

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

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**J.P., Appellant** )

**and** )

**U.S. POSTAL SERVICE, POST OFFICE,** )  
**Phoenix, AZ, Employer** )

**Docket No. 22-0403**  
**Issued: October 10, 2023**

*Appearances:*  
*Stephanie Leet, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On January 26, 2022 appellant, through counsel, filed a timely appeal from a September 3, 2021 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 this case.<sup>3</sup>

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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.*

<sup>3</sup> The Board notes that following the September 3, 2021 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.*

## ISSUE

The issue is whether OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d), effective March 27, 2019, due to her failure to attend a scheduled medical examination.

## FACTUAL HISTORY

On March 12, 1999 appellant, then a 38-year-old custodial/laborer, filed an occupational disease claim (Form CA-2) alleging that she sustained an allergic reaction causally related to factors of her federal employment. OWCP accepted the claim for angioneurotic edema and urticaria due to latex exposure. Appellant stopped work on November 7, 2001 and did not return. OWCP paid her wage-loss compensation for total disability on the supplemental rolls effective June 28, 2002 and on the periodic rolls effective March 23, 2003.

In a report dated September 11, 2018, Dr. John R. Walker, II, a psychologist, evaluated appellant at her residence. He diagnosed an unspecified anxiety disorder and somatization disorder and opined that the conditions were disabling. Dr. Walker indicated that appellant developed an anxiety disorder after her exposure to latex and had grown concerned about exposure to any toxins due to her fear of latex exposure.

On September 26, 2018 appellant, through her then-counsel, requested that OWCP expand the acceptance of her claim to include the additional conditions described by Dr. Walker in his September 11, 2018 report.

On December 11, 2018 OWCP advised appellant that it was referring her for a second opinion examination. It informed her of her obligations to attend and cooperate with the examination and that her compensation benefits would be suspended for failure to report to or cooperate with such an examination, pursuant to 5 U.S.C. § 8123(d).

On December 14, 2018 OWCP referred appellant to Dr. Alvin C. Burstein, a Board-certified psychiatrist, for a second opinion examination on February 11, 2019.

In a report dated January 29, 2019, Dr. Michael R. Gray, Board-certified in occupational medicine, related that he had treated appellant for the past 18 years due to a latex allergy that had caused exacerbations of asthma, angioedema, and episodes of "life[-]threatening anaphylaxis." He noted that she had been referred for an evaluation in a building with multiple stories and carpet with "no warranty that she will not inadvertently get exposed to [l]atex." Dr. Gray related that appellant could not attend the examination with Dr. Burstein until he had received confirmation that she would not be exposed to latex in his office or the passages leading to his office. He advised that appellant could undergo an examination in her home or another safe place if Dr. Burstein wore clothing laundered in clear soap with no fabric softeners.

On January 30 and February 5, 2019 appellant's then-counsel referred to Dr. Gray's January 29, 2019 report and requested that the referral physician interview her at her home or provide confirmation that there was no exposure risk at his office building.

In a letter dated February 7, 2019, OWCP advised appellant's then-counsel that it had confirmed that Dr. Burstein's office was latex free and requested that she attend the scheduled February 11, 2019 appointment.

In a February 12, 2019 response, appellant's then-counsel noted that OWCP's referral physician worked in a 10-story building and that it had not indicated whether the building was within the restrictions set forth by her attending physician. He advised that in the absence of a written response he would assume that OWCP had cancelled the appointment pending verification.

On February 12, 2019 Dr. Burstein's office notified OWCP that appellant had not attended the scheduled appointment.

On February 19, 2019 OWCP referred appellant for a second opinion examination scheduled with Dr. Burstein for March 21, 2019.

In a letter dated February 25, 2019, OWCP notified appellant and counsel that its scheduler had confirmed that there was no latex in the office or the path to the doctor's office and instructed her to attend the scheduled March 21, 2019 appointment.

Appellant did not attend the scheduled examination.

On March 27, 2019 OWCP advised appellant of its proposed suspension of her wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d) as she failed to attend the scheduled examination on March 21, 2019 with Dr. Burstein. It informed her that she could provide a written explanation of her reasons for failing to attend the scheduled examination, with substantive corroborating evidence, within 14 days.

Thereafter, OWCP received a March 5, 2019 report, wherein Dr. Gray noted that appellant had "multiple anaphylactic reactions to latex in her lifetime." Dr. Gray maintained that she could not be seen in an office that a certified industrial hygienist had not cleared "to a level that they can tell me is safe for an individual who will react to the presence of even a few molecules of latex on dust particles." He noted that OWCP had not provided any proof that quality controls had been performed. Dr. Gray related, "As a result thereof, the only treatment course for me is to recommend in the strongest terms that [appellant] not appear for that appointment and that we defend the validity of medical science that supports the risk analysis that says that she is at a greater than 50 [percent] risk of reacting to a direct contact with significant latex in the form of either an angioneurotic reaction or a reaction of laryngeal edema closure with a possible fatal outcome."

On April 9, 2019 appellant's then-counsel requested that it explain the basis for its scheduler's statement that she had no risk of latex exposure. He again requested that the appointment take place in her residence.

By decision dated April 11, 2019, OWCP suspended appellant's wage-loss compensation and medical benefits effective March 27, 2019 for failure to attend to a scheduled medical examination under 5 U.S.C. § 8123(d). It found that Dr. Gray's March 27, 2019 report was insufficient to establish good cause for her failure to attend the scheduled examination.

On March 25, 2020 appellant, through current counsel, requested reconsideration. She asserted that she would attend the appointment as long as it was medically safe. Counsel requested that OWCP reinstate appellant's benefits and refer her for a new second opinion examination at a safe location. She maintained that appellant had shown good cause for not attending the examination as it had not been verified that the office or medical building was a latex-free environment. Counsel advised that she had submitted supporting medical evidence.

In a report dated March 25, 2020, Dr. Gray noted that OWCP had accepted appellant's claim for angioneurotic edema, angioedema, and urticaria from latex exposure at work. He maintained that she had restrictions that prevented her from being in any environment "that is not verified latex free because of her accepted workers' compensation conditions." Dr. Gray asserted that appellant could not encounter people wearing fragrances or clothes laundered with fabric softener. Appellant further could not be around latex gloves, rubber bands, carpet with latex material, or in a room that shared air ventilation with an office that had latex. Dr. Gray related that appellant was willing to attend the scheduled examination, if her restrictions were accommodated by having the location verified latex free by a certified industrial hygienist. He indicated that the referral physician could also go to her home if he used no fragrance or fabric softeners.

On June 24, 2020 Dr. Alan Goodman, a Board-certified allergist and immunologist serving as a district medical adviser (DMA), provided his review of the medical evidence and opined that appellant's refusal to undergo an examination in Dr. Burstein's office was not reasonable. He noted that her latex allergy may have resolved and advised that a positive test for latex did not necessarily mean a symptomatic allergy. Dr. Goodman indicated that Dr. Edward Chu, a Board-certified allergist, had found in a November 18, 1999 report that she should avoid working in a room with latex equipment or having direct contact with latex. He related, "Having a claim accepted for a medical condition is not conclusory medical evidence that the problem has been medically proven or is still an active problem. One cannot rely upon a prior accepted condition or even an impairment award to limit or to defer a medical evaluation." Dr. Goodman advised that it was reasonable that Dr. Burstein not use scented personal products but not reasonable to require him to use specific laundry detergents or have the examination at a specific location.

By decision dated July 1, 2020, OWCP denied modification of its April 11, 2019 decision.

Thereafter, OWCP received a November 24, 2020 report from Dr. Gray indicating that appellant's antibodies to latex had returned to normal, but that she was remained at risk of anaphylaxis if exposed.

In a February 18, 2021 report, Dr. Gray reviewed appellant's history of injury and noted that she had extreme reactions to latex when exposed, as demonstrated by her antibodies. He noted that her latex titers had returned to normal after she avoided contact with latex but that she remained at a risk of anaphylaxis and should not be in a work environment or undergo appointments "in which there is any potential for a latex exposure." Dr. Gray asserted that appellant had previously experienced a reaction after an appointment with a prior referral physician. He maintained that Dr. Goodman had referenced generalities rather than specifics in reaching his conclusion and had found that she had only sustained one reaction in 1999. Dr. Gray advised that even powder-free latex gloves contained some powder content. He questioned Dr. Goodman's reliance upon findings from 1999 in denying appellant's accommodation request. Dr. Gray again noted that Dr. Burstein had not certified that his space or building was latex free. He advised that appellant's appointment with Dr. Burstein could be conducted over the telephone, and noted that COVID-19 was also an issue. Dr. Gray questioned whether the statement of accepted facts had specified her allergy to natural rubber latex.

On June 21, 2021 appellant, through counsel, requested reconsideration. Counsel advised that appellant would attend the appointment if it was conducted in accordance with the medical restrictions set forth by her physician. She related that they had not received any documentation supporting that the office building was latex free or information about the type of cleaning products

used, which often contain latex. Counsel asserted that appellant had submitted evidence from her physician showing good cause for not attending the examination. She noted that Dr. Burstein had not indicated whether he would refrain from using scented products in accordance with Dr. Goodman's finding in his June 23, 2002 report.

By decision dated September 3, 2021, OWCP denied modification of its July 1, 2020 decision.

### **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>4</sup> 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.<sup>5</sup> 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.<sup>6</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>7</sup> 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.<sup>8</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>9</sup>

### **ANALYSIS**

The Board finds that OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d), effective March 27, 2019, due to her failure to attend a scheduled medical examination.

On December 11, 2018 OWCP advised appellant that it was referring her for a second opinion examination. It informed her of her obligations to attend and cooperate with an OWCP-directed examination and explained that her compensation benefits would be suspended, pursuant to 5 U.S.C. § 8123(d), for failure to report to or cooperate with such an examination. OWCP initially scheduled the second opinion evaluation with Dr. Burstein on February 11, 2019. On January 29, 2019 Dr. Gray, appellant's attending physician, opined that she could only attend the examination if Dr. Burstein verified that there was no possibility of latex exposure in his office or

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<sup>4</sup> 5 U.S.C. § 8123.

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

<sup>6</sup> 20 C.F.R. § 10.320.

<sup>7</sup> *See* 5 U.S.C. § 8123; 20 C.F.R. § 10.323; *S.S.*, Docket No. 22-1291 (issued April 26, 2023); *D.K.*, Docket No. 18-0217 (issued June 27, 2018).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13d (September 2010).

<sup>9</sup> *Id.* at Chapter 2.810.13e.

the passageways in the building. On February 25, 2019 OWCP advised that Dr. Burstein's office had indicated that it was latex free. It rescheduled appellant's appointment with Dr. Burstein for March 21, 2019 and directed her to attend the rescheduled appointment. Appellant, however, did not attend the March 21, 2019 appointment.

Thereafter, OWCP received a March 5, 2019 report from Dr. Gray, who reiterated that appellant could not attend an evaluation in an office that had not been cleared as safe for a severely latex-allergic individual by a certified industrial hygienist. Dr. Gray noted that OWCP had not provided proof that qualify controls had been performed on the building. On March 25, 2020 he again advised that appellant could not be in any environment not verified as latex free or in a room that shared ventilation with an office that used latex or around carpet with latex material or clothes laundered with fabric softener. Dr. Gray related that the referral physician could conduct the examination in her home if he did not use fragrance or fabric softeners. In a report dated February 18, 2021, he indicated that appellant's latex titers had returned to normal since she avoided contact with latex but that she remained at risk of anaphylaxis when exposed to latex. Dr. Gray again noted that Dr. Burstein had not certified that his space or building was latex free.

On June 24, 2020 Dr. Goodman, a DMA, opined that appellant had not provided good cause for her failure to undergo the scheduled examination with Dr. Burstein. He advised that her latex allergy may have resolved.

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.<sup>10</sup> The only limitation on OWCP's authority, with regard to instructing a claimant to undergo a medical examination, is that of reasonableness.<sup>11</sup> 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.<sup>12</sup>

The Board finds that OWCP did not abuse its discretion in directing appellant to appear for a second opinion examination with Dr. Burstein.<sup>13</sup> OWCP's referral to Dr. Burstein was reasonable, and it properly found that appellant failed to provide good cause for failing to attend the March 21, 2019 examination with Dr. Burstein.<sup>14</sup>

As appellant did not attend the examination as scheduled, and failed to provide good cause for failing to appear, the Board finds that OWCP properly suspended her wage-loss compensation and medical benefits in accordance with 5 U.S.C. § 8123(d), effective March 27, 2019.<sup>15</sup>

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<sup>10</sup> *Supra* note 5; *M.N.*, Docket No. 19-1865 (issued May 29, 2020).

<sup>11</sup> *G.E.*, Docket No. 19-1949 (issued October 26, 2020); *A.F.*, Docket No. 18-1155 (issued February 21, 2019).

<sup>12</sup> *A.F.*, *id.*; *B.C.*, Docket No. 19-1058 (issued November 15, 2019).

<sup>13</sup> *See B.C.*, Docket No. 21-1327 (issued January 31, 2023); *G.R.*, Docket No. 20-0915 (issued January 29, 2021).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

**CONCLUSION**

The Board finds that OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d), effective March 27, 2019, due to her failure to attend a scheduled medical examination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 3, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 10, 2023  
Washington, DC

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

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board