

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

D.B., Appellant

and

**DEPARTMENT OF JUSTICE, U.S.
ATTORNEYS OFFICE, Birmingham, AL,
Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 13-727
Issued: June 3, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On February 7, 2013 appellant filed a timely appeal from a September 14, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which suspended her 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 September 23, 2012 under 5 U.S.C. § 8123(d) due to her failure to attend a scheduled medical examination on August 28, 2012.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 31, 2002 appellant, then a 37-year-old assistant United States attorney, submitted an occupational disease claim alleging major depression, hypertension, panic attacks and severe stress as a result of her employment duties. She stopped work on May 13, 2002. OWCP accepted that appellant had depression with anxiety. Appellant was placed on the periodic rolls.

By letter dated August 8, 2012, OWCP directed appellant to report to a second-opinion examination by Dr. Solomon Miskin, a Board-certified psychiatrist and neurologist, on August 28, 2012 at 7:15 p.m. to determine the nature of her condition, extent of disability and appropriate treatment. Appellant was advised that the examination could take up to 60 minutes. OWCP informed her that the failure to keep, refusal to submit to or obstruction of the examination could result in suspension of her right to compensation under section 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 an undated letter received on August 22, 2012, appellant stated that she was unable to attend the appointment on August 28, 2012 and requested that OWCP reschedule the appointment for a later date.

On August 30, 2012 OWCP was informed that appellant did not attend the scheduled August 28, 2012 examination.

In an August 30, 2012 letter, OWCP proposed to suspend appellant's compensation benefits on the grounds that she failed to report for the scheduled examination on August 28, 2012. It allowed her 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, her entitlement to compensation would be suspended under 5 U.S.C. § 8123(d) until after she attended and fully cooperated with the examination.

In a September 4, 2012 statement, appellant related that on August 20, 2012 she called Medical Consultants Network to reschedule her appointment but was informed that she had to contact OWCP. She called OWCP on Monday afternoon and Tuesday morning but could not get through. On August 28, 2012, approximately 30 minutes before the scheduled appointment, appellant received a voicemail stating that OWCP claims examiner had been on vacation and that he received her letter but could not grant her request without knowing a reason. By the time she received that voicemail, it was too late to attend the meeting. Appellant stated that she had to attend a public hearing the next day on August 29, 2012 at 9:00 a.m. and would have to leave early in order to get there on time. Because of the late appointment with Dr. Miskin and the distance of the examination, she would not return home until very late at night. Appellant reported that the short turn around and lengthy drives back to back would overtax her system and aggravate her condition so that she would not be able to function for her August 29, 2012 morning hearing.

In a decision dated September 14, 2012, OWCP finalized appellant's suspension of compensation benefits effective September 23, 2012. It determined that, although she stated that she had to attend a public hearing she did not provide any supporting evidence concerning why she had to appear or the purpose of the public hearing. OWCP advised appellant that her benefits would be reinstated after verification that she attended and fully cooperated with the examination.²

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.³ 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.⁴ OWCP regulations at section 10.320 provide that a claimant must submit to examination by a qualified physician as often and at such times as OWCP considers reasonably necessary.⁵ Section 8123(d) of FECA and section 10.323 of the implementing federal 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.⁶ 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.⁷ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA until the claimant reports for examination.⁸

ANALYSIS

OWCP scheduled a second opinion examination on August 28, 2012 at 7:15 p.m. with Dr. Miskin. Appellant did not appear for the scheduled examination. By decision dated September 14, 2012, OWCP suspended her compensation for failure to attend the scheduled examination, finding that she did not establish good cause. The Board finds that it properly suspended appellant's compensation for failure to attend a medical examination on August 28, 2012.

² The Board notes that appellant subsequently attended the rescheduled second opinion examination on October 16, 2012 and her compensation benefits have been reinstated.

³ 5 U.S.C. § 8123.

⁴ *J.T.*, 59 ECAB 293 (2008).

⁵ 20 C.F.R. § 10.320.

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

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

⁸ *Id.*

The Board finds that appellant has not established good cause for her failure to attend the scheduled August 28, 2012 examination with Dr. Miskin. In a September 4, 2012 response, appellant explained that she did not attend the examination because of the distance and late time. It would have caused her to arrive home late in the evening and she had to be at a public hearing early the next morning.

The Board finds that appellant has not adequately substantiated her failure to attend the scheduled second opinion medical examination. While she stated that the examination was scheduled at 7:15 p.m. and she would have to travel a distance to attend, the Board notes that she was advised that the examination would be up to an hour in length and would end by approximately 8:15 p.m. Appellant did not submit any evidence to substantiate the distance between her home in Poughkeepsie, NY and Dr. Miskin's office in Mount Kisko NY, she therefore has not substantiated that she would arrive at home late at night.⁹ While appellant alleged that she was required to attend a public hearing the next morning at 9:00 a.m., she did not submit any evidence to establish that she was required to attend a public hearing the following day or the purpose of the hearing.

Appellant did advise OWCP by letter received on August 22, 2012 that she would not attend the examination with Dr. Miskin on August 28, 2012 and she requested that the appointment be rescheduled, but she did not offer any explanation for her request to substantiate good cause.

Without evidence in support of her allegation, OWCP has nothing more than an unsubstantiated excuse.¹⁰ As noted, 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. The only limitation on this authority is that of reasonableness.¹¹ There is no evidence in the record that OWCP abused its discretion in directing the examination.

Appellant has not submitted sufficient evidence to establish that she was incapable of attending the medical examination scheduled on August 28, 2012. The Board finds that OWCP properly suspended appellant's right to future compensation benefits effective September 23, 2012.

On appeal, appellant contends that she was entitled to compensation for the period September 23 through December 14, 2012 because she neither obstructed nor refused to attend the second opinion evaluation. She stated that she made a good faith effort to reschedule the examination more than a week prior to the appointment date and that she did not miss the appointment because of a deliberate disregard to OWCP's instructions. The relevant issue, however, is whether OWCP properly suspended appellant's compensation benefits under 5 U.S.C. § 8123(d) due to her failure to attend the scheduled medical examination on

⁹ The Board takes notice that the average distance between Poughkeepsie NY and Mount Kisko NY is 50 miles.

¹⁰ *Atanacio G. Sambrano*, 51 ECAB 557 (2000).

¹¹ 20 C.F.R. § 10.320; *see supra* note 4.

August 28, 2012. As appellant did not submit sufficient evidence to establish good cause for not attending the August 28, 2012 examination, the Board finds that OWCP did not abuse its discretion by suspending her compensation benefits effective September 23, 2012.

CONCLUSION

The Board finds that OWCP properly suspended appellant's right to compensation benefits on September 23, 2012, as she failed to attend a scheduled medical examination without showing good cause for her refusal.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 3, 2013
Washington, DC

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

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

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