United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 11-1213**
	)	**Issued: June 5, 2012**
DEPARTMENT OF THE AIR FORCE, 90th MISSILE WING, WARREN AIR FORCE BASE, WY, Employer	)	

Appearances:
John S. Evangelisti, Esq., for the appellant
No appearance, for the Director

Oral Argument January 11, 2012

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 20, 2011 appellant, through his attorney, filed a timely appeal from the December 15, 2010 and April 7, 2011 decisions of the Office of Workers' Compensation Programs (OWCP) terminating his compensation and the November 4, 2010 nonmerit decision of OWCP denying his request for merit review of decisions suspending his compensation. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective May 6, 2010 on the grounds that he had no residuals of his work injury after that date; and (2) whether appellant established clear evidence of error in OWCP decisions, which suspended his compensation for failure to attend a scheduled examination with an OWCP referral physician.

[1] 20 C.F.R. § 8101 *et seq.*

FACTUAL HISTORY

In 1993, OWCP accepted that appellant, then a 44-year-old financial assistant, sustained permanent aggravation of reactive airway disease due to workplace exposure to perfumes and colognes. He received compensation for periods of disability.

In a March 5, 2002 report, investigators for the Air Force Office of Special Investigations detailed the results of surveillance of appellant in May 2001. Appellant was observed engaging in such activities as watering his lawn, walking his dogs, driving a motor vehicle and visiting business establishments without the aid of respiratory devices.

In an October 19, 2004 report, Dr. Brigitte Gottschall, an attending Board-certified pulmonologist, noted that appellant had a confirmed diagnosis of persistent asthma with continued symptom triggering by nonspecific respiratory irritants. Appellant also had a component of vocal cord dysfunction. Dr. Gottschall stated that, due to the nonspecific nature of his triggers, it was unlikely that appellant could return to a workplace without suffering a setback due to his respiratory illness.

In a September 21, 2004 letter, OWCP referred appellant for a second opinion examination on October 8, 2004 with Dr. Timothy Kennedy, a Board-certified pulmonologist. It advised appellant that, under section 8123(d) of FECA, if an employee refuses to submit to or obstructs an examination, his right to compensation is suspended until the refusal or obstruction stops. The letter stated, "If for any reason you cannot keep this appointment, you must advise the examining specialist no later than seven days before the scheduled appointment. You must also advise your claims examiner in writing of your reason, within seven days of the appointment."

In two September 27, 2004 letters, received on October 5, 2004, appellant advised OWCP that he would be unable to attend the second opinion examination scheduled for October 8, 2004 due to a previously scheduled medical appointment. He asked whether Dr. Kennedy's facility was fragrance free and, if not, what measures would be put in place to ensure his safety. On October 22, 2004 appellant wrote OWCP and confirmed that he was not able to attend the second opinion evaluation on October 8, 2004. He reiterated his concern about being harmed if Dr. Kennedy's facility was not fragrance free.

A November 4, 2004 e-mail from the medical scheduler to OWCP stated that appellant "was a no show for appointment with Dr. Kennedy October 8, 2004."

In a November 4, 2004 letter, OWCP advised appellant that it proposed to suspend his compensation because he failed to appear for the October 8, 2004 second opinion examination with Dr. Kennedy. It advised that he had 14 days from the date of the letter to provide a reason for not appearing for the October 8, 2004 examination.

In a November 9, 2004 letter, appellant informed OWCP that on October 27, 2004 his wife called Dr. Kennedy's office and cancelled the appointment set for October 28, 2004 due to

the fact that he was ill.[2] He asserted that he had not refused to submit to a second opinion and stated, "I'll see Dr. Kennedy in his office, parking lot, or my vehicle; just tell me when." Appellant also noted that he did not get a response to his September 27, 2004 request to be examined in a fragrance-free environment.

In a November 22, 2004 decision, OWCP suspended appellant's wage-loss benefits effective November 27, 2004 for failure to appear for the October 8, 2004 examination with Dr. Kennedy. The decision found that, although appellant stated that the appointment with Dr. Kennedy had been cancelled, it had not in fact been cancelled.

In a November 15, 2004 report, Dr. Gottschall stated that she examined appellant on October 19, 2004 and found that he could work as long as he "is not exposed to any of the nonspecific environmental triggers of his airway disease."

In a May 31, 2005 decision, OWCP suspended appellant's compensation benefits effective June 11, 2005 due to his failure to complete a Form EN1032 regarding his employment and earnings which had been sent to him in April 2005. It advised appellant that, if he completed and returned a Form EN1032, his compensation benefits would be restored retroactively to the date they were suspended.

On June 15, 2005 OWCP advised appellant that it had failed to consider his September 27, 2004 letters stating that he had been unable to attend the second opinion appointment scheduled for October 8, 2004 due to a conflict with a prior scheduled medical appointment. It asked him to provide documentation of the prior scheduled appointment and the need to be examined at a fragrance-free facility. OWCP advised appellant that the suspension of his compensation would be reconsidered upon receipt of the requested information.

In a July 26, 2005 decision, OWCP found, "The proposed suspension of your compensation under 5 U.S.C. § 8123(d) is made final, effective July 26, 2005. This final suspension corrects the previous effective date of November 27, 2004."[3] It noted that, since it did not consider appellant's prior scheduled appointment, his compensation benefits would be restored for the period November 27, 2004 to June 11, 2005. OWCP effectively set aside its November 22, 2004 decision, in which it suspended his compensation effective November 27, 2004 for failure to appear for the October 8, 2004 second opinion examination with Dr. Kennedy.

On August 15, 2005 OWCP received a Form EN1032, which appellant completed on August 8, 2005.

On September 15, 2006 appellant wrote OWCP and reiterated that he was willing to undergo a second opinion examination when notified by OWCP to do so.

[2] Appellant later indicated that he had previously contacted Dr. Kennedy's office and set up an appointment to be examined on October 28, 2004.

[3] OWCP indicated that it was suspending appellant's compensation under 5 U.S.C. § 8123(d) for not attending an OWCP-directed examination, but it did not clearly identify the scheduled examination he failed to attend without good cause.

In a November 14, 2006 letter, OWCP advised appellant that it had been determined that his November 9, 2004 statement that he would see Dr. Kennedy "in his office, parking lot or my vehicle" could be construed as a willingness to attend a second opinion examination. It informed him that it would notify him in writing of the date, time and location of the second opinion examination once it had been scheduled.

In a November 14, 2006 letter, OWCP notified appellant that a second opinion examination had been scheduled for him with a pulmonologist. It stated, "Please see the attached letter for the time, date and location of his appointment," but no other document was attached. The letter advised appellant that his compensation would be suspended under 5 U.S.C. § 8123(d) if he failed to attend the scheduled second opinion examination. It was sent to appellant's address of record in Cheyenne.

In a November 20, 2006 letter, OWCP advised appellant that a second opinion examination had been scheduled for him on December 11, 2006 at 9:00 a.m. with Dr. Lawrence H. Repsher, a Board-certified pulmonologist. The letter was sent to appellant's address of record.

On December 12, 2006 OWCP issued appellant a "Notice of Continued Suspension of Compensation" for failure to attend the scheduled examination with Dr. Repsher on December 11, 2006. It advised him of the consequences of failing to attend a scheduled second opinion examination and afforded him 14 days from the date of the letter to provide a reason for failing to attend the December 11, 2006 medical examination. OWCP stated, "If you do not show good cause, your entitlement to compensation will be suspended under 5 U.S.C. § 8123(d) until after you attend and fully cooperate with the examination."[4]

On December 13, 2006 appellant wrote OWCP and stated that he never received the notice of appointment with Dr. Repsher, but that he received the December 12, 2006 document on December 13, 2006.

On January 12, 2007 OWCP advised appellant of the mailbox rule. Appellant was advised that, if he intended to report for a rescheduled examination with Dr. Repsher, he should contact the Denver District Office immediately.

On February 20, 2007 appellant again wrote OWCP asking that it address the concerns raised in his previous letters.

In a June 1, 2007 decision, the district director for OWCP determined that, due to appellant's failure to attend the second opinion examination scheduled for December 11, 2006 with Dr. Repsher, his compensation continued to be suspended. OWCP found that appellant was provided an opportunity to challenge the suspension, but he did not submit sufficient evidence to show that his failure to attend the December 11, 2006 examination was justified. Appellant was advised that his compensation would be resumed upon attendance at an OWCP-directed second opinion examination.

[4] The letter was sent to appellant's address of record.

On May 21, 2008 appellant wrote OWCP noting his desire to attend a second opinion examination. OWCP retroactively reinstated his compensation benefits effective May 21, 2008.

On May 1, 2009 appellant's counsel reiterated appellant's intent to attend a second opinion examination.

In February 2010, OWCP again referred appellant to Dr. Repsher for a second opinion examination. In a March 18, 2010 report, Dr. Repsher discussed appellant's medical history and briefly summarized medical reports of attending physicians produced between 1991 and 2004. He indicated that examination of appellant's chest revealed normal breath sounds with an expiratory phase that was not prolonged. There were no rales, rhonchi or wheezes, even with forced expiration. Dr. Repsher stated that a methacholine challenge test obtained on March 18, 2010 was unequivocally normal with no response even at the 16 milligram percent dose.[5] He diagnosed several conditions, including no evidence of bronchial asthma; possible, but not documented, very mild and clinically insignificant chronic obstructive pulmonary disease, as a result of his long, heavy and continued cigarette smoking habit; and gross malingering, with probable voluntary vocal cord dysfunction syndrome.

Dr. Repsher further stated that it was his opinion that appellant did not now or ever suffer from asthma and noted, "Therefore, it was also my opinion that [appellant] reached [maximum medical improvement] on the date of his alleged injury and has a [zero percent permanent impairment]. Finally, it was my opinion that [appellant] was now and always has been, since the date of his alleged injury, fully fit to carry out his usual job duties without restriction." He stated that appellant never did suffer from any disabling residuals of the accepted work event and certainly did not have any residuals at the present time. Dr. Repsher posited that appellant did not now or ever have reactive airway disease indicating that this diagnosis was "based on prevarication by [appellant] and an incompetent evaluation by several physicians, mostly those at the National Jewish Hospital." Appellant never had any respiratory aggravation, other than from his long, heavy and continued cigarette smoking habit and he did not now or ever have an inability to be exposed to irritants. Dr. Repsher stated that appellant had no restrictions that would prevent him from full-time work and could work in a sedentary position in almost any office setting. He concluded that appellant never had a respiratory condition due to fumes and vapors.[6]

In a March 29, 2010 letter, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits based on the March 18, 2010 opinion of Dr. Repsher. It provided him 30 days from the date of the letter to submit evidence and argument challenging the proposed termination.

In an April 27, 2010 letter, appellant's counsel argued that prior medical evidence showed that appellant in fact suffered from pulmonary disease.

[5] The record contains the results on a March 18, 2010 methacholine challenge test which indicated, "Normal, which would rule out bronchial asthma."

[6] Dr. Repsher completed a form report indicating that appellant could work eight hours per day without restrictions.

In a May 6, 2010 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective May 9, 2010. It indicated that its termination action was based on the opinion of Dr. Repsher.

On May 26, 2010, an OWCP claims examiner advised appellant that a compensation check was issued on April 23, 2010 for May 21, 2008 to April 10, 2010.[7] He indicated that appellant was not due any further compensation. On July 13, 2010 an OWCP claims examiner wrote appellant that he would be paid from April 11 to May 8, 2010.

Counsel requested a decision with appeal rights regarding appellant's request for reinstatement of compensation retroactive to June 12, 2005 and submitted an undated statement from appellant and his wife regarding the changing of the date of the appointment scheduled for October 8, 2004 with Dr. Kennedy. He also submitted a July 14, 2010 letter from Dr. Kennedy's office noting that appellant called and rescheduled his second opinion evaluation which was set for October 8, 2004 to October 27, 2004 but then called again and cancelled it.

On August 11, 2010 an OWCP claims examiner wrote that the date of reinstatement of appellant's compensation was determined in the decisions dated November 22, 2004 and December 12, 2006.[8]

In a September 17, 2010 letter, appellant, through counsel, requested reconsideration of OWCP's decisions to suspend his compensation. Counsel noted that OWCP reinstated appellant's compensation for the period November 27, 2004 to June 11, 2005 because its November 22, 2004 decision did not adequately consider his reason for missing the October 8, 2004 second opinion examination with Dr. Kennedy. Counsel argued that OWCP erred by not reinstating appellant's compensation after June 11, 2005 given that he had expressed a willingness to attend a second opinion examination and that, after October 2004, no additional second opinion examination had been scheduled until December 2006.[9]

In a November 4, 2010 decision, OWCP refused to review appellant's claim on the merits because his untimely reconsideration request did not show clear evidence of error in its prior decisions suspending his compensation for failure to attend an OWCP-directed second opinion examination. It found that his argument that he never received the notice for the December 11, 2006 appointment with Dr. Repsher was not valid as OWCP could presume that the letter was received unless it was returned as undeliverable, which did not happen. OWCP noted, "That obstruction means that you again needed to advise OWCP of your intent to actually attend any future appointments scheduled by [OWCP]."[10]

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[7] On May 21, 2008 appellant advised OWCP that he was willing to attend a second opinion examination.

[8] The claims examiner referenced an OWCP decision dated December 12, 2006, but this actually constituted a preliminary determination rather than a final decision.

[9] Counsel provided a similar argument in a letter dated July 12, 2010. He did not clearly request reconsideration of appellant's claim at that time.

[10] OWCP indicated that its December 12, 2006 determination "did not require appeal rights as it was not a new suspension, but rather a continuation of the suspension decision issued July 25, 2005 that was still in place."

In a December 15, 2010 decision, an OWCP hearing representative affirmed the May 6, 2010 decision terminating appellant's compensation effective May 9, 2010. She found that Dr. Repsher's opinion supported the termination, finding that appellant had not shown that Dr. Repsher was biased against him or committed any impropriety.

On December 30, 2010 counsel requested reconsideration of OWCP's December 15, 2010 decision and asserted that submitted documents showed that Dr. Repsher conducted 610 examinations from December 7, 1999 to January 11, 2010.

In an April 7, 2011 decision, OWCP affirmed its December 30, 2010 decision noting that appellant did not show that Dr. Repsher had committed any impropriety.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[11] It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[12] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[13]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained permanent aggravation of reactive airway disease due to workplace exposure to perfumes and colognes and paid him compensation for periods of disability. It terminated his compensation effective May 9, 2010 based on the March 18, 2010 report of Dr. Repsher, a Board-certified pulmonologist, serving as an OWCP referral physician.

The Board finds that the opinion of Dr. Repsher is not sufficiently well rationalized to support the termination of appellant's wage-loss compensation and medical benefits. The March 18, 2010 report of Dr. Repsher does not establish that appellant had no residuals of his accepted work injury after May 9, 2010.

Dr. Repsher reported physical examination and diagnostic testing findings and diagnosed several conditions, including no evidence of bronchial asthma; possible, but not documented, very mild and clinically insignificant chronic obstructive pulmonary disease, as a result of appellant's long, heavy and continued cigarette smoking habit; and gross malingering, with probable voluntary vocal cord dysfunction syndrome. He concluded that appellant did not have any residuals of his work injury and could perform his regular work.

Dr. Repsher's medical opinion is not based on a complete and accurate factual and medical history and therefore is of limited probative value. He stated that appellant did not now

[11] *Charles E. Minniss,* 40 ECAB 708, 716 (1989); *Vivien L. Minor,* 37 ECAB 541, 546 (1986).

[12] *Id.*

[13] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

or ever suffer from asthma or reactive airway disease and noted that the later diagnosis was "based on prevarication by [appellant] and an incompetent evaluation by several physicians, mostly those at the National Jewish Hospital." As previously noted, OWCP accepted that appellant sustained permanent aggravation of reactive airway disease due to workplace exposure to perfumes and colognes. Dr. Repsher did not adequately explain why appellant did not have this condition; he did not address in any detail the numerous prior reports of record showing that appellant had a work-related pulmonary condition. He suggested that appellant's pulmonary diagnosis was due to malingering, but he did not explain the basis for this belief. Dr. Repsher concluded that appellant never had an inability to be exposed to irritants, but he did not provide medical rationale supporting this assertion. He also asserted that appellant never had any disabling residuals of the accepted work injury. But this statement is not in accordance with the factual and medical history as OWCP has accepted that appellant had extended periods of disability, as well as a need for medical care, due to his work injury.

For these reasons, Dr. Repsher's opinion does not show that appellant ceased to have residuals of his work injury and OWCP improperly terminated his compensation effective May 9, 2010.

LEGAL PRECEDENT -- ISSUE 2

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.[14] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.[15]

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review was not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[16] OWCP regulations and procedure provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of OWCP.[17]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.[18] The evidence must be positive, precise and explicit and

[14] 20 C.F.R. § 10.607(a).

[15] 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[16] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[17] *Id*. at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP procedure further provides, "The term 'clear evidence of error' was intended to represent a difficult standard. The claimant must present evidence which on its face shows that [OWCP] made an error (for example, proof that a schedule award was miscalculated)."

[18] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

must manifest on its face that OWCP committed an error.[19] Evidence which does not raise a substantial question concerning the correctness of OWCP's decision was insufficient to establish clear evidence of error.[20] It was not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[21] This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.[22]

Section 8123(a) of FECA[23] authorizes OWCP to require an employee who claims compensation for an employment injury to undergo such physical examinations as it deems necessary. The determination of the need for an examination, the type of examination, the choice of local and the choice of medical examiners are matters within the province and discretion of OWCP. The only limitation on this authority was that of reasonableness.[24] Section 8123(d) of FECA provides that, "[i]f an employee refuses to submit to or obstructs an examination, his right to compensation is suspended until refusal or obstruction stops."[25] If an employee fails to appear for an examination, OWCP must ask the employee to provide in writing an explanation for the failure within 14 days of the scheduled examination.[26]

It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.[27]

ANALYSIS -- ISSUE 2

OWCP properly determined that appellant filed an untimely request for reconsideration of OWCP's prior decisions suspending his compensation, under section 8123(d) of FECA, for failure to attend an OWCP-directed second opinion examination. Appellant's reconsideration request was filed in September 2010, more than one year after the issuance of OWCP's last merit decision, dated June 1, 2007, regarding the suspension of his compensation and therefore he must demonstrate clear evidence of error on the part of OWCP in issuing these prior decisions.

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[19] 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

[20] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[21] *See Leona N. Travis*, *supra* note 19.

[22] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[23] 5 U.S.C. § 8123(a).

[24] *See Dorine Jenkins*, 32 ECAB 1502, 1505 (1981).

[25] 5 U.S.C. § 8123(d). *See* 20 C.F.R. § 10.323.

[26] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (April 1993).

[27] *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

The Board finds that appellant has established clear evidence of error with respect to OWCP's determinations regarding the suspension of his compensation for failure to attend a second opinion examination. Before OWCP and on appeal to the Board, appellant, through counsel, pointed out that OWCP's July 26, 2005 decision reinstated appellant's compensation for the period November 27, 2004 to June 11, 2005 because its November 22, 2004 decision did not adequately consider his reason for missing the October 8, 2004 second opinion examination with Dr. Kennedy, a Board-certified pulmonologist. The Board notes that counsel has argued that OWCP's July 26, 2005 decision effectively set aside its November 22, 2004 decision, in which it suspended appellant's compensation effective November 27, 2004.

Appellant argued that OWCP erred by not reinstating his compensation shortly after June 11, 2005 given that he had expressed a willingness to attend a second opinion examination and that, after October 2004, no additional second opinion examination had been scheduled until December 2006. Although OWCP properly suspended his compensation effective June 11, 2005 for a reason other than failing to attend a second opinion examination, *i.e.,* failure to complete a Form EN1032 concerning his employment and earnings, it received a completed Form EN1032 on August 15, 2006. It should have then reinstated appellant's compensation as it did not, at that point, have any basis to suspend his compensation for failure to attend a directed second opinion examination. Appellant's argument raises a substantial question concerning the correctness of OWCP's decisions with respect to his entitlement to compensation between August 2005 and December 2006.

The Board further finds that appellant has not shown clear evidence of error with respect to OWCP's determination that he was not entitled to compensation beginning December 11, 2006 due to his failure to attend a second opinion examination scheduled for December 11, 2006 with Dr. Repsher.

In a November 20, 2006 letter, OWCP advised appellant that a second opinion examination had been scheduled for him on December 11, 2006 at 9:00 a.m. with Dr. Repsher. The letter was sent to his address of record. On December 12, 2006 OWCP advised appellant that his failure to attend the scheduled examination with Dr. Repsher on December 11, 2006 justified the suspension of his compensation. It advised him of the consequences, under section 8123(d) of FECA, of failing to attend a scheduled second opinion examination and afforded him 14 days from the date of the letter to provide a reason for failing to attend the December 11, 2006 medical examination. In a June 1, 2007 decision, OWCP determined that, due to appellant's failure to attend the second opinion examination scheduled for December 11, 2006, his compensation continued to be suspended.

Before OWCP and on appeal to the Board, appellant, through counsel, argued that he did not receive OWCP's November 20, 2006 letter advising him of the second opinion examination scheduled for December 11, 2006 with Dr. Repsher. He cited several cases, including *Mike C. Geffre,* 44 ECAB 942 (1993), which he believed showed that his assertion that he did not receive the November 20, 2006 letter was sufficient to rebut the presumption that he received it.[28] Appellant has not shown clear evidence error in this regard because the cases he cited do not

[28] *Id*. It should be noted that appellant acknowledged receiving OWCP's December 12, 2006 letter advising him of the consequences of failing to attend the December 11, 2006 medical examination with Dr. Repsher.

support his argument.[29] His arguments do not raise a substantial question concerning the correctness of OWCP's decision to suspend his compensation for failing to attend the December 11, 2006 medical examination.

For these reasons, appellant has shown that OWCP erred by failing to pay him wage-loss compensation and medical benefits from the time he complied with OWCP's reporting requirements in August 2005 until the time he failed to attend, without just cause, the second opinion examination scheduled for December 11, 2006 with Dr. Repsher.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective May 9, 2010 on the grounds that he had no residuals of his work injury after that date. The Board further finds that he has shown that OWCP erred when it did not pay him compensation from the time he complied with OWCP's reporting requirements in August 2005 until the time he failed to attend the December 11, 2006 medical examination with Dr. Repsher.

[29] On appeal, appellant argued that his compensation could not be suspended with respect to the December 11, 2006 appointment because the November 20, 2006 referral letter did not advise him of the consequences, under section 8123(d) of FECA, of failing to attend an OWCP-directed examination. This argument would not show clear evidence of error in OWCP's prior decisions because he had been advised of such consequences on several prior occasions as well as in OWCP's December 12, 2006 letter.

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2011 and December 15, 2010 decisions of the Office of Workers' Compensation Programs are reversed. The November 4, 2010 decision of OWCP is modified in part and affirmed in part.

Issued: June 5, 2012
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board