

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 14, 2003 appellant, then a 38-year-old mail handler equipment operator, filed a traumatic injury claim (Form CA-1) alleging that on February 18, 2003 she sustained shoulder and chest pain, a headache, and stress from repetitive pulling out of wire containers while in the performance of duty. She stopped work on February 18, 2003 and returned to full-time modified work on March 7, 2003. OWCP accepted the claim for bilateral shoulder rotator cuff sprain/strain.²

OWCP prepared a statement of accepted facts dated May 18, 2021 in which it included that appellant was currently working full time with restrictions in a temporary modified position.

On June 15, 2021 OWCP referred appellant to Dr. James T. Gaylon, a Board-certified orthopedic surgeon, for a second opinion evaluation on July 1, 2021 to determine whether she continued to have residuals from her accepted bilateral shoulder sprain/strain.

In a letter dated June 22, 2021, appellant requested the second opinion examination with Dr. Galyon on July 1, 2021 be canceled and rescheduled. She alleged improper and untimely notification as she was only given 11 days' notice. Appellant also asserted that she was uncomfortable with Dr. Gaylon because of a prior second opinion evaluation wherein he misclassified his examination as an impartial medical evaluation, and he defamed her character by stating that she was unstable, and aggressive. She related that her prior second opinion evaluation with him had been under OWCP File No. xxxxxx343 and she argued that he should be barred from conducting any examinations under FECA because he was biased towards her.

In a letter dated July 6, 2021, OWCP responded to appellant's June 22, 2021 letter. It advised that she was given adequate notice of her appointment as the appointment memorandum was dated June 15, 2021 for the appointment on July 1, 2021. OWCP noted appellant's other arguments and advised that no further action would be taken on her letter as she did attend the scheduled July 1, 2021 appointment with Dr. Gaylon.

In a report dated July 1, 2021, Dr. Gaylon advised that appellant was very angry when she arrived for her evaluation. Appellant took photographs all around his waiting room with her cell phone. During her check in for her appointment, she complained that she did not need another evaluation and did not know why she was there. Appellant also refused to remove an elastic lumbar support on her back as she only wanted Dr. Gaylon to examine her shoulder. Dr. Gaylon advised that she was very angry and would not fully participate in the examination. Physical examination findings were detailed. Dr. Gaylon opined that he did not believe that appellant could perform her regular mail handler duties and that her bilateral shoulder strain had not resolved. He recommended that she continue to work in her modified position. Dr. Gaylon emphasized that his examination and evaluation were limited by the appellant's "very poor cooperation."

² OWCP has accepted that appellant sustained a traumatic injury on November 29, 2018 causing sprain of the right wrist and ganglion of the right wrist. It assigned this claim OWCP File No. xxxxxx343 and administratively combined it with master OWCP File No. xxxxxx577.

After receiving his July 1, 2021 report, OWCP requested a supplemental report from Dr. Gaylon clarifying whether appellant's bilateral shoulder strain had resolved and also whether the accepted sprain of the right wrist and ganglion cyst had resolved. In a report dated July 7, 2021, Dr. Gaylon opined that her bilateral shoulder strain had not resolved. He explained that the MRI scan showed supraspinatus tendinosis, "which is a degenerative inflammatory response to persistent use of this extremity," that has not resolved. Dr. Gaylon pointed out that this is the reason appellant is on limited range of motion and strength use of both shoulders. Regarding her accepted sprain of the right wrist and ganglion cyst, he opined that they had resolved, noting that Dr. Childress had removed the ganglion cyst. Dr. Gaylon reported that appellant could not use both shoulders through a full range of motion and heavy lifting. He noted, however, that he believed that she was working full time on a forklift, which accommodated her shoulder problems. Dr. Gaylon concluded that appellant could not perform the duties of a mail handler as she does not have strength or range of motion of both shoulders. He explained that, "While [appellant] is not very cooperative, I do believe [that] she has limited range of motion in the shoulders. I do believe [that] this is a result of her work-related activities. I do believe [that] they are permanent wear-and-tear problems which will not resolve."

On July 8, 2021 Dr. Galyon completed a work capacity evaluation (Form OWCP-5c) in which he noted a diagnosis of bilateral rotator cuff tendinitis and related that appellant would have permanent restrictions. He indicated that standing, reaching, pushing, pulling, and lifting were limited to one hour, and that pushing, pulling, and lifting were limited to 10 pounds.

In a July 27, 2021 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. Gaylon on July 1, 2021 as she was very angry and failed to fully participate in the examination. OWCP advised appellant that she must submit a new and pertinent explanation for obstructing the examination with Dr. Gaylon within 14 days of the notice of proposed suspension. If good cause was not established, entitlement to 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.

Appellant responded to the notice of proposed suspension of benefits by letter dated August 5, 2021. She asserted that she would see Dr. Gaylon again if her own physician could be present, or listening or viewing the examination by video. Appellant further stated that, if that was not possible, she would attend the examination anyway.

On August 25, 2021 appellant requested that the notice of proposed suspension due to obstruction be dismissed. She also submitted medical and factual evidence. Appellant asserted that Dr. Gaylon was aware of her request that her physician be with her during the examination or that she be allowed to record the examination. She denied obstruction because removal of her back brace, as requested by Dr. Gaylon, would cause back and neck pain. Appellant also noted that he was able to examine her shoulders despite her refusal to remove the back brace.

By decision dated October 14, 2021, OWCP finalized its notice of proposed suspension, effective that day. It found that appellant did not establish good cause for obstruction of the medical examination nor did she reschedule a medical appointment with Dr. Gaylon.

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.³ 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.⁴ 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.⁵ 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.⁶ 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.⁷ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA (5 U.S.C. § 8123(d)).

ANALYSIS

The Board finds that OWCP improperly suspended appellant's entitlement to compensation benefits pursuant to 5 U.S.C. § 8123(d), effective October 14, 2021, due to her obstruction of a scheduled medical appointment.

The evidence of record is insufficient to establish that appellant obstructed a scheduled medical examination, without good cause, within the meaning of 5 U.S.C. § 8123(d).

In a June 15, 2021 letter, OWCP advised appellant of a second opinion examination with Dr. Gaylon to determine whether she continued to have residuals from her accepted bilateral shoulder sprain/strain. Appellant attended the examination with him on July 1, 2021. Dr. Gaylon advised that she was angry and refused to fully cooperate with the examination. While he reported that appellant demonstrated "very poor cooperation," ultimately he was able to conduct a sufficient evaluation to determine that she still had residuals of her accepted condition and that she should continue in modified position. In a supplemental report dated July 7, 2021, Dr. Gaylon opined that her bilateral shoulder strain had not resolved. He concluded that appellant could not perform the duties of a mail handler as she did not have strength or range of motion of both shoulders. The Board has previously explained that, to find an obstruction of medical examination, OWCP must

³ 5 U.S.C. 8123.

⁴ See *T.A.*, Docket No. 21-0582 (issued December 14, 2021); *R.L.*, Docket No. 20-0160 (issued October 30, 2020); *M.T.*, Docket No. 18-1675 (issued March 8, 2019); *L.B.*, Docket No. 17-1891 (issued December 11, 2018); *J.T.*, 59 ECAB 293 (2008).

⁵ 20 C.F.R. § 10.320; 5 U.S.C. § 8123(a); *id.* at § 10.323; *T.A.*, *id.*; *R.L.*, *id.*; *A.P.*, Docket No. 19-0328 (issued August 6, 2019); *D.K.*, Docket No. 18-0217 (issued June 27, 2018).

⁶ *Id.* at § 8123(d); *id.* at § 10.323; *T.A.*, *id.*; *R.L.*, *id.*; *A.P.*, *id.*; *D.K.*, *id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010).

establish that she refused to attend a directed examination, or if she did attend the examination, OWCP must establish that the actions of her constituted such an obstruction that the evaluation was invalidated.⁸

Dr. Gaylon was in fact able to make findings regarding residuals of appellant's accepted bilateral shoulder conditions and he was able to recommend permanent restrictions for her accepted conditions. OWCP did not establish that her conduct during the examination invalidated the medical evaluation.

The Board therefore finds that OWCP has not established that appellant obstructed the July 1, 2021 medical examination, such that her entitlement to compensation benefits should be suspended.

CONCLUSION

The Board finds that OWCP improperly suspended appellant's entitlement to compensation benefits pursuant to 5 U.S.C. § 8123(d), effective October 14, 2021, due to her obstruction of a scheduled medical appointment.

ORDER

IT IS HEREBY ORDERED THAT the October 14, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 10, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

⁸ See *Ernest E. Gaylor*, ECAB 97-523 (issued October 9, 1998).