MRI scan scheduled for March 14, 2018. On March 9, 2018 it informed counsel that it had scheduled the MRI scan at the facility closest to her residence with standing MRI scan equipment.

Appellant failed to attend the March 14, 2018 MRI scan, citing inclement weather. OWCP subsequently referred her, by letter dated April 24, 2018, for a May 14, 2018 MRI scan. It informed her of the time and place of the diagnostic testing and that it would suspend her compensation pursuant to 5 U.S.C. § 8123(d) if she refused to submit to or obstructed testing. Appellant, however, failed to appear for the May 14, 2018 MRI scan.

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 OWCP's authority, with regard to instructing a claimant to undergo a medical examination, is that of reasonableness.¹⁵ The Board has interpreted the plain meaning of section 8123(d) to provide that compensation is not payable while a refusal or obstruction of an examination continues unless appellant can establish good cause for failing to report at the scheduled time.¹⁶

Appellant's refusal to submit to the medical testing warrants suspension of her entitlement to compensation unless she can establish good cause for her failure to report at the scheduled time. The Board finds that she has not established good cause for her failure to report at the scheduled

¹² *Id.* at § 10.323; *L.B.*, *supra* note 10.

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010).

¹⁴ *Id.*

¹⁵ *D.K.*, Docket No. 18-0217 (issued June 27, 2018).

¹⁶ *See A.E.*, Docket No. 18-1155 (issued February 21, 2019).

MRI scan. OWCP allowed appellant 14 days to provide reasons for failing to appear.¹⁷ Appellant asserted that she was unable to undergo the scheduled MRI scan due to her medical conditions of a fractured spine, torn meniscus, and hole in her right retina.

Appellant submitted a report from an optometrist diagnosing a macular cyst or hole in her right eye. The optometrist, however, failed to address whether this particular condition would preclude her attendance at the scheduled MRI scan. An opinion which does not address the relevant issue is of no probative value.¹⁸

Appellant further submitted progress reports from 2017 describing her treatment for various conditions, including her left knee, right elbow, and back. Again, these reports contain no opinion regarding the pertinent issue of whether she was able to undergo a standing MRI scan and thus these reports are of no probative value.¹⁹

On October 26, 2018 a nurse practitioner opined that appellant could not undergo the prescribed MRI scan due to her health. Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered “physician[s]” as defined under FECA.²⁰ Thus, the report from the nurse practitioner is insufficient to support appellant’s claim that she was unable to attend the MRI scan.²¹

As appellant did not attend the May 14, 2018 MRI scan and failed to provide good cause for failing to appear within 14 days of OWCP’s May 21, 2018 notice of proposed suspension, the Board finds that OWCP properly suspended entitlement to future compensation in accordance with 5 U.S.C. § 8123(d) until the date on which she agrees to attend the examination. If appellant actually attends the prescribed MRI scan, payment retroactive to the date on which she agreed to attend the examination may be made.²²

CONCLUSION

The Board finds that OWCP properly suspended appellant’s compensation benefits pursuant to 5 U.S.C. § 8123(d), effective June 6, 2018, due to her failure to attend a scheduled medical appointment.

¹⁷ 5 U.S.C. § 8123; *supra* note 15.

¹⁸ *See L.G.*, Docket No. 18-0140 (issued August 6, 2019).

¹⁹ *Id.*

²⁰ 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

²¹ *See M.F.*, Docket No. 17-1973 (issued December 31, 2018); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician. *Supra* note 13 at Chapter 2.805.3a(1) (January 2013).

²² *Supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 15, 2019
Washington, DC

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

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

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