

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case, as set forth in the prior decision, are incorporated herein by reference.

On January 25, 2006 appellant, then a 64-year-old mine safety and health inspector, injured his right knee in the performance of duty.⁴ OWCP accepted his traumatic injury claim (Form CA-1) for right knee sprain, medial meniscus tear, aggravation of degenerative osteoarthritis, and chondromalacia patellae. Additionally, it authorized two right knee arthroscopic surgical procedures performed by Dr. Richard Hoblitzell, a Board-certified orthopedic surgeon, on March 30, 2006 and December 8, 2011. Appellant retired effective July 31, 2006.

On October 23, 2012 appellant, through counsel, filed a claim for a schedule award (Form CA-7). In an April 11, 2012 report, Dr. Hoblitzell opined that appellant had reached maximum medical improvement (MMI) for his right knee on January 3, 2012. He indicated that appellant would likely require right knee joint replacement surgery due to the progression of arthritis and not due to his employment injury. Dr. Hoblitzell assigned appellant to class 2 for primary knee joint arthritis, grade A and found that he had 16 percent permanent impairment of the right lower extremity based on Table 16-3, Knee Regional Grid, American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) 509-11 (6th ed. 2009).

OWCP referred appellant to Dr. Theodore Toan Le, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of his permanent impairment. Initially, in an April 9, 2013 report, Dr. Le found 26 percent permanent impairment of the right lower extremity. However, in an August 7, 2013 letter, OWCP's district medical adviser (DMA), Dr. Zimmerman, indicated that Dr. Le's rating was unacceptable because he used the rating methodology for primary knee joint arthritis or patellofemoral arthritis without measuring the knee joint space interval with a ruler graduated in millimeters, in accordance with the A.M.A., *Guides* (6th ed. 2009).

In an October 3, 2013 addendum report, Dr. Le utilized Table 16-3 of the A.M.A., *Guides* based on a magnetic resonance imaging (MRI) scan report dated September 24, 2011, which showed chondromalacia patella and a progression with cartilage damage of the posterior aspect of the weight-bearing portion of the medial femoral condyle in comparison to a previous May 14, 2008 report. He opined that the loss of cartilage corresponded to class 2 for both the knee

³ Docket No. 14-1834 (issued September 18, 2015).

⁴ Appellant twisted his right knee while stepping out of a trailer. The distance (step) from the trailer to ground level was approximately 10 inches.

arthritis and patellofemoral arthritis. Dr. Le corrected his impairment rating based on a grade modifier of 2 for Functional History (GMFH) and Physical Examination (GMPE) and 1 for Clinical Studies (GMCS). He concluded that appellant had 14 percent permanent impairment of the right lower extremity.

On October 21, 2013 Dr. Zimmerman found that, in his October 3, 2013 report, Dr. Le had not considered plane film x-rays, but rather chose to extrapolate a rating for joint space interval narrowing based on what he thought the joint space interspace would be due to changes in an MRI scan of the right knee. He indicated that this method was not permitted by the A.M.A., *Guides*. Utilizing Table 16-23,⁵ Dr. Zimmerman utilized the range of motion (ROM) method and determined that appellant had 10 percent permanent impairment of the right lower extremity based on 100 degrees flexion as reported by Dr. Le in his April 9, 2013 report. He also found that appellant had reached MMI on April 9, 2013, the date of Dr. Le's initial second opinion examination.

By decision dated November 6, 2013, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right lower extremity. The award ran for 28.8 weeks for the period April 9 through October 27, 2013.

Counsel requested a telephonic hearing before a representative of the Branch of Hearings and Review, which was held on May 9, 2014.

By decision dated July 23, 2014, an OWCP hearing representative affirmed the November 6, 2013 schedule award decision.

In a decision dated September 18, 2015, the Board set aside OWCP's July 23, 2014 decision and remanded the case for further development because appellant's ROM had not been properly measured under Chapter 16 of the A.M.A., *Guides*. The Board found that there was no indication that the digital measurements for each extremity reported by Dr. Le followed the procedure outlined in section 16.7b, page 544, of the sixth edition of the A.M.A., *Guides* and remanded the case for OWCP to obtain further information.

Accordingly, on October 21, 2015, OWCP referred appellant to Dr. Le for another second opinion evaluation to determine the extent of his permanent impairment.

In a November 12, 2015 report, Dr. Le found that appellant's active ROM of the right knee was limited. Passive ROM in the supine position was 50, 55, and 55 degrees on three separate determinations. In the sitting position, the knee could be flexed to 65 degrees on two determinations and 75 degrees with some passive stretch. Dr. Le found that with comparison to his previous measurements and his worksheet from 2013, using Table 16.23, page 549, of the A.M.A., *Guides* for knee impairments utilizing three separate measurements of the right knee put appellant in a moderate impairment category, equaling 20 percent permanent impairment of the right lower extremity. He noted that his measurements were performed in accordance with section 16.7 of the sixth edition of the A.M.A., *Guides* and all three measurements were taken after warm-up in the supine position and in the sitting position.

⁵ Table 16-23, page 549 of the sixth edition of the A.M.A., *Guides* is entitled *Knee Motion Impairments*.

OWCP subsequently referred the case to its DMA, Dr. Morley Slutsky, who is Board-certified in occupational medicine.

In a November 24, 2015 report, Dr. Slutsky disagreed with Dr. Le's impairment rating. He utilized the diagnosis-based impairment (DBI) rating method and found that appellant's most impairing diagnosis in the right knee region was a class 1 primary knee joint arthritis secondary to having a full-thickness articular cartilage defect in the medial compartment of the knee. Dr. Slutsky explained that if Dr. Le had taken joint space measurements for each compartment of the knee using x-rays, then appellant may have been eligible for a higher class of arthritis. However, Dr. Le only obtained passive knee ROM measurements. Dr. Slutsky found that the ROM measurements utilized by Dr. Le were invalid for rating appellant's impairment because they were passive, not active measurements. Additionally, he opined that the DBI method was preferred over the ROM method for calculating impairment ratings. Dr. Slutsky determined that using the DBI method, appellant had nine percent permanent impairment of the right lower extremity based on his diagnosis of primary knee joint arthritis.

In a January 6, 2016 letter, OWCP found a conflict in the medical opinion evidence between appellant's attending physician, Dr. Hoblitzell, who found 16 percent permanent impairment, and its second opinion physician, Dr. Le, who found 20 percent permanent impairment of the right lower extremity. It referred appellant to Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon, for a referee examination scheduled for January 14, 2016 to resolve the conflict.

In letters dated January 12 and 15, 2016, counsel provided notice that appellant would not be present for the scheduled January 14, 2016 examination with Dr. Fisher because there was no conflict in the case. He noted that OWCP had already determined that Dr. Hoblitzell's 16 percent impairment rating was unacceptable. Therefore, OWCP was obligated to utilize Dr. Le's 20 percent right lower extremity permanent impairment rating, and award an additional 10 percent permanent impairment. Counsel argued that, in the absence of a true conflict in medical opinion, a referee examination was unwarranted.

In a January 20, 2016 notice of proposed suspension, OWCP informed appellant that it planned to suspend his compensation benefits because he failed to attend the January 14, 2016 referee examination that had been scheduled with Dr. Fisher. It explained the consequences under 5 U.S.C. § 8123(d) for failing to submit to or obstruction an examination. OWCP also noted that counsel's argument regarding the lack of conflict did not establish good cause for appellant's failure to attend the previously scheduled referee examination. It allowed appellant 14 days to provide good cause for his failure to submit to or cooperate with the referee examination. OWCP also forwarded a copy of the notice of proposed suspension to counsel. Thereafter, counsel submitted a letter dated January 26, 2016, reiterating his contention that there was no need or requirement for a referee examination as there was no disagreement among the physicians in the claim because OWCP did not recognize the impairment rating of Dr. Hoblitzell. He further requested that OWCP refer appellant back to Dr. Le for another examination to determine his impairment rating.

By decision dated March 8, 2016, OWCP finalized the proposed suspension of compensation, finding that appellant had failed to attend the medical examination scheduled for

January 14, 2016 and did not establish good cause for refusing to submit to the examination. It found that counsel's arguments were insufficient to establish good cause for appellant's failure to attend the referee examination. OWCP noted that another second opinion examination was scheduled with Dr. Le, but his November 12, 2015 report continued to improperly apply the sixth edition of the A.M.A., *Guides*. It explained that it had not gone back to Dr. Le for clarification because since 2013 he had repeatedly provided impairment ratings that were not in accordance with the A.M.A., *Guides*. Moreover, OWCP decided that it would be more advantageous for appellant to seek an impartial referee examination from a different specialist to determine a final impairment rating for his right lower extremity because two DMAs had provided impairment ratings lower than his attending physician.

On March 17, 2016 counsel requested a hearing before the Branch of Hearings and Review.

A telephonic hearing was held before an OWCP hearing representative on November 3, 2016 and counsel reiterated his arguments.

By decision dated January 24, 2017, OWCP's hearing representative affirmed the prior 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.⁶ 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.⁷ 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.⁸ 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 compensation is suspended until the refusal or obstruction ceases.⁹ However, before OWCP may invoke these provisions, the employee is to be provided a 14-day period within which to present in writing his or her reasons for the refusal or obstruction.¹⁰ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.¹¹

⁶ 5 U.S.C. § 8123(a).

⁷ *J.T.*, 59 ECAB 293 (2008); *S.B.*, 58 ECAB 267 (2007); *James C. Talbert*, 42 ECAB 974 (1991).

⁸ 20 C.F.R. § 10.320.

⁹ 5 U.S.C. § 8123(d); *id.* at § 10.323.

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

¹¹ *Id.*; see *T.W.*, Docket No. 16-1524 (issued February 6, 2017).

ANALYSIS

OWCP scheduled a referee examination on January 14, 2016 with Dr. Fisher. Appellant did not appear for the scheduled examination. On January 20, 2016 it advised him of its intention to suspend compensation benefits pursuant to 5 U.S.C. § 8123(d), and afforded him 14 days to submit new and pertinent explanation for not attending or obstructing the referee examination. Counsel responded on January 26, 2016 essentially reiterating his prior argument that there was no conflict and, therefore, no need for a referee examination. Additionally, he argued that OWCP should either seek further clarification from Dr. Le or refer appellant for another examination by Dr. Le. By decision dated March 8, 2016, OWCP suspended appellant's entitlement to compensation benefits based on his failure to establish good cause for not participating in the scheduled impartial medical examination. The Board finds that OWCP properly suspended his entitlement to compensation for failure to attend a medical examination on January 14, 2016.

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.¹² 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.¹³

In a January 6, 2016 letter, OWCP found a conflict in the medical opinion evidence between appellant's attending physician, Dr. Hoblitzell, and its second opinion physician, Dr. Le, regarding his impairment rating. Appellant was referred for a referee examination with Dr. Fisher and was advised of the need for the examination and the time and place for the scheduled appointment. He failed to attend the scheduled January 14, 2016 appointment. OWCP subsequently allowed appellant 14 days to provide reasons for failing to appear.

Counsel's argument that there was no conflict and therefore no need or requirement for a referee examination is without merit. The Board finds that OWCP reasonably referred appellant for an impartial referee examination from a different specialist to determine a final impairment rating for his right lower extremity because two DMAs had provided impairment ratings lower than his attending physician. Counsel further requested that OWCP return the case to Dr. Le for another examination to clarify his impairment rating. In its March 8, 2016 decision, OWCP explained that it did not go back to Dr. Le for clarification because since 2013 he had repeatedly provided impairment ratings that were not in accordance with the A.M.A., *Guides* (6th ed. 2009).

Thus, the Board finds that OWCP properly suspended entitlement to compensation in accordance with 5 U.S.C. § 8123(d) until the date on which appellant agrees to attend the

¹² *Lynn C. Huber*, 54 ECAB 281 (2002).

¹³ *T.W.*, Docket No. 16-1524 (issued February 6, 2017).

examination. When appellant actually reports for examination, payment retroactive to the date on which he agreed to attend the examination may be made.¹⁴

CONCLUSION

The Board finds that OWCP properly suspended appellant's compensation benefits effective March 8, 2016 due to his failure to attend a scheduled medical examination.

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁴ C.S., Docket No. 11-1366 (issued December 12, 2011); *E.B.*, 59 ECAB 298 (2008).