

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

T.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Lexington, KY, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 13-740
Issued: December 4, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 11, 2013 appellant filed a timely appeal of the January 29, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) suspending his compensation benefits. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly suspended appellant's compensation benefits effective October 21, 2011 under 5 U.S.C. § 8123(d) due to his failure to attend a scheduled medical examination.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board with respect to the denial of appellant's claim for a schedule award.² In a July 21, 2011 decision, the Board found that the case was not in posture for decision regarding the extent of his permanent impairment due to a conflict in medical opinion between Dr. Gregory T. Snider, an attending Board-certified family practitioner and an OWCP medical adviser. The Board directed that OWCP refer appellant for an impartial medical examination. The Board set aside the February 17 and July 9, 2010 OWCP decisions and remanded the case for further development of the medical evidence. The facts of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are delineated below.³

By letter dated September 20, 2011, OWCP referred appellant to an impartial medical examination by Dr. Arthur F. Lee, a Board-certified orthopedic surgeon, on October 21, 2011 at 12:30 p.m. in Cincinnati, Ohio. The notice included Dr. Lee's address and telephone number. OWCP informed appellant that the failure to keep, refusal to submit to or obstruction of the examination might result in suspension of his right to compensation under 5 U.S.C. § 8123(d) of FECA. It stated that compensation was not payable while the refusal or obstruction continued and that the period of the refusal or obstruction would be deducted from the period for which compensation was payable.

In a September 29, 2011 letter, appellant refused to attend the scheduled medical examination, contending that there was no conflict in medical opinion. He alleged bias on the part of the medical adviser. Appellant further alleged that accompanying medical evidence regarding his emotional condition established his inability to undergo the scheduled examination. He stated that he was unable to drive or ride in a car out of state.

In an October 18, 2011 letter, OWCP advised appellant that he failed to provide an acceptable reason for appearing at the scheduled examination. The medical evidence did not provide a firm diagnosis regarding his back and hip conditions. OWCP noted that appellant's claim was only accepted for a sprain of the lumbar spine and right SI ligament.

On November 9, 2011 OWCP was informed by Dr. Lee's office that appellant did not attend the scheduled examination.

In a November 9, 2011 decision, OWCP denied appellant's schedule award claim on the grounds that he failed to attend the October 21, 2011 examination.

On November 14, 2011 appellant requested an oral hearing before an OWCP hearing representative.

² Docket No. 10-2056 (issued July 21, 2011).

³ OWCP accepted that appellant sustained a lumbar strain under File Nos. xxxxxx077 and xxxxxx454. It also accepted that he sustained a right sacroiliac (SI) strain under File No. xxxxxx456. OWCP combined these files into a master claim assigned File No. xxxxxx456.

In a May 11, 2012 decision, an OWCP hearing representative set aside the November 9, 2011 decision. The hearing representative found that OWCP improperly denied appellant's schedule award claim on the grounds that he refused to attend the scheduled impartial medical examination. Appellant was not given the required 14-day notice following the missed evaluation on October 21, 2011. The case was remanded for OWCP to follow its established procedures to determine whether his compensation and medical benefits should be suspended under 5 U.S.C. § 8123(d) for failure to attend a scheduled medical examination.

By letter dated May 24, 2012, OWCP proposed to suspend appellant's compensation benefits on the grounds that he failed to report for the scheduled examination on October 21, 2011. It allowed him 14 days to provide a written statement containing a valid reason for failing to submit to the examination. OWCP stated that, if appellant did not show good cause, his entitlement to any future compensation would be suspended under 5 U.S.C. § 8123(d) until after he attended and fully cooperated with the examination.

In a June 2, 2012 letter, appellant stated that on February 12, 2008 he was advised by Dr. Kim Scott Larmore, a Board-certified psychiatrist, not to submit to any more OWCP directed medical examinations as doing so would be detrimental to his emotional health. He tried to harm himself in 2003 due to undergoing such examinations. Appellant stated that driving long distances caused pain in his lower back and right hip and leg. A May 17, 2012 prescription note from Dr. Sniders explained that appellant was required to change positions as needed. Appellant was concerned about his safety as he used his right leg to depress the gas and brake pedals while driving a car. He would not go to any more examinations until he obtained the right to select the physician who would rate his impairment. Appellant submitted a copy of Dr. Larmore's February 12, 2008 report. He also submitted her June 1, 2006 report, in which she opined that his October 2003 psychiatric breakdown and subsequent long stay in a residential nursing home were a direct consequence of his serious back injury incurred while working at the employing establishment. Dr. Larmore advised that appellant's prognosis remained guarded and he likely needed extensive psychiatric care in the future.

In a June 19, 2012 decision, OWCP finalized the proposed suspension of appellant's compensation benefits effective October 21, 2011 under 5 U.S.C. § 8123(d). It found that he did not provide good cause for his failure to attend the scheduled examination. OWCP had previously reviewed Dr. Larmore's February 12, 2008 prescription. It advised appellant that it could provide transportation to and from the examination if he was unable to drive long distances. OWCP stated that the referee examination physician was independently selected and scheduled by its contractor. Appellant was informed that compensation benefits would be reinstated after he attended and fully cooperated with an examination.

On June 24, 2012 appellant requested an oral hearing.

In a January 29, 2013 decision, an OWCP hearing representative affirmed the June 19, 2012 decision. The hearing representative found that appellant did not establish good cause for failing to attend the scheduled October 21, 2011 examination.

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.⁴ 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.⁵ OWCP regulations at section 10.320 provide that a claimant must submit to examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary.⁶ Section 8123(d) of FECA and section 10.323 of OWCP 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.⁷ OWCP's procedures provide that before OWCP may invoke these provisions, the employee is to be provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.⁸ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.⁹

ANALYSIS

OWCP scheduled an impartial medical examination on October 21, 2011 at 12:30 p.m. in Cincinnati, Ohio with Dr. Lee. Appellant did not appear for the scheduled examination. By decisions dated June 19, 2012 and January 29, 2013, OWCP suspended his compensation effective October 21, 2011 for failure to attend the scheduled examination. The Board finds that OWCP properly suspended appellant's compensation for failure to attend a medical examination on October 21, 2011.

On September 20, 2011 OWCP notified appellant that he was being referred for an impartial medical examination to resolve an existing conflict of medical opinion evidence as directed by the Board. It informed him of his obligations to attend and cooperate. The notice clearly explained that appellant's compensation benefits would be suspended for failure to report to or obstruction of the examination. OWCP advised him of the date and time of his scheduled October 21, 2011 appointment with Dr. Lee. Appellant was also provided with Dr. Lee's address and telephone number. As noted, he did not appear for the appointment nor did he attempt to reschedule the appointment prior to the designated time. Appellant's refusal to submit

⁴ 5 U.S.C. § 8123.

⁵ *J.T.*, 59 ECAB 293 (2008).

⁶ 20 C.F.R. § 10.320.

⁷ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; *Dana D. Hudson*, 57 ECAB 298 (2006).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010); *supra* note 5.

⁹ Federal (FECA) Procedure Manual, *id.* at Chapter 2.810.13(e) (September 2010); *supra* note 5.

to the medical examination warrants suspension of entitlement to compensation unless he can establish good cause for his failure to report at the scheduled time.¹⁰

The Board finds that appellant did not establish good cause for his failure to report to the scheduled examination with Dr. Lee. OWCP notified appellant on May 24, 2012 that it proposed suspension of his entitlement to compensation benefits. Appellant was given 14 days to submit a valid reason for his failure to attend the scheduled medical appointment. He argued that an impartial medical examination was not necessary because there was no conflict in the medical opinion evidence. Appellant alleged bias on the part of the medical adviser. He may not decide whether the circumstances warrant an impartial medical examination. There is no discretion for appellant to exercise in this matter.¹¹ Further, his stated lack of trust in the opinion of the medical adviser does not amount to exceptional circumstances. Without evidence in support of his allegation of bias, OWCP has nothing more than an unsubstantiated excuse.¹² Appellant argued that Dr. Larmore's February 12, 2008 report advised him not to submit to any more OWCP directed examinations because doing so would be detrimental to his emotional health. Dr. Larmore failed to address how his emotional condition would worsen if he attended a future OWCP directed examination. Moreover, the Board notes that appellant's claim has not been accepted for an employment-related emotional condition. For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship.¹³ While Dr. Larmore opined in a June 1, 2006 report that appellant's October 2003 psychiatric breakdown and subsequent lengthy stay in a residential nursing home were directly caused by his employment-related back injury, she failed to provide a specific diagnosis or medical rationale explaining how his emotional condition arose from the accepted work injury.¹⁴

The Board finds that his various objections to driving long distance to the scheduled examination are not a valid excuse to refuse to attend an impartial medical examination. Appellant did not submit any medical evidence supporting his assertions or evidence showing that he was unable to get to the appointment by any other mode of transportation. While Dr. Sniders, in a May 17, 2012 prescription, noted that appellant was to change positions as needed, he did provide a narrative opinion addressing appellant's ability to attend the scheduled examination or how the inability was due to the accepted employment injury. OWCP advised appellant that it could provide transportation to and from the examination if he was unable to drive long distances, but he failed to make such arrangements. Appellant refused to undergo any more examinations until he obtained the right to select the physician who would rate his

¹⁰ *Id.*

¹¹ See *G.M.*, Docket No. 09-1835 (issued June 21, 2010).

¹² *Atanacio G. Sambrano*, 51 ECAB 557 (2000).

¹³ *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

¹⁴ See *Gloria J. McPherson*, 51 ECAB 441 (2000) (the opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant).

impairment. The Board notes that, pursuant to OWCP's procedures, a claimant who asks to participate in selecting the referee physician or who objects to the selected physician should provide the reason for the objection.¹⁵ Here, appellant generally asked to participate, but provided no particular reason. There is no unqualified right to participate in the selection of an impartial specialist.¹⁶ Therefore, appellant's request does not conform with OWCP procedural requirements for participating in the selection of an impartial medical examiner.

Appellant has not submitted sufficient evidence to establish that he was incapable of attending the scheduled medical examination. The Board finds, therefore, that OWCP properly suspended his right to future compensation benefits effective October 21, 2011.

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.

CONCLUSION

The Board finds that OWCP properly suspended appellant's right to future compensation effective October 21, 2011 for failing to attend a scheduled medical examination.

¹⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4(f) (July 2011).

¹⁶ *Joseph R. Boutot*, 45 ECAB 560 (1993).

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 4, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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