

FACTUAL HISTORY

This case has previously been before the Board.³ In a January 15, 2010 decision, the Board reversed an October 3, 2008 OWCP decision which found that appellant's request for reconsideration was untimely and did not demonstrate clear evidence of error. The Board noted that OWCP used an incorrect standard of review in treating her inquiry as a reconsideration request. The Board noted that OWCP scheduled a second opinion examination with Dr. Arnal Chakraborty, a Board-certified psychiatrist, but appellant did not appear for the scheduled examination. On September 26, 2003 OWCP suspended appellant's compensation effective October 5, 2003 on the grounds that her refusal to attend the scheduled examination resulted in an obstruction. On June 30, 2008 appellant visited OWCP to inquire into what she needed to do to resume her benefits. Although OWCP characterized the visit and her inquiry as a request for reconsideration, the Board found that OWCP should have adjudicated her claim to determine if her compensation benefits should remain suspended or be reinstated. The Board remanded the case for an appropriate decision. The facts and the history contained in the prior appeal are incorporated by reference.

Evidence germane to the present matter includes that, in a September 11, 2003 letter, OWCP advised appellant that she failed to attend the examination scheduled with Dr. Chakraborty on September 6, 2003 and that she had 15 days in which to explain the reasons for not attending the examination and to reschedule the examination or her compensation would be suspended. On September 12, 2007 appellant contacted OWCP and contended that she did not receive the September 11, 2003 letter.⁴ She argued that she did not refuse nor obstruct an examination and requested that OWCP resume her benefits. On May 7, 2008 appellant advised OWCP that she was again requesting resumption of her benefits. On June 30, 2008 she presented to OWCP's office and requested reconsideration in person. Appellant reiterated that she did not receive OWCP's letters and therefore, she did not reschedule her appointment.

Subsequent to the Board's January 15, 2010 decision, appellant contacted OWCP on February 15, 24 and June 25, 2010 and requested that she be scheduled for a second opinion examination.

In letters dated August 11 and September 14, 2010, appellant's representative requested that OWCP schedule appellant for medical examination in accordance with the Board's January 15, 2010 remand instructions. He also requested that OWCP make payment "retroactive to the date on which she agreed to attend the examination." Appellant's representative argued that the Board's decision was, "in effect prescribing that (September) date as the date to be utilized in calculating the retroactive look-back period (effectively establishing September 2007 as the date she agreed to attend the examination). [OWCP] is to make such payment retroactive to that date when Ms. Davis reports for an examination." Appellant's representative noted that since the Board's January 15, 2010 decision, appellant had not received any correspondence from OWCP.

³ Docket No. 09-602 (issued January 15, 2010).

⁴ The September 11, 2003 letter was sent to appellant's mailing address of record.

By letter dated September 2, 2010, OWCP referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record to Dr. Amar Bhandary, a Board-certified psychiatrist. The record reflects that appellant attended the examination scheduled for November 18, 2010.

In a telephone memorandum dated November 24, 2010, appellant contacted OWCP to advise that she had kept her appointment. In a January 6, 2011 telephone memorandum, she contacted OWCP and was advised that her compensation would be reinstated back to the date she agreed to attend the second opinion examination and that prior compensation was not payable due to the suspension for not attending the second opinion examination.

In a February 15, 2011 merit decision, OWCP determined that appellant's June 30, 2008 appearance at OWCP's office constituted her agreement to comply with the request that she attend a second opinion evaluation and it reinstated her compensation benefits beginning June 30, 2008. It further found that appellant was not eligible for compensation during the period of obstruction, October 5, 2003 through June 29, 2008.

LEGAL PRECEDENT

FECA provides that, if an employee refuses to submit to or obstructs an examination, her right to compensation is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee.⁵ The plain meaning of this language is that compensation is forfeited for the period of the refusal or obstruction.⁶

OWCP procedures state that, if the claimant does not report for a scheduled appointment, he or she should be asked in writing to provide an explanation within 14 days. If good cause is not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d) until the date on which the claimant agrees to attend the examination. Such agreement may be expressed in writing or by telephone (documented on Form CA-110). When the claimant actually reports for examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made.⁷

ANALYSIS

OWCP suspended appellant's compensation, effective October 5, 2003, for refusal to attend a scheduled second opinion examination. On September 12, 2007 appellant contacted

⁵ 5 U.S.C. § 8123(d).

⁶ *William G. Saviolidis*, 37 ECAB 174 (1985). The employee will forfeit compensation otherwise paid or payable under FECA for the period of the refusal or obstruction, and any compensation already paid for that period will be declared an overpayment and will be subject to recovery pursuant to 5 U.S.C. § 8129. 20 C.F.R. § 10.323 (the penalties for failing to report for or obstructing a second opinion or referee examination).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14.d (July 2000). See *Sharon Handy*, 57 ECAB 446 (2006).

OWCP and indicated that she did not receive OWCP's September 11, 2003 letter notifying her that her compensation would be suspended if she did not provide good cause for not attending the examination.⁸ She asserted that she did not refuse nor obstruct an examination and requested that OWCP resume her benefits. However, other than requesting that her benefits be reinstated, appellant did not indicate that she agreed to attend the examination or otherwise ask that OWCP reschedule her examination. She again contacted OWCP on May 7, 2008. The Board notes that appellant merely requested that OWCP resume payment of her benefits. It was not until she visited OWCP's offices on June 30, 2008, to determine what she should do to reinstate her benefits, that it was determined that she had agreed to attend the examination. When the claimant actually reports for examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made.⁹ As OWCP determined that appellant agreed to attend the examination on June 30, 2008, and she subsequently did attend a scheduled examination, this constitutes the date that retroactive payments shall begin.

Appellant's representative argued that September 2007 was when appellant agreed to attend the examination. He further noted that the Board in its January 15, 2010 decision¹⁰ was, "in effect" prescribing a September date as the date to be utilized in calculating the "retroactive look-back period (effectively establishing September 2007 as the date she agreed to attend the examination)" and that OWCP was "to make such payment retroactive to that date" when appellant reported for her examination. Appellant's representative has misconstrued the Board's decision. While the Board noted that appellant had contacted OWCP on September 12, 2007 and May 7, 2008, the Board did not determine whether these contacts constituted an agreement to attend the examination. As noted in its January 15, 2010 decision, the Board did not have jurisdiction to consider the merits of the claim, only whether OWCP properly adjudicated the matter as a request for reconsideration. The Board determined that OWCP did not use the proper standard of review and remanded the case for OWCP to issue an appropriate decision. The Board did not purport to make any merit findings regarding when appellant may have indicated her willingness to report for an examination. Instead, the Board explained why the matter should not be treated as a request for reconsideration and it directed OWCP to issue an appropriate decision using the proper standard of review.

On appeal, appellant's representative essentially repeats his previous arguments. He also argued that there was no legal requirement for an injured worker to physically appear at OWCP's offices of OWCP to manifest an intention to appear for a scheduled medical examination. While there is, of course, no requirement that a claimant appear in person to an OWCP office to express an intention to attend a medical examination,¹¹ this June 30, 2008 appearance was the first time that OWCP determined that appellant expressed an intent to attend the examination. Her previous letters asking for resumption of benefits did not clearly indicate her willingness to

⁸ As noted, the September 11, 2003 letter was mailed to appellant's address of record. It is well established that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an addressee in the ordinary course of business was received by the addressee. *See Larry L. Hill*, 42 ECAB 596, 600 (1991).

⁹ *E.B.*, 59 ECAB 298 (2008); *see supra* note 7.

¹⁰ *See supra* note 3.

¹¹ *See supra* note 7.

attend an examination. Therefore, OWCP properly determined that June 30, 2008 was the date that appellant's obstruction ceased.¹²

CONCLUSION

The Board finds that June 30, 2008 was the correct date for appellant's eligibility for compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the February 15, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 15, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

¹² Appellant may submit evidence or argument with a written request for reconsideration 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.