

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

S.Y., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Pittsburgh, PA, Employer)

**Docket No. 15-1313
Issued: November 2, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 26, 2015 appellant filed a timely appeal from a February 10, 2015 merit and a May 11, 2015 nonmerit 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 February 9, 2015 due to his failure to attend a scheduled medical examination; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 31, 2012 appellant, then a 51-year-old housekeeping aid, was injured when he lifted a five-gallon bucket of batteries. OWCP accepted the claim for right inguinal hernia without obstruction or gangrene. On May 2, 2013 appellant underwent a right inguinal herniorrhaphy and on December 27, 2013 he underwent a right inguinal exploration with ilioinguinal nerve transection. He stopped work on the date of injury. Appellant worked light duty intermittently beginning on September 10, 2013. OWCP accepted recurrences of disability on December 27, 2013 and March 10, 2014. Appellant received appropriate medical and wage-loss compensation benefits.

In a June 20, 2014 letter, OWCP advised appellant that he had not provided a recent comprehensive narrative medical report from his physician which supported his continued disability from work. It stated that it was unclear why he remained out of work and that it would refer him for a second opinion examination.

Appellant was released to return to work with restrictions effective July 1, 2014. By letter dated July 3, 2014, the employing establishment offered him a light-duty position beginning July 7, 2014. Appellant accepted the position and returned to work. However, he stopped work on July 10, 2014 and claimed compensation beginning July 11, 2014.²

By letter dated July 21, 2014, OWCP notified appellant that a second opinion examination was needed to address the nature of his condition, extent of disability, and appropriate treatment. Appellant was advised that, if he refused to attend or obstructed the examination, his compensation could be suspended under 5 U.S.C. § 8123(d). OWCP also noted that he could use a travel voucher to claim reimbursement for any necessary travel expenses incurred to attend the examination.

On September 24, 2014 appellant was notified that he was scheduled for an appointment with Dr. David Hofius, an osteopath specializing in surgery, at 11:00 a.m. on October 13, 2014.

In a letter dated October 14, 2014, QTC Medical Services, Inc., OWCP's medical appointment scheduler, notified OWCP that appellant did not appear at his scheduled appointment.

On October 27, 2014 OWCP proposed to suspend appellant's compensation benefits pursuant to section 8123(d) of FECA for failure to attend the October 13, 2014 examination with Dr. Hofius. Appellant was advised to provide a written explanation of his reasons for not attending this appointment, along with corroborating evidence, within 14 days. He was advised that he would be rescheduled for another second opinion examination.

A letter dated August 29, 2014 acknowledged receipt of a claim for compensation filed on appellant's behalf and two benefits statements were returned to OWCP as undeliverable on October 30, 2014.

² OWCP accepted appellant's claim for a recurrence commencing July 10, 2014.

On November 6, 2014 appellant was again scheduled for a second opinion examination with Dr. Hofius at 11:30 a.m. on December 8, 2014. The letter was sent to his most recent address of record.

In e-mail correspondence dated November 13, 2014, between the claims examiner and Judy Zubal, a human resources specialist for the employing establishment, the claims examiner requested that Ms. Zubal provide appellant's updated address or that she forward the notice of proposed suspension to appellant. Ms. Zubal advised that appellant was residing in the employing establishment's domiciliary and provided the address. The claims examiner asked if the address provided was appellant's permanent address and advised that he needed to put something in writing to update the file. Ms. Zubal noted that she was unsure as to how long appellant would be staying there and noted that he moved around frequently. She advised that she would forward the attached letters to appellant.

In a letter dated December 9, 2014, QTC Medical Services, Inc. notified OWCP that appellant did not appear for the scheduled examination on December 8, 2014.

By decision dated February 10, 2015, OWCP finalized its proposed suspension, effective February 9, 2015. It noted that it had directed appellant to report for the examination scheduled on October 13 and December 8, 2014, but he neither attended the examinations, nor provided a written explanation for his failure to attend within 14 days of OWCP's October 27, 2014 letter.

On a February 25, 2015 appeal form, postmarked April 17, 2015, appellant simultaneously requested an oral telephone hearing and reconsideration. He marked through his oral hearing selection and initialed. However the space for telephone hearing remained checked. Appellant advised that he originally sent the appeal form to OWCP on February 25, 2015, but he did not hear back from anyone. OWCP received the appeal form on April 21, 2015.

In an April 12, 2015 statement, appellant advised that he recently came across OWCP's February 10, 2015 decision that was lost as he moved to a different residence. He acknowledged that he received a letter sometime in August or September about a doctor's appointment. Appellant advised that he called to have the appointment rescheduled closer to Pittsburgh as he did not know where the doctor's office was located and did not have money to get there. He alleged that he did not receive notification of a subsequent appointment. Appellant stated that he was willing to attend any appointment set up for him.

By decision dated May 11, 2015, appellant's request for an oral hearing was denied as untimely. OWCP exercised its discretion and further denied the request for the reason that the relevant issue of the case could be addressed by requesting reconsideration and submitting evidence not previously considered.

On appeal appellant asserts that he tried to contact his claims examiner to schedule another second opinion examination. He contends that the claims examiner told him he would schedule another appointment.

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 examination by a qualified physician as often and at such time and places as OWCP considers reasonably necessary.⁵

Section 8123(d) of FECA and section 10.323 of OWCP regulations provide that, if an employee refused to submit to or obstructs a directed medical examination, his or her compensation is suspended until the refusal or obstruction ceases.⁶ However, before OWCP may invoke these provisions, the employee is 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 of FECA.⁸

ANALYSIS -- ISSUE 1

OWCP suspended appellant's compensation effective February 9, 2015 under section 8123(d) of FECA, as he failed to attend a scheduled medical examination. 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 OWCP's authority, with regards to instructing a claimant to undergo a medical examination, is that of reasonableness.⁹ The Board has interpreted the plain meaning of section 8123(d) to provide that compensation is not payable while a refusal or obstruction of an examination continues.¹⁰ In this case, OWCP rescheduled appellant for an evaluation on December 8, 2014. After appellant failed to appear for the December 8, 2014 examination, OWCP finalized the

³ 5 U.S.C. § 8123(a).

⁴ C.S., Docket No. 09-1597 (issued February 4, 2010); *J.T.*, 59 ECAB 293 (2008); *Dana D. Hudson*, 57 ECAB 298 (2006); *James C. Talbert*, 42 ECAB 974 (1991).

⁵ 20 C.F.R. § 10.320; *see J.C.*, Docket No. 09-609 (issued January 5, 2010); *J.T.*, *id.*; *Walter L. Jordan*, 57 ECAB 218 (2005).

⁶ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323. *See J.C.*, *id.*; *Sharon Handy*, 57 ECAB 446 (2006); *Maura D. Fuller (Judson H. Fuller)*, 56 ECAB 383 (2005).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010). *See J.C.*, *supra* note 5; *Dana D. Hudson*, *supra* note 4; *Lynn C. Huber*, 54 ECAB 281 (2002).

⁸ *See J.C.*, *supra* note 5; *Dana D. Hudson*, *supra* note 4; *Scott R. Walsh*, 56 ECAB 353 (2005).

⁹ *See Lynn C. Huber*, *supra* note 7.

¹⁰ *See M.B.*, Docket No. 10-1755 (issued March 24, 2011).

suspension of wage-loss compensation based on his failure to appear at the October 13 and December 8, 2014 examinations.

While OWCP provided appellant notice that he had 14 days to provide reasons for failing to appear at the initial October 13, 2014 examination, it did not provide him with similar notice following his failure to attend the examination of December 8, 2014. Rather, it finalized the suspension effective February 9, 2015 indicating that he did not respond to the 14-day notice dated October 27, 2014. OWCP procedures clearly state that if a claimant does not report for a scheduled appointment he or she should be asked to provide a written explanation within 14 days.¹¹ After missing the later scheduled December 8, 2014 examination, appellant should have been provided proper notice and given 14 days to submit written reasons for his failure to appear. As this was not done, the Board finds that OWCP erred in suspending his right to compensation benefits based on notice pertaining to the October 13, 2014 examination.¹²

For these reasons, the Board finds that OWCP erred in suspending appellant's right to compensation.¹³ Given the Board's holding with respect to the first issue presented it is not necessary to address the second issue.

CONCLUSION

The Board finds that OWCP did not properly suspend appellant's compensation benefits effective February 9, 2015 due to his failure to attend a scheduled medical examination.

¹¹ Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.810.13(d) (September 2010).

¹² *See K.G.*, Docket No. 10-137 (issued August 6, 2010).

¹³ The Board also notes that it is unclear if appellant received notice of the December 8, 2014 examination. On October 30, 2014 correspondence sent to appellant's address of record was returned to OWCP as undeliverable. In response, OWCP contacted the employing establishment on November 13, 2014 to obtain his current address. The employing establishment informed OWCP that appellant was now residing in its domiciliary and provided OWCP with his new address. However, the record does not indicate that OWCP sent notice of the December 8, 2014 examination to the new address. The mailbox rule provides that proper and timely mailing of a document in the ordinary course of business raises a rebuttable presumption of receipt by the addressee. *See Kenneth E. Harris*, 54 ECAB 502, 505 (2003). When there is evidence of nondelivery or other evidence that supports that the addressee did not receive the correspondence, the mailbox presumption does not apply. *See J.L.*, Docket No. 15-0828 (issued August 3, 2015).

ORDER

IT IS HEREBY ORDERED THAT the May 11 and February 10, 2015 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: November 2, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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