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C.E., Appellant)	
)	
and)	Docket No. 11-745
)	Issued: October 12, 2011
U.S. POSTAL SERVICE, JAMES A. FARLEY)	
BUILDING, New York, NY, Employer)	
)	

Case Submitted on the Record

Before:
 RICHARD J. DASCHBACH, Chief Judge
 ALEC J. KOROMILAS, Judge
 MICHAEL E. GROOM, Alternate Judge

On February 2, 2001 appellant filed a timely appeal of an August 19, 2010 Office of Workers' Compensation Programs' merit decision suspending his compensation and an October 20, 2010 nonmerit decision denying reconsideration. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merit and nonmerit issues of the case.

The issues are: (1) whether OWCP properly suspended appellant's compensation benefits on the grounds that he refused to cooperate with a medical examination; and (2) whether OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 29, 2003 appellant, then a 57-year-old maintenance support clerk, filed a traumatic injury claim alleging that on January 28, 2003 he hit his right shoulder on a bolt protruding from a door. OWCP accepted his claim for right shoulder strain on February 19, 2003. Appellant returned to full duty on February 1, 2003.

Appellant filed a recurrence of disability claim on April 18, 2003 alleging that on March 26, 2003 he sustained disability due to limited movement in his right shoulder and extreme pain with certain movements. OWCP accepted this claim on April 30, 2003. Dr. Darren Friedman, a Board-certified orthopedic surgeon, performed a glenohumeral arthroscopy and arthroscopic acromioplasty as well as an open repair of the rotator cuff on March 5, 2004. Appellant returned to light-duty work on February 22, 2005. He filed a recurrence of disability claim on October 4, 2005 and alleged that he stopped work on August 2, 2005 due to his employment injury. OWCP accepted this claim on April 18, 2006.

On April 4, 2008 OWCP referred appellant to Dr. Christopher B. Michelsen, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve a conflict of medical opinion between appellant's physician and OWCP's second opinion physician. Dr. Michelsen submitted a report dated May 12, 2008. OWCP requested a supplemental report on August 15, 2008. Dr. Michelsen did not respond.

On January 8, 2009 OWCP directed appellant to attend a second impartial medical examination on January 27, 2009 with Dr. Jeffrey Kaplan, a Board-certified orthopedic surgeon, at 9:30 a.m. Appellant telephoned OWCP on January 12, 2009 and stated that it was not necessary for him to attend the scheduled examination as he had previously cooperated with an impartial medical examination. The claims examiner returned appellant's call and instructed him to attend the medical appointment.

In a letter dated January 12, 2009, appellant objected to the selection of Dr. Kaplan and enclosed a copy of Dr. Michelsen's impartial medical report.

In a letter dated February 3, 2009, OWCP noted that appellant failed to report for the scheduled examination with Dr. Kaplan on January 27, 2009. It instructed him to provide a valid reason for failing to submit or cooperate with the scheduled examination within 14 days. OWCP noted that, if appellant did not show good cause for his failure to appear, then his entitlement to compensation would be suspended under 5 U.S.C. § 8123(d) until after he attended and fully cooperated with the examination. Appellant responded in a letter dated February 10, 2009 and stated that he had complied with 5 U.S.C. § 8123(a) by submitting to the appointment with Dr. Michelsen. He contended that he was not required to submit to a fourth examination. Appellant refused to submit to the examination and requested a hearing.

By decision dated February 19, 2009, OWCP finalized appellant's suspension of compensation effective February 20, 2009. It noted that his benefits would be reinstated only after verification that he attended and fully cooperated with the impartial medical examination scheduled with Dr. Kaplan.

Appellant requested reconsideration on January 16, 2010. He again stated that he had complied with the requirements of FECA by reporting to the examination on May 12, 2008. In a letter dated August 20, 2009, appellant stated that he was willing to attend a referee medical examination.

In a decision dated March 15, 2010, OWCP reviewed appellant's claim on the merits and found that he had failed to establish that the suspension of his compensation benefits was improper.

Appellant requested reconsideration and stated that he had complied with the request for a medical examination with Dr. Michelsen. He stated that he went to Dr. Michelsen's supervisor who stated that a complete report was submitted and no supplemental report requested. Appellant stated that Dr. Michelsen's office disputed that a supplemental report was requested. He stated, "During the period of time in question I was recovering from acute cancer surgery and chemotherapy of which I'm still recovering." Appellant stated that he was willing to undergo any examination that OWCP requested. He submitted a letter dated March 25, 2010 from Dr. Michelsen's office stating that Dr. Michelsen had not received an addendum request regarding appellant. In a letter dated June 10, 2010, Dr. Imtiaz Patel stated that appellant had surgery in September 2007 for nonsmall cell lung cancer and started chemotherapy on October 2007. He noted that appellant had severe side effects post chemotherapy.

By decision dated August 19, 2010, OWCP reviewed the merits of appellant's claim, but denied modification of the February 19, 2009 decision suspending appellant's compensation benefits.

On August 24, 2010 OWCP scheduled an appointment for appellant to be examined by Dr. P. Leo Varriale, an orthopedic surgeon, on September 14, 2010.

Appellant requested reconsideration on October 2, 2010 and argued that OWCP did not request a supplemental report from Dr. Michelson. He noted that he had reported for the examination scheduled with Dr. Varriale and that the Social Security Administration (SSA) had found him totally disabled. In support of his request, appellant submitted a benefit statement from the SSA, a radiology report, medical notes dating from February 3, 2004 through August 14, 2006, and a report dated February 12, 2007 from David Tiersten, M.D., addressing his right upper extremity.

By decision dated October 20, 2010, OWCP declined to reopen appellant's claim for consideration of the merits finding that he failed to submit relevant new evidence or argument in support of his request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

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.² The determination of the need for an examination, the type of examination, the choice of locale

² 5 U.S.C. § 8123(a).

and the choice of medical examiners are matters within the province and discretion of OWCP.³ OWCP's federal regulations at section 10.320 provide that a claimant must submit to examination by a qualified physician as often and at such time and places as OWCP considers reasonably necessary.⁴ Section 8123(d) of FECA and section 10.323 of OWCP's regulations provide that, if an employee refused to submit to or obstructs a directed medical examination, his or her compensation is suspended until the refusal or obstruction ceases.⁵ However, before OWCP may invoke these provisions, the employee is provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.⁶ If good cause for the refusal or obstruction is not established entitlement to compensation is suspended in accordance with section 8123 of FECA.⁷

ANALYSIS -- ISSUE 1

OWCP directed appellant to attend a medical examination with Dr. Kaplan to resolve an existing conflict of medical opinion evidence. Appellant telephoned OWCP and stated that he would not attend and in fact did not attend the scheduled examination. OWCP provided him with a period of 14 days to present in writing his reasons for refusing to submit to the examination. Appellant argued that he had already submitted to an impartial medical examination and was not required to submit to a fourth examination. As noted above, OWCP regulations require that a claimant must submit to examination by a qualified physician as often and at such time and places as OWCP considers reasonably necessary. The Board finds that appellant's argument that he had previously submitted to an impartial medical examination is not good cause for refusing to submit to the additional examination scheduled by OWCP.

Appellant also argued that Dr. Michelsen's report was complete and that OWCP did not request a supplemental report prior to scheduling the second impartial examination. This allegation is not supported by the record. The record before the Board contains a request for a supplemental report from OWCP and faxed to Dr. Michelsen. Appellant's allegation does not establish good cause for failing to attend the scheduled examination.

Appellant's final argument was that he was recovering from cancer surgery and undergoing chemotherapy during the period that the medical examination with Dr. Kaplan was scheduled. He submitted documentation that he had surgery in September 2007 for nonsmall cell lung cancer and started chemotherapy on October 2007. The Board finds that these assertions do not represent good cause for failing to attend the examination scheduled in January 2009. Appellant was able and did attend the April 4, 2008 appointment with Dr. Michelsen within a short time after his surgery and the beginning of his chemotherapy in

³ *James C. Talbert*, 42 ECAB 974, 976 (1991).

⁴ 20 C.F.R. § 10.320.

⁵ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluation Medical Evidence*, Chapter 2.810.14(d) (July 2000).

⁷ *See Scott R. Walsh*, 56 ECAB 592 (2005); *Raymond C. Dickinson*, 48 ECAB 646 (1997).

2007. This fact does not support that he was incapacitated from attending the January 27, 2009 appointment with Dr. Kaplan.

The Board finds that appellant has not submitted good cause for his failure to attend the January 27, 2009 appointment with Dr. Kaplan and that OWCP properly suspended his compensation benefits effective February 20, 2009.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.⁸ Section 10.606(b) of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.⁹ Section 10.608 of OWCP's regulations provide that, when a request for reconsideration is timely, but does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.¹⁰

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹¹

ANALYSIS -- ISSUE 2

Appellant requested reconsideration on October 2, 2010. He again argued that OWCP did not request a supplemental report from Dr. Michelsen. As appellant had previously raised this argument before OWCP, this argument is not a basis for reopening his claim for consideration of the merits.

Appellant stated that he reported for the examination scheduled by OWCP with Dr. Varriale in September 2010. His cooperation with this medical examination is not relevant

⁸ 5 U.S.C. §§ 8101-8193, 8128(a).

⁹ 20 C.F.R. § 10.606.

¹⁰ *Id.* at § 10.608.

¹¹ *M.E.* 58 ECAB 694 (2007).

to whether he had good cause to fail to submit to the January 2009 examination with Dr. Kaplan. This information is not relevant and is not sufficient to require OWCP to reopen appellant's claim for consideration of the merits.

Appellant asserted that the SSA had found him totally disabled and submitted benefit statement from the SSA. This information is not relevant to the central issue of whether appellant had good cause to refuse to submit to the scheduled medical examination. Furthermore, the Board has frequently held that the determination of an employee's rights or remedies under other statutory authority does not establish entitlement to benefits under FECA.¹²

Appellant also submitted medical evidence including, a radiology report, medical notes dating from August 14, 2006 through February 3, 2004 and a report dated February 12, 2007 from Dr. Tiersten addressing his right upper extremity. These reports cannot address appellant's inability to report to an examination scheduled for January 2009 and are therefore not relevant to the issue of whether appellant has established good cause for failing to submit to the January 27, 2009 medical examination with Dr. Kaplan.

The Board finds that appellant's request for reconsideration was not supported by pertinent new and relevant evidence or argument and that OWCP therefore properly declined to reopen appellant's claim for consideration of the merits.

CONCLUSION

The Board finds that OWCP properly suspended appellant's compensation benefits effective February 20, 2009. The Board further finds that OWCP properly declined to reopen appellant's claim for consideration of the merits on October 20, 2010.

¹² *J.F.*, 59 ECAB 331 (2008).

ORDER

IT IS HEREBY ORDERED THAT the October 20 and August 19, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 12, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board