

FACTUAL HISTORY

On May 23, 2009 appellant, then a 60-year-old crew leader and lister, filed a traumatic injury claim alleging that on May 18, 2009 she sustained a severe sprain and contusions to both her knees when she fell down at work. She stopped work on May 19, 2009. OWCP accepted appellant's claim for bilateral knee contusion, right lateral meniscus derangement and right knee medial meniscus tear. Appellant was paid medical and wage-loss compensation benefits.

On November 6, 2013 OWCP referred appellant, along with a statement of accepted facts, for a second opinion examination to address whether she continued to suffer residuals of her May 18, 2009 employment injury, whether she continued to be disabled as a result of her accepted condition and whether she could return to work.

In a letter dated November 19, 2013, QTC Medical Services, Inc., the medical appointment scheduler, notified appellant that she was scheduled for an appointment with Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, at 12:30 p.m. on December 5, 2013. Appellant did not appear for the scheduled examination on December 5, 2013.

By letter dated December 6, 2013, OWCP proposed to suspend appellant's compensation benefits pursuant to section 8123(d) of FECA for failure to attend the December 5, 2013 examination with Dr. Lakin. Appellant was advised to provide a written explanation of her reasons for not attending this appointment, along with corroborating evidence, within 14 days.

In a letter dated December 16, 2013 and received on December 19, 2013, appellant requested rescheduling of the December 5, 2013 medical appointment. She stated that she had been extremely ill and mostly bedridden due to the deterioration of her left leg condition. Appellant noted that on November 12, 2013 she was given a shot in the knee for pain and that she subsequently also had a flu shot. She explained that she did not know that persons with extreme health issues, especially fibromyalgia, should not have a flu shot. Appellant reported that she became extremely ill within a few days and was incapable of "handling telephone calls, paperwork, etc...." She included a prescription note which indicated that she had received a flu shot.

By letter dated January 6, 2014, OWCP advised appellant that her second opinion examination with Dr. Lakin was rescheduled for January 20, 2014 at 2:45 p.m.

On January 21, 2014 QTC Medical Services, Inc., informed OWCP that appellant did not appear for her January 20, 2014 appointment with Dr. Lakin.

On January 21, 2014 OWCP proposed to suspend appellant's compensation benefits pursuant to section 8123(d) of FECA for failure to attend the January 20, 2014 examination with Dr. Lakin. Appellant was advised to provide a written explanation of her reasons for not attending this appointment, along with corroborating evidence, within 14 days.

Appellant submitted medical reports dated May 17 and November 12, 2013 by Dr. Fred Lee, a Board-certified orthopedic surgeon, who specializes in sports medicine, regarding treatment for persistent left knee pain and degenerative joint disease.

By decision dated March 21, 2014, OWCP finalized its proposed suspension, effective March 21, 2014. It noted that it had directed appellant to report for the examination scheduled on January 20, 2014, but she neither attended the examination nor provided a written explanation for her failure to attend within 14 days of OWCP's January 21, 2014 letter.

In an appeal request form dated March 27, 2014 and received on April 18, 2014, appellant requested reconsideration. She stated that she did not receive the letter regarding an appointment with Dr. Lakin. No additional evidence was received.

By decision dated April 28, 2014, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant further merit review under 5 U.S.C. § 8128(a).

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.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 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.⁵

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.⁶ OWCP procedures provide that, before OWCP may invoke these provisions, the employee is to be provided a period for 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.⁸

The Board has found that 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.⁹

³ 5 U.S.C. § 8123.

⁴ *J.T.*, 59 ECAB 293, 296 (2008); *S.B.*, 58 ECAB 267, 271 (2007); *James C. Talbert*, 42 ECAB 974, 975 (1991).

⁵ 20 C.F.R. § 10.320.

⁶ *Supra* note 3; 20 C.F.R. § 10.323; *Dana D. Hudson*, 57 ECAB 298, 303 (2006).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010).

⁸ *Id.*

⁹ *Y.C.*, Docket No. 13.800 (issued August 22, 2013).

ANALYSIS -- ISSUE 1

On November 6, 2013 OWCP referred appellant for a second opinion examination to determine the nature and extent of her accepted May 18, 2009 conditions and continuing disability. Appellant did not appear for the scheduled examination on December 5, 2013. On January 6, 2014 OWCP rescheduled her second opinion examination for January 20, 2014. Appellant again did not appear for the scheduled examination. In a letter dated January 21, 2014, 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 statement or explanation within the allotted time. By decision dated March 21, 2014, OWCP suspended her compensation benefits based on her failure to appear for the January 20, 2014 examination. The Board finds that OWCP properly suspended appellant's compensation for failure to attend a scheduled medical examination on January 20, 2014.

On appeal, appellant alleges that she never received any letters regarding missing appointments with Dr. Lakin. She also noted that she was hospitalized on March 27, 2014 due to her left leg condition. The record establishes that the letter notifying appellant of the date, time and location of the January 20, 2014 appointment was mailed to her last known address in Leonia, NJ, on January 6, 2014. The letter proposing to suspend her compensation was also mailed to this proper address. The Board notes that at the time the letters were sent, appellant's last known address was in Leonia, NJ.

The Board finds that it is presumed that appellant received OWCP's letter dated January 6, 2014 advising her of her appointment with Dr. Lakin and the letter dated January 21, 2014 advising her of the proposed suspension of benefits, because these letters were properly addressed and duly mailed to her last known address.¹⁰ Appellant alleged that she had not received any letters from OWCP, but she 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 March 21, 2014, for failure to submit to a medical examination without good cause. Should appellant subsequently agree to attend the examination and cease the obstruction, OWCP will restore any periodic benefits retroactive to the date she agreed to attend the examination.¹¹

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.¹² OWCP's regulations provide that OWCP may

¹⁰ *Id.*

¹¹ 20 C.F.R. § 10.323.

¹² 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his or her right through a request to the district office.¹³

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁴

A request for reconsideration must also be submitted within one year of the date of the OWCP decision for which review is sought.¹⁵ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁶ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁷

ANALYSIS -- ISSUE 2

By decision dated March 21, 2014, OWCP suspended appellant's compensation on the grounds that she did not attend a scheduled second opinion examination. On April 18, 2014 it received appellant's request for reconsideration. Appellant stated that she never received a letter regarding an appointment with Dr. Lakin and that she was currently in the hospital because of her left knee. No additional evidence was received. As discussed previously, appellant's argument that she did not receive the appointment letter lacks color of validity. OWCP's correspondence to appellant was mailed to her last known address. While a reopening of a case may be predicated solely on a legal premise not previously considered such reopening is not required where the legal contention does not have a reasonable color of validity.¹⁸

The Board notes that appellant's April 18, 2014 request for reconsideration did not demonstrate that OWCP erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered nor submit new and relevant evidence. Consequently, the Board finds that she did not meet any of the necessary requirements to entitle her to further merit review.

¹³ 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

¹⁴ *Id.* at § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁵ *Id.* at § 10.607(a).

¹⁶ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁷ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁸ *See John F. Critz*, 44 ECAB 788, 794 (1993).

Therefore, OWCP properly refused to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128.

CONCLUSION

The Board finds that OWCP properly suspended appellant's right to future compensation effective March 21, 2014 because she did not attend a scheduled medical examination. The Board also finds that OWCP properly denied her April 18, 2014 request for reconsideration pursuant to 5 U.S.C. § 8128(a)

ORDER

IT IS HEREBY ORDERED THAT the April 28 and March 21, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 12, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board