

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

_____)
K.F., Appellant)

and)

GOVERNMENT PRINTING OFFICE,)
Washington, DC, Employer)

_____)

**Docket No. 07-1059
Issued: August 15, 2007**

Appearances:

*Richard J. Link, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 12, 2007 appellant filed a timely appeal from a March 2, 2007 decision of the Office of Workers' Compensation Programs, denying modification of a decision suspending his compensation and an October 10, 2006 decision denying his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly suspended appellant's right to compensation benefits effective January 11, 2005 on the grounds that he failed to attend a directed medical examination; and (2) whether the Office abused its discretion in denying his request for a review of the written record.

FACTUAL HISTORY

On February 24, 2003 appellant, then a 37-year-old press operator, filed a traumatic injury claim alleging that on February 14, 2003 he was off loading a printing job when he heard a click and felt a sharp pain in his back and numbness in his left foot. The Office accepted his

claim for a herniated lumbar disc and left leg peroneal neuropathy. On January 14, 2004 appellant underwent surgery consisting of left L4 and L5 partial hemilaminectomies, a partial facetectomy and foraminotomy and a discectomy at L4-5.

By letter dated October 11, 2004, sent to appellant's correct address of record, the Office referred appellant to Dr. Charles J. Lancelotta, a neurosurgeon, for an examination and opinion as to whether he had any residual disability or medical condition causally related to his February 14, 2003 employment injury. The Office advised appellant that the examination was scheduled for November 4, 2004 at 10:00 a.m. It warned appellant that his compensation benefits would be suspended if he missed the appointment and did not provide an acceptable reason for the missed appointment.

On November 4, 2004 Dr. Lancelotta's office staff advised the Office that appellant did not appear for the scheduled examination.

On December 21, 2004 the Office proposed to suspend appellant's compensation benefits pursuant to section 8123(d) of the Federal Employees' Compensation Act for failure to attend the examination scheduled with Dr. Lancelotta for November 4, 2004, as directed in the October 11, 2004 letter. He was given 14 days in which to provide a written explanation of his reasons for failing to attend the directed examination. If he did not show good cause for his failure to attend the examination, his entitlement to compensation benefits would be suspended. He did not respond.

By decision dated January 11, 2005, the Office finalized its suspension of appellant's compensation benefits.

By letter dated March 11, 2005, received by the Office on March 14, 2005, appellant stated that he did not receive notification of the November 4, 2004 medical examination. He did not become aware of the scheduled examination until he received the Office's December 21, 2004 letter notifying him of the proposed suspension of his compensation benefits.¹ Appellant requested that the Office reinstate his compensation benefits and reschedule the medical examination.

By letter dated September 25, 2006, received by the Office on September 27, 2006, appellant requested a review of the written record. His attorney contended that the Office did not respond to his letters and telephone calls between March 11, 2005 and September 17, 2007 requesting that the medical examination be rescheduled.

On October 10, 2006 the Office denied appellant's request for a hearing on the grounds that it was untimely filed and that the issue of whether he refused to submit to or obstructed a directed medical examination, could be equally well addressed through a request for reconsideration and the submission of additional evidence.

By decision dated March 2, 2007, the Office denied modification of the January 11, 2005 decision. The Office stated that appellant's compensation benefits could not be reinstated until

¹ Appellant did not indicate the date that he received the December 21, 2004 Office letter.

the date of verification that he had attended and fully cooperated with a medical examination. The Office noted that appellant had indicated that he would cooperate with the scheduling of another medical examination.

LEGAL PRECEDENT -- ISSUE 1

Section 8123 of the Act authorizes the Office 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 and the choice of medical examiners are matters within the province and discretion of the Office.³ The Office's federal regulations at section 10.320 provides that a claimant must submit to examination by a qualified physician as often and at such times and places as the Office considers reasonably necessary.⁴ Section 8123(d) of the Act and section 10.323 of the Office's 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.⁵ Office procedures provide that before the Office may invoke these provisions, the employee is to be afforded 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(d) of the Act.⁷

ANALYSIS -- ISSUE 1

The Office scheduled a medical examination on November 4, 2004. Appellant did not appear for the scheduled examination.

On March 11, 2005 appellant stated that he did not receive notification of the November 4, 2004 medical examination. He did not become aware of the scheduled examination until he received the Office's December 21, 2004 letter notifying him of the proposed suspension of his compensation benefits. Appellant requested that the Office reschedule the examination. The Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual.⁸ Under the mailbox rule, evidence of a properly addressed letter

² 5 U.S.C. § 8123.

³ See *Lynn C. Huber*, 54 ECAB 281 (2002).

⁴ 20 C.F.R. § 10.320.

⁵ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; see *Alfred R. Anderson*, 54 ECAB 179 (2002).

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

⁷ *Id.*

⁸ *Joseph R. Giallanza*, 55 ECAB 186 (2003).

together with evidence of proper mailing may be used to establish receipt.⁹ There is a properly addressed copy of the October 11, 2004 Office letter in the case record and there is no evidence to rebut the presumption of receipt by appellant under the mailbox rule. Because appellant failed to attend the November 4, 2004 medical examination and did not provide good cause for the failure within 14 days of the Office's December 21, 2004 notice of proposed suspension, the Office properly suspended his compensation benefits as of January 11, 2005.

On March 2, 2007 the Office denied modification of the January 11, 2005 decision and stated that appellant's compensation benefits could not be reinstated until the date of verification that he had attended and fully cooperated with a medical examination. Section 8123(d) provides that an employee's right to compensation is suspended "until the refusal or obstruction stops," not when the Office verifies that a rescheduled examination has taken place. As the Office received notice from appellant on March 14, 2005 that he was willing to attend a rescheduled medical examination, the suspension of his compensation benefits should have ceased as of March 14, 2005.¹⁰ On remand, the Office should reinstate appellant's compensation benefits as of March 14, 2005.

LEGAL PRECEDENT -- ISSUE 2

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing, or, in lieu thereof, a review of the written record.¹¹ A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which the hearing is sought.¹² A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which the hearing is sought.¹³ The Office has discretion, however, to grant or deny a request that is made after this 30-day period.¹⁴ In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.¹⁵

⁹ *Id.*

¹⁰ The Board notes that appellant stated that he received the Office's December 21, 2004 letter but did not indicate the date it was received. In any event, he did not explain why he did not respond to the Office's notice, that he provide an explanation for his failure to attend the November 4, 2004 medical examination within 14 days, until his March 11, 2005 letter.

¹¹ 5 U.S.C. § 8124(b) of the Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary of Labor is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary of Labor. Section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing; a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days. See *Charles J. Prudencio*, 41 ECAB 499 (1990).

¹² 20 C.F.R. § 10.616(a).

¹³ *James Smith*, 53 ECAB 188 (2001).

¹⁴ 20 C.F.R. § 10.616(b).

¹⁵ *James Smith*, *supra* note 13.

ANALYSIS -- ISSUE 2

Appellant's request for a review of the written record was received by the Office on September 27, 2006, more than 30 days after the Office's January 11, 2005 decision. Therefore, appellant was not entitled to a hearing as a matter of right. The Office exercised its discretion and determined that the issue in the case, whether he refused to submit to or obstructed a directed medical examination, could be equally well addressed through a request for reconsideration and additional evidence. The Board finds no evidence to indicate that the Office abused its discretion in denying appellant's untimely request for a hearing in its October 10, 2006 decision.

CONCLUSION

The Board finds that it properly suspended appellant's compensation benefits effective January 11, 2005 for failure to attend a directed medical examination. However, the suspension should have ceased as of March 14, 2005, the date that appellant indicated his willingness to attend a medical examination. The March 2, 2007 decision should be modified to reflect that the suspension ceased as of March 14, 2005 and the Office should reinstate compensation benefits as of that date. The Board further finds that the Office did not abuse its discretion in denying his untimely request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 2, 2007 is affirmed, as modified. The October 10, 2006 decision is affirmed.

Issued: August 15, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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