

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

B.L., Appellant)	
)	
and)	Docket No. 13-1869
)	Issued: January 14, 2014
DEPARTMENT OF THE ARMY, TEST & EVALUATION COMMAND, White Sands Missile Range, NM, Employer)	
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)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 7, 2013 appellant filed a timely appeal from a July 12, 2013 nonmerit decision and a March 28, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUES

The issues are: (1) whether OWCP properly suspended appellant's compensation benefits effective April 7, 2013 due to her failure to attend a scheduled medical examination; and (2) whether OWCP properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On March 2, 2012 appellant, then a 48-year-old IT specialist, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right back and abdominal injury on February 28,

¹ 5 U.S.C. § 8101 *et seq.*

2012 when she was moving and lifting metal desks. She indicated on the claim form that her home was in New Mexico. On April 11, 2012 OWCP accepted that appellant sustained a lumbar sprain. Appellant was paid medical and wage-loss benefits.

By letter dated April 18, 2012, OWCP acknowledged receipt of appellant's change of address request to an address in El Paso, Texas.

By letter dated September 28, 2012, OWCP notified appellant that a second-opinion examination was needed to address the nature of her condition, extent of disability and appropriate treatment. Appellant was advised that, if she refused to attend or obstructed the examination, her compensation could be suspended under 5 U.S.C. § 8123(d).

In a letter dated October 1, 2012, QTC Medical Services, Inc., the medical appointment scheduler, notified her that she was scheduled for an appointment with Dr. Charles D. Mitchell, a Board-certified orthopedic surgeon, at 12:30 p.m. on November 12, 2012.

In a record of a telephone conversation dated November 13, 2012, a claims examiner noted that she had spoken with appellant, who stated that she did not go to the appointment with Dr. Mitchell on November 12, 2012 because she had not been notified about the appointment.

In an e-mail dated November 13, 2012, a claims examiner asserted that appellant had missed her appointment with Dr. Mitchell due to late notification. She stated that the appointment with Dr. Mitchell was seven hours away from appellant's address of record.

By letter dated November 14, 2012, QTC Medical Services, Inc. informed OWCP that appellant did not keep her appointment on November 12, 2012.

In a letter dated November 14, 2012, QTC Medical Services, Inc. notified appellant that her appointment had been rescheduled with Dr. James Hood, a Board-certified orthopedist, at 8:30 a.m. on December 27, 2012, in El Paso Texas. This letter was addressed to appellant's home in El Paso Texas.

By letter dated December 31, 2012, OWCP was informed that appellant did not keep her appointment on December 27, 2012.

On February 11, 2013 OWCP proposed to suspend appellant's compensation benefits pursuant to section 8123(d) of FECA for failure to attend the December 27, 2012 examination with Dr. Hood. Appellant was advised to provide a written explanation of her reasons for not attending this appointment, along with corroborating evidence, within 14 days for failing to attend the scheduled examination. She did not respond within the allotted period.

By decision dated March 28, 2013, OWCP finalized its proposed suspension, effective April 7, 2013. It noted that it directed appellant to report for the examination scheduled on December 27, 2012, but she did not attend the examination or provide a written explanation of her failure to attend within 14 days of OWCP's February 11, 2013 letter.

In a letter dated April 9, 2013, appellant alleged that she never received the letter of November 14, 2012, notifying her of her appointment with Dr. Hood, or the letter of February 11, 2013, notifying her of the proposed suspension of benefits. She stated that she had

not been contacted by OWCP regarding suspension of her benefits until receiving the March 28, 2013 letter finalizing its proposed suspension. Appellant noted that she did not go to her appointment with Dr. Mitchell because her claims examiner told her to ignore letters from QTC Medical Services, Inc., until she had heard back from the claims examiner. She stated that Dr. Mitchell's office was nine hours from El Paso, Texas and that she could not drive.

In a note dated May 14, 2013, a claims examiner stated that appellant attended a May 10, 2013 second-opinion appointment for another case, and that the claims examiner requested doubling of the case file.

In a letter dated June 24, 2013, appellant stated that her claims examiner had directed her not to attend the appointment with Dr. Mitchell and to ignore further appointment notifications with QTC Medical Services, Inc. until contacted. She noted that she had not known she was required to see Dr. Hood until she received the March 28, 2013 letter finalizing suspension of benefits. Appellant noted that she would attend an examination with Dr. Mitchell if OWCP approved travel expenses to visit him.

In a letter dated June 24, 2013, appellant enclosed a work capacity evaluation from her treating physician, a copy of the October 1, 2012 letter regarding her appointment with Dr. Mitchell, and noted that she was still waiting for approval of travel expenses to visit him.

Appellant requested a telephonic hearing on June 24, 2013. The form requesting an oral hearing was received on July 1, 2013 and was date stamped June 28, 2013.

In a letter dated June 24, 2013, appellant reviewed the history of her case and noted that she had not received any letter regarding her appointment with Dr. Hood.

By decision dated July 12, 2013, OWCP denied appellant's request for an oral hearing as untimely. It found that she had not made her request for an oral hearing within 30 days.

LEGAL PRECEDENT -- ISSUE 1

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.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 OWCP.³ OWCP regulations provide that a claimant must submit to an examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary.⁴ Section 8123(d) of FECA and 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.⁵ OWCP procedures provide that, before OWCP may invoke these provisions, the employee is to be provided a period for 14 days within which to

² 5 U.S.C. § 8123.

³ *J.T.*, 59 ECAB 293, 296 (2008); *S.B.*, 58 ECAB 267, 271 (2007); *James C. Talbert*, 42 ECAB 974, 975 (1991).

⁴ 20 C.F.R. § 10.320.

⁵ *Supra* note 3; 20 C.F.R. § 10.323; *Dana D. Hudson*, 57 ECAB 298, 303 (2006).

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 FECA.⁷

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.⁸

ANALYSIS -- ISSUE 1

OWCP scheduled a second opinion examination on December 27, 2012 with Dr. Hood. Appellant did not appear for the scheduled examination. In a February 11, 2013 letter, OWCP provided her 14 days from the date of the letter to provide an explanation for her failure to attend the scheduled examination. Appellant did not provide a response within the allotted time. By decision dated March 28, 2013, OWCP suspended her compensation benefits based on her failure to appear. The Board finds that OWCP properly suspended appellant's compensation for failure to attend a medical examination on December 27, 2012.

Regarding her failure to appear for the examination, appellant stated that she had not received any letter notifying her of an appointment with Dr. Hood in El Paso, Texas. The letter notifying her of the date, time and location of the appointment was mailed to her last known address in El Paso, Texas on November 14, 2012, over a month prior to the date of the scheduled examination. The Board notes that at the time the letters were sent, appellant's last known address was in El Paso, Texas. Her later letters to OWCP dated from April 9 through June 24, 2013, and her request for a hearing dated June 24, 2013, were mailed from the same address.

The Board finds that it is presumed that appellant received OWCP's letter dated November 14, 2013 advising her of her appointment with Dr. Hood and the letter dated February 11, 2013 advising her of the proposed suspension of benefits, because these letters were properly addressed and duly mailed to her last known address.⁹ Appellant alleged that she had not received these letters, but did not submit any contrary evidence to show that these letters were not mailed to her in the ordinary course of business.

For these reasons, the Board finds that OWCP properly suspended appellant's entitlement to compensation in accordance with 5 U.S.C. § 8123, effective April 7, 2013, for failure to submit to a medical examination without good cause. Should appellant subsequently agree to attend the examination or cease the obstruction, OWCP will restore any periodic benefits to which she is entitled when she actually reports for and cooperates with the examination.¹⁰ Payment will be retroactive to the date appellant agreed to attend the examination.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010).

⁷ *Id.*

⁸ *Y.C.*, Docket No. 13-800 (issued August 22, 2013).

⁹ *See id.*

¹⁰ 20 C.F.R. § 10.323.

Appellant submitted new evidence on appeal. The Board lacks jurisdiction to review evidence for the first time on appeal.¹¹ 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.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.¹² Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.¹³ A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.¹⁴ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.¹⁵ OWCP's procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).¹⁶

ANALYSIS -- ISSUE 2

Appellant requested an oral hearing in an appeal form dated June 24, 2013, received on July 1, 2013, and date stamped June 28, 2013. As the hearing request was made more than 30 days after issuance of the March 28, 2013 OWCP decision, her request for an oral hearing was untimely filed and she was not entitled to an oral hearing as a matter of right.

OWCP also notified appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. It has broad administrative discretion in choosing means to achieve its general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken, which are contrary to both logic and probable deductions from established facts.¹⁷ There is no indication that OWCP abused its discretion in this case in finding that appellant could further pursue the matter through the reconsideration process.

¹¹ *Id.* at § 501.2(c).

¹² 5 U.S.C. § 8124(b)(1).

¹³ 20 C.F.R. §§ 10.616-10.618.

¹⁴ *Id.* at § 10.616(a).

¹⁵ *Eddie Franklin*, 51 ECAB 223, 227 (1999); *Delmont L. Thompson*, 51 ECAB 155, 157 (1999).

¹⁶ *See R.T.*, Docket No. 08-408 (issued December 16, 2008).

¹⁷ *Minnie B. Lewis*, 53 ECAB 606, 609 (2002).

Consequently, the Board finds that OWCP properly denied appellant's request for an oral hearing.

CONCLUSION

The Board finds that OWCP properly suspended appellant's compensation effective April 7, 2013. The Board further finds that OWCP properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b)(1).

ORDER

IT IS HEREBY ORDERED THAT the July 12 and March 28, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 14, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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