

ISSUES

The issues are: (1) whether OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d) due to his failure to cooperate with a scheduled medical examination; and if so, (2) whether OWCP properly determined that appellant's claims for disability for the period October 29 to November 25, 2016, and any further period, were not payable.

FACTUAL HISTORY

On December 1, 2010 appellant, then a 33-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he had black outs due to a November 30, 2010 motor vehicle accident that occurred while delivering mail. The claim was adjudicated by OWCP under File No. xxxxxx389. On January 13, 2011 OWCP accepted major depression, recurrent episode, and anxiety state, unspecified as a result of an employment-related motor vehicle accident that occurred on November 30, 2010. Appellant returned to full-time, full duty in January 2011.

On April 11, 2014 appellant filed a traumatic injury claim alleging that on April 10, 2014 he was assaulted by a customer while delivering mail causing neck and shoulder injuries, head trauma, panic attacks, and depression. He stopped work that day. OWCP developed this claim under File No. xxxxxx195.

Appellant filed a claim for compensation (Form CA-7) for the period June 28 to July 10, 2014.

By decision dated July 10, 2014, OWCP denied the claim for the alleged April 10, 2014 employment injury. It found that the April 10, 2014 incident was a compensable factor of employment, but that the record contained insufficient medical evidence to establish a condition caused by this compensable employment factor. Appellant timely requested a hearing before an OWCP hearing representative.

Appellant filed additional CA-7 claims for compensation commencing July 12, 2014.

By decision dated May 8, 2015, OWCP's hearing representative reversed the July 10, 2014 decision, finding that the medical evidence of record was sufficient to establish causal relationship between the April 10, 2014 employment incident and appellant's medical condition. Thus, he directed OWCP to accept appellant's claim for post-traumatic stress disorder (PTSD). The hearing representative also directed that File Nos. xxxxxx195 and xxxxxx389 be combined, which was done on May 14, 2015.⁴

On May 14, 2015 OWCP accepted PTSD and paid appellant retroactive wage-loss compensation for the period June 28 through October 7, 2014 and May 30 through August 7, 2015, and continuing.

⁴ OWCP File No. xxxxxx389 serves as the master file.

In a July 30, 2015 decision, OWCP denied appellant's claim for compensation for the period October 27, 2014 through May 29, 2015. It noted that this claimed period was not substantiated by the evidence of record. Appellant timely requested a hearing.

On September 15, 2015 OWCP referred appellant to Dr. Jose Rios-Robles, a Board-certified psychiatrist, for a second opinion evaluation. On September 21, 2015 it also referred him to Deborah Perez, Ph.D., a clinical psychologist, for neuropsychological testing at 10:00 a.m. on October 15, 2015.

In an October 7, 2015 report, Dr. Rios-Robles noted the history of injury and his review of the record, including the statement of accepted facts (SOAF) he had been provided. Following mental status examination, he diagnosed PTSD, noting that appellant had a fear of being attacked, relived the experiences of the assault, was easily startled, and had avoidance behaviors. Dr. Rios-Robles advised that appellant's condition had not resolved and that he remained disabled and could not return to his date-of-injury job, but could return to sedentary work, such as an office job. On a psychiatric work capacity evaluation form (OWCP-5a), he reiterated his conclusions, noting that appellant was fearful of working on the streets, and felt persistently threatened when in public.

On October 16, 2015 OWCP scheduled additional testing with Dr. Perez at 11:30 a.m. on October 28, 2015.

In a November 10, 2015 report, Dr. Perez noted performing neuropsychological testing on October 15 and 28, 2015. She reported reviewing the SOAF, the medical record, and the history of injury. Dr. Perez advised that the results of the testing were not a valid reflection of appellant's current abilities or of his cognitive, neuropsychological, or psychological functioning. She indicated that effort and motivation testing consistently confirmed diminished effort and concluded that the testing was invalid. Dr. Perez diagnosed PTSD and major depressive disorder by history, and anxiety disorder. She opined that the PTSD and depressive disorder were not supported in her evaluation and "are not considered an accurate representation" of appellant's maximal capacity to respond correctly. Dr. Perez found "his performance was compromised by insufficient effort, symptom exaggeration, and inconsistencies."

A December 8, 2015 functional capacity evaluation indicated that appellant could work at a sedentary level of physical demands for an eight-hour workday.

On January 27, 2016 OWCP proposed to suspend appellant's compensation benefits because he obstructed the October 2015 evaluations with Dr. Perez. Appellant was informed of the penalty provision of section 8123(d) of FECA and was afforded 14 days to provide, in writing, good cause for his failure to cooperate with the evaluation. He was also advised to contact OWCP immediately if he intended to report for a rescheduled examination.

A CA-110 form revealed that appellant telephoned OWCP on February 3, 2016 to request that it reschedule his second opinion medical examination and noted that he was willing to attend the rescheduled psychological testing.

In correspondence dated February 3, 2016, received by OWCP on February 11, 2016, appellant noted that his evaluation by Dr. Perez was interrupted several times when Dr. Perez did other things, and he did not have the opportunity to eat lunch or a snack during the testing. He maintained that Dr. Perez was not professional or communicative as she was taking care of other business on her telephone. Appellant concluded that he would be fully cooperative with a rescheduled examination, but would prefer another doctor.

Following a preliminary review of the record, by decision dated February 12, 2016, an OWCP hearing representative reversed the July 30, 2015 decision which had denied appellant's claim for wage-loss compensation for the period October 27, 2014 through May 29, 2015. She found that, based on the evidence of record, appellant had met his burden of proof to establish entitlement to monetary compensation for the period claimed.⁵

On February 16, 2016 OWCP finalized the proposed suspension, effective that day. It found that appellant had obstructed the October 2015 examination by Dr. Perez. OWCP further indicated that it had not received anything in writing in which appellant indicated full compliance with an evaluation. It informed appellant that wage-loss compensation would be reinstated only after he attended and fully cooperated with an examination.

OWCP paid appellant retroactive compensation for the period October 27, 2014 through May 29, 2015. However, appellant's wage-loss compensation was suspended as of February 16, 2016.

In correspondence postmarked February 29, 2016 appellant requested a hearing from the February 16, 2016 decision. He maintained that he did not obstruct the evaluation and did not refuse to take a second test. Appellant indicated that he would retake the evaluation at any time. He continued to file claims for compensation (Form CA-7).

On August 11, 2016 nearly five months after notifying OWCP that he would attend and cooperate with a rescheduled second opinion examination, appellant again wrote that he would fully cooperate with any rescheduled examination with Dr. Perez. However, OWCP did not reschedule the examination.

Effective August 11, 2016 appellant retained a representative. In a September 12, 2016 letter, his representative advised that appellant had notified OWCP on February 23, 2016 that he intended to fully comply with a new examination and requested that appellant's benefits be immediately restored retroactive to February 23, 2016.

At the hearing, held on October 4, 2016, appellant's representative asserted that appellant made multiple telephone calls and mailed letters indicating his intention to cooperate with a rescheduled examination. He maintained that, per OWCP procedures, a telephone call was sufficient notice on behalf of appellant. Appellant testified that Dr. Perez's examination was over two days, was longer than he expected, and that his neck and back hurt. He indicated that he had not returned to work and would fully cooperate with a rescheduled examination.

⁵ The hearing representative noted that appellant had not submitted claims for compensation for dates prior to June 28, 2014 or for the period October 8 through 26, 2014.

By decision dated November 10, 2016, an OWCP hearing representative affirmed the February 16, 2016 decision suspending appellant's compensation because he had obstructed a scheduled medical appointment. She found that he did not establish good cause for his noncompliance with the examination. The hearing representative noted that, as appellant had agreed to cooperate with a rescheduled examination on February 3, 2016, OWCP should schedule an appointment and, following his attendance and cooperation, compensation should be restored retroactive to the date of suspension.

On December 6, 2016 appellant's representative requested that OWCP reschedule a second opinion evaluation. Appellant had continued to submit claims for compensation through November 25, 2016.

In a December 9, 2016 decision, OWCP found that appellant's claim for compensation for the period October 29 to November 25, 2016 was not payable. It explained that no compensation benefits would be paid until he had attended a second opinion evaluation and fully complied with the evaluation, after which his compensation would be restored retroactively to the date of the suspension of benefits.

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.⁶ 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.⁷ 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.⁸ 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.⁹ OWCP 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.¹⁰ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.¹¹

⁶ 5 U.S.C. § 8123.

⁷ *J.T.*, 59 ECAB 293 (2008).

⁸ 20 C.F.R. § 10.320.

⁹ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; *R.T.*, Docket No. 14-95 (issued May 22, 2014).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010).

¹¹ *Id.*

ANALYSIS -- ISSUE 1

The Board finds that, within the meaning of section 8123 of FECA, appellant obstructed Dr. Perez's neuropsychological testing on October 15 and 28, 2015. OWCP directed appellant to attend the evaluation by Dr. Perez after it determined that it required an assessment of his psychological functioning.

By letter dated September 21, 2015, OWCP's scheduling contractor, notified appellant of the scheduled evaluation beginning at 10:15 a.m. on October 15, 2015 and on October 16, 2015 notified him that additional testing was scheduled at 11:30 a.m. on October 28, 2015. The correspondence indicated that the evaluation should take approximately 60 minutes and that additional time could be required should the provider request additional testing.

The record supports that appellant attended Dr. Perez's testing appointments on October 15 and 28, 2015. Dr. Perez, however, advised that the results of the testing were not a valid reflection of appellant's current abilities or of his cognitive, neuropsychological, or psychological functioning. She indicated that effort and motivation testing consistently confirmed diminished effort. Dr. Perez concluded that the testing was invalid, indicating that appellant's diagnosed PTSD and depressive disorder were not supported in her evaluation which was not considered an accurate representation of his maximal capacity to respond correctly. She advised that his testing performance was compromised by insufficient effort, symptom exaggeration, and inconsistencies.

The Board has recognized OWCP's responsibility in developing claims.¹² Section 8123 authorizes it to require an employee, who claims disability as a result of federal employment, to undergo a physical examination as OWCP deems necessary. 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.¹³ The referral to an appropriate specialist in appellant's area at OWCP's expense cannot be considered unreasonable. In this case, OWCP acted within its discretion by referring appellant for neuropsychological testing by Dr. Perez to assess his employment-related conditions.

The Board finds that appellant's refusal to fully cooperate with Dr. Perez's testing constituted obstruction of an OWCP-directed examination. While appellant attended the scheduled evaluation, he did not provide consistent effort in Dr. Perez's testing. Although he maintained that Dr. Perez was unprofessional, failed to be properly communicative, that his evaluation with her was interrupted several times when she did other things, and that he did not have the opportunity to eat lunch or a snack during the testing, the Board finds these contentions are of insufficient merit to absolve him of his failure to cooperate fully with her testing.¹⁴ For the purpose of invoking the penalty provision of section 8123(d), it is sufficient that appellant

¹² *Scott R. Walsh*, 56 ECAB 353 (2005).

¹³ 20 C.F.R. § 10.320; *see J.T.*, *supra* note 7.

¹⁴ *See Edward Burton Lee*, 53 ECAB 183 (2001).

refused to fully cooperate with Dr. Perez's evaluation. The Board will therefore affirm OWCP's November 10, 2016 decision suspending appellant's monetary compensation pursuant to section 8123(d) of FECA.¹⁵

On appeal appellant's representative asserts that OWCP delayed in rescheduling appellant's second opinion examination for more than one year after appellant's notice of his intent to appear and comply with a scheduled medical appointment, thus causing prejudice to appellant. The delay in rescheduling the second opinion examination issue, however, is outside of the Board's jurisdiction as it does not involve a final adverse decision issued under FECA.¹⁶ The Board further notes that the hearing representative held in her November 10, 2016 decision that, as appellant had agreed to cooperate with a rescheduled examination on February 2, 2016, OWCP should schedule an appointment and, following his attendance and cooperation, compensation should be restored retroactive to the date of suspension.

LEGAL PRECEDENT -- ISSUE 2

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.¹⁷

ANALYSIS -- ISSUE 2

In its December 9, 2016 decision, OWCP denied appellant's claim for compensation for the period October 29 to November 25, 2016.

As noted above, section 8123(d) provides that an employee's right to compensation is suspended until the refusal or obstruction stops. When the claimant actually reports for examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made.¹⁸

In the case at hand, appellant advised OWCP on February 3, 2016 that he would fully cooperate with any rescheduled evaluation, but would prefer another doctor, and on August 11, 2016 indicated that he would fully cooperate with an evaluation with Dr. Perez. He also testified to this intent at the October 4, 2016 hearing. A new evaluation had not been scheduled at the time of the December 9, 2016 decision.

As appellant had not fully cooperated within the parameters of section 8123(d) of FECA at the time OWCP issued its December 9, 2016 decision, his right to compensation remained

¹⁵ *R.T.*, Docket No. 14-95 (issued May 22, 2014).

¹⁶ 20 C.F.R. § 501.2(c).

¹⁷ 5 U.S.C. § 8102.

¹⁸ *Sharon Handy*, 57 ECAB 446 (2006).

suspended. He, therefore, was not entitled to wage-loss compensation for the period October 29 to November 25, 2016 and any other period, until the obstruction ends.¹⁹

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 compensation benefits pursuant to 5 U.S.C. § 8123(d) due to his failure to cooperate with a scheduled medical examination, and thus, that it properly determined that appellant's claims for disability for the period October 29 to November 25, 2016, and any further period were not payable.

ORDER

IT IS HEREBY ORDERED THAT the December 9 and November 10, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 11, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ 5 U.S.C. § 8123(d).