

ISSUE

The issue is whether OWCP properly suspended appellant's entitlement to compensation benefits pursuant to 5 U.S.C. § 8123(d), effective August 2, 2019, due to her obstruction of a scheduled medical appointment.

FACTUAL HISTORY

On March 13, 2013 appellant, then a 48-year-old general clerk, filed a traumatic injury claim (Form CA-1) alleging that on February 14, 2013 she injured her shoulders and left hip when she fell from her chair while in the performance of duty. On April 15, 2013 OWCP accepted the claim for a partial tear of the right rotator cuff. It paid appellant wage-loss compensation on the supplemental rolls beginning April 1, 2013 and on the periodic rolls beginning June 2, 2013.

On November 13, 2018 OWCP referred appellant to Dr. Donald Garver, a Board-certified orthopedic surgeon, for a second opinion examination. It advised that under section 8123(a) that she may arrange to have a physician of her choice who is paid by her present at the examination and that she was not entitled to have anyone else in the examination room with her unless OWCP determined, based on rationalized medical evidence, that it was necessary or that exceptional circumstances existed.

A November 19, 2018 report by Dr. Garver indicated that appellant presented in a wheelchair with a mask over her face due to a recent episode of pneumonia. Appellant's speech was slow and slurred and her friend reminded her about her history of injury because she got the dates confused and had trouble answering questions. Dr. Garver stated that her past medical history included seizures and a stroke and that she had many cognitive issues including memory loss. He stated that appellant was 240 pounds and was wearing a back brace. Dr. Garver related that she could barely stand and he had to have her friend help her up onto the examination table, which he described as a major undertaking. He related that she appeared disabled and as if she could barely maneuver or function. Dr. Garver additionally noted that he did not know if appellant gave her full effort in his physical examination of her or if she falsified some of her issues.

In a July 18, 2019 notice of proposed suspension, OWCP advised appellant that 5 U.S.C. § 8123(d) provides that, if an employee refuses to submit to or obstructs an examination, his or her right to compensation is suspended until the refusal or obstruction stops. It found that she obstructed the examination with Dr. Garver on November 19, 2018 because she had an additional person attend her examination. OWCP stated that an additional person is allowed at an examination only when there is rationalized medical evidence that establishes the need for someone else in the room, and it found that appellant had not supplied this evidence. It advised appellant that she must submit a new and pertinent explanation for obstructing the examination with Dr. Garver within 14 days of the notice of proposed suspension. If good cause was not established, entitlement to wage-loss compensation and medical benefits would be suspended in accordance with 5 U.S.C. § 8123(d) until she attended and fully cooperated with the examination.

A March 4, 2013 unsigned letter from Dr. Jeff Carroll, an osteopath Board-certified in orthopedic surgery, indicated that appellant presented with increased pain in her right shoulder.

Dr. Carroll conducted a physical examination and diagnosed a possible right shoulder internal derangement.

April 9, 2013 physical therapy records signed by David Gross, a physical therapist, indicated that appellant had a rotator cuff disorder and stated that, while appellant showed some improvement in range of motion, strength, and function, she continued to experience a lot of pain.

A June 2, 2014 left shoulder magnetic resonance imaging (MRI) scan interpreted by Dr. Jerald Henry, a Board-certified radiologist, displayed tendinosis and/or interstitial partial tear involving the distal supraspinatus tendon, a joint effusion, and mild acromioclavicular arthritis.

A June 4, 2014 right shoulder MRI scan interpreted by Dr. Henry displayed a distal supraspinatus tendon partial tear, evidence of chronic rotator cuff tendinopathy, moderate acromioclavicular osteoarthritis, and a joint effusion.

A November 2, 2018 unsigned right shoulder MRI scan revealed a full-thickness tear of the anterior supraspinatus in the setting of severe tendinosis and articular surface delamination throughout the entire supraspinatus and conjoined fibers of infraspinatus. It also showed subcromial/subdeltoid bursitis and mild acromioclavicular osteoarthritis.

An undated and unsigned left shoulder MRI scan revealed degenerative cysts and spurring in the bone marrow and a full-thickness defect in the anterior aspect of the supraspinatus in the background of extensive tendinosis and severe articular surface delamination in the rotator cuff.

A June 24, 2019 attending physician's report (Form CA-20) signed by Dr. Mazin Yonan, Board-certified in internal medicine, diagnosed rotator cuff tears and a lung injury. Dr. Yonan indicated that appellant was unable to work as she was totally disabled and was unable to perform daily activities such as grooming, cooking, and driving.

The record contains a July 30, 2019 memorandum of a telephone call (Form CA-110 notes) indicating that appellant agreed to attend a second opinion examination and stated that she would need an accommodation. OWCP informed her that she had 14 days to respond to the notice of proposed suspension, and that her compensation was at risk of being suspended. It further explained that the second opinion examination would be rescheduled, and that if she attended and did not obstruct the examination her compensation would be reinstated. Appellant indicated that she had just received the notification of suspension on "Friday."

A July 30, 2019 letter from appellant indicated that the person she brought with her to her November 19, 2018 appointment with Dr. Garver was a part-time caregiver and transporter who assisted her with daily activities and is aware of her conditions. Appellant indicated that she had a mask on because she was being treated for pneumonia and was also being treated for a methicillin-resistant staphylococcus aureus (MRSA) infection. She stated that she was in a wheelchair because of her walking limitations, edema, torn meniscus, and fluid in her knees. Appellant related that she also had medicated cotton in her mouth due to an abscess which may have been why Dr. Garver thought her speech was slow and slurred, but her memory loss only occurs during her seizures and she is fully aware of her history of injury and was not being coached by her caregiver. She also related that she brought in medical records documenting her history and asked Dr. Garver to read them, but he declined. Appellant noted that her shoulder issues have

caused her to be unable to engage in activities of daily living (ADLs) and have contributed to her weight gain and lack of mobility. She listed additional issues she suffered from as congested heart failure, pain, kidney problems, seizures that cause memory issues, stenosis, and emotional disturbances that prevent her from staying on task. Appellant related that she wears a back brace, hand and wrist braces, knee braces, shoulder harnesses, and uses a walker. She stated that she has been deemed disabled by the Social Security Administration, and that all of her injuries are documented in x-rays, MRI scans, and computerized tomography (CT) scans. Appellant also stated that because her doctor was male she would be more comfortable with a nurse being present for the examination. She added that she was prepared to be reevaluated as soon as possible.

July 31, 2019 Form CA-110 notes indicated that appellant stated that she had special needs that needed to be accommodated for a second opinion examination, such as having a woman in the room when being examined by a male doctor. The Form CA-110 notes further indicated that appellant requested a “call back” to further discuss “her ‘special needs at [second opinion] appt.’”

By decision dated August 2, 2019, OWCP finalized its proposed suspension, effective August 2, 2019, pursuant to 5 U.S.C. § 8123(d). It explained, “You failed to adhere to [the] FECA regulations by having another person present in the room during your examination without prior authorization by this office.”

LEGAL PRECEDENT

Section 8123(a) 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’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.⁶

The employee may have a qualified physician, paid by him or her, present at such examination.⁷ However, the employee is not entitled to have anyone else present at the examination unless there is rationalized medical evidence that establishes that someone else is needed in the room or OWCP decides that exceptional circumstances exist.⁸ Where an employee requires an accommodation, such as where a hearing-impaired employee needs an interpreter, the presence of an interpreter will be allowed.⁹

⁴ 5 U.S.C. § 8123(a).

⁵ *L.B.*, Docket No. 17-1891 (issued December 11, 2018); *J.T.*, 59 ECAB 293 (2008).

⁶ 20 C.F.R. § 10.320.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

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.¹⁰ 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.¹¹ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.¹²

ANALYSIS

The Board finds that OWCP improperly suspended appellant's entitlement to compensation benefits pursuant to 5 U.S.C. § 8123(d), effective August 2, 2019, due to her obstruction of a scheduled medical appointment.

Dr. Garver's November 19, 2018 report indicated that appellant presented in a wheelchair with a mask over her face due to a recent episode of pneumonia. Appellant's speech was slow and slurred and she got the dates confused and had trouble answering questions. Dr. Garver noted that her past medical history included seizures and a stroke and that she has many cognitive issues including memory loss. He indicated that appellant was 240 pounds and was wearing a back brace. Dr. Garver related that she could barely stand and he had to have her caregiver help her up onto the examination table, which he described as a major undertaking. He also related that appellant appeared disabled and could barely maneuver or function. Dr. Garver additionally noted that he did not know if she gave her full effort in his physical examination of her or if she falsified some of her issues.¹³

Appellant's July 30, 2019 letter indicated that the friend she brought with her to her November 19, 2018 appointment with Dr. Garver was a part-time caregiver and transporter who assisted her with daily activities and is aware of her conditions. Appellant indicated that she had a mask on because she was being treated for pneumonia and was also being treated for an MRSA infection. She stated that she was in a wheelchair because of her walking limitations, edema, torn meniscus, and fluid in her knees. Appellant related that she also had medicated cotton in her mouth due to an abscess which may have been why Dr. Garver thought her speech was slow and slurred. She noted that her shoulder issues have caused her to be unable to engage in ADLs and have contributed to her weight gain and lack of mobility. Appellant listed additional issues she suffered from, such as congested heart failure, pain, kidney problems, seizures that cause memory issues, stenosis, and emotional disturbances that prevent her from staying on task. She related that she wears a back brace, hand and wrist braces, knee braces, shoulder harnesses, and uses a walker.

¹⁰ 5 U.S.C. § 8123(d); *see also id.* at § 10.323; *L.B.*, *supra* note 4.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010).

¹² *Id.*

¹³ Dr. Garver's report, however, indicated that he was able to conduct an examination and was able to evaluate, make conclusions and answer the questions posed by OWCP relative to her condition.

As noted above, the employee is not entitled to have anyone else present at the examination unless there is rationalized medical evidence that establishes that someone else is needed in the room or OWCP decides that exceptional circumstances exist.¹⁴ Where an employee requires an accommodation, such as where a hearing-impaired employee needs an interpreter, the presence of an interpreter will be allowed.¹⁵ The only limitation on this authority is that of reasonableness.¹⁶

The Board finds that exceptional circumstances exist in this case because Dr. Garver's November 19, 2018 report indicates that appellant was physically disabled and needed a caregiver present to help with her examination. Dr. Garver needed the caregiver's assistance to help appellant answer questions and to physically lift her out of the wheelchair and onto the examination table, which he described as a major undertaking. He observed that appellant could barely maneuver or function and suffered from cognitive issues. The evidence is sufficient to establish that appellant required an accommodation due to her disability and; therefore, the Board finds that OWCP was unreasonable in finding that appellant obstructed her November 19, 2018 medical appointment by having her caregiver accompany her to the scheduled examination.¹⁷

CONCLUSION

The Board finds that OWCP improperly suspended appellant's entitlement to compensation benefits pursuant to 5 U.S.C. § 8123(d), effective August 2, 2019, due to her obstruction of a scheduled medical appointment.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Anthony H. Jackson*, 53 ECAB 29 (2002).

¹⁷ The Board notes that OWCP reinstated appellant's compensation on November 11, 2019.

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 9, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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