

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits in this case.

ISSUE

The issue is whether OWCP properly suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d) due to her failure to attend a scheduled medical examination.

FACTUAL HISTORY

On September 13, 2016 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on September 12, 2016, while delivering mail in an apartment complex she was verbally assaulted and locked in a hallway by a resident who held the door closed until she was able to call for help and forcibly exit through the door 20 minutes later. She stopped work on September 14, 2016, and received continuation of pay through October 27, 2016. OWCP initially accepted her claim for panic disorder without agoraphobia and later expanded appellant's claim to include major depressive disorder, single episode, severe without psychotic features. Effective October 26, 2016, appellant received wage-loss compensation for temporary total disability on the supplemental rolls.

In a letter dated March 31, 2017, OWCP advised appellant that an appointment had been scheduled for her in order to assess the nature of her condition, the extent of disability, and appropriate treatment. It explained that her entitlement to compensation could be suspended, pursuant to 5 U.S.C. § 8123(d), if she refused to submit to or obstructed an examination. The letter was also sent to counsel.

By letter dated April 4, 2017, mailed to appellant's address of record, OWCP referred appellant to Dr. Richard W. Cohen, a Board-certified psychiatrist, for an appointment on April 17, 2017 at 10:45 a.m. Eastern Standard Time (EST), to determine the nature and extent of any residuals of her accepted work-related conditions, and whether she was capable of returning to full-duty employment.

On April 18, 2017 QTC Medical Services, OWCP's scheduling contractor, advised OWCP that appellant had not appeared for her scheduled April 17, 2017 examination with Dr. Cohen.

By letter dated April 17, 2017, counsel advised OWCP that he had just received the April 4, 2017 letter which notified appellant of a second opinion examination scheduled for April 17, 2017. He indicated that appellant had not received the March 31, 2017 letter. Counsel indicated that, as appellant's authorized representative, he should have been notified of a referral for a second opinion examination. He asserted that OWCP provided inadequate notice and therefore requested that the second opinion examination be rescheduled.

³ 5 U.S.C. § 8101 *et seq.*

By letter dated April 18, 2017, OWCP again referred her to Dr. Cohen. The appointment was scheduled for May 16, 2017 at 10:00 a.m. EST. This notice was also sent to counsel.

By letter dated April 24, 2017, counsel acknowledged receipt of OWCP's correspondence dated April 18, 2017. He requested a copy of the letter sent to the physician, the statement of accepted facts, and the questions for the physician.

On May 12, 2017 QTC Medical Services requested approval from OWCP to reschedule the May 16, 2017 examination, noting that appellant had called, stating that she had a prior engagement and would not be attending the May 16, 2017 second opinion examination. OWCP denied the request, indicating that it had previously rescheduled the examination. It noted that counsel would be notified of this determination.

On June 1, 2017 QTC Medical Services notified OWCP that appellant had not appeared for her May 16, 2017 examination.⁴

On June 8, 2017 OWCP provided notice to appellant that it proposed to suspend her wage-loss compensation and medical benefits, pursuant to 5 U.S.C. § 8123(d), based upon her failure to attend the scheduled May 16, 2017 second opinion examination. It advised her that she had 14 days to provide a written explanation of her reasons, with substantive corroborating evidence, for failing to attend the scheduled examination. OWCP explained that an employee's right to compensation under FECA shall be suspended during the period of a refusal or obstruction of an examination by a physician.

On June 12, 2017 counsel indicated that appellant had attended the May 16, 2017 second opinion examination, but that neither Dr. Cohen nor any of his staff were present. Counsel referenced an attached picture as supportive evidence. The picture, stamped "May 16" and "10:00 a.m." showed Dr. Cohen's office door with a hand holding up OWCP's April 4, 2017 scheduling letter. He also expressed appellant's willingness to cooperate, and requested that the appointment be rescheduled.

In an e-mail dated June 14, 2017, a QTC Medical Services representative indicated that she spoke with Dr. Cohen on June 14, 2017 and he confirmed that he was in the office on May 16, 2017. Dr. Cohen noted that he had another patient scheduled for 9:00 a.m. on May 16, 2017, and that appellant was scheduled for 10:00 a.m. He further indicated that he has two secretaries in the office and emphasized that appellant had not attended her appointment.

By decision dated June 23, 2017, OWCP finalized its proposed suspension of wage-loss compensation and medical benefits, effective that same date. It noted that it had directed appellant on April 18, 2017 to report for the examination scheduled on May 16, 2017, but that she had not attended the examination or shown good cause for her failure to attend the examination. It indicated that appellant had failed to establish good cause for her failure to attend the scheduled

⁴ The Board notes that a May 22, 2017 fiscal worksheet shows that appellant was paid wage-loss compensation on the supplemental rolls through May 12, 2017. On June 7, 2017 appellant filed a claim for compensation (Form CA-7) for wage loss for the period May 13 to 26, 2017.

examination and therefore, pursuant to 5 U.S.C. § 8123(d), her compensation and medical benefits were suspended, effective June 23, 2017.

On June 28, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.⁵

A telephonic hearing was held on December 13, 2017. Counsel explained in an opening statement that appellant had attended the scheduled examination and, when no one responded to her knocking on the door, she called Dr. Cohen's office, but no one answered. He further explained, and appellant testified, that she took a picture of the door and her appointment letter with her cellular phone to prove she had attempted to attend the scheduled appointment at the correct time. Appellant further testified that, when she entered the building in which Dr. Cohen's office was located she had to sign in and "be buzzed into the back." She noted that she had signed in at 9:40 a.m. Appellant explained that she had arrived early because she had been instructed on her notice of appointment to arrive at 9:45 a.m. to complete paperwork. She testified that she waited in a chair for Dr. Cohen to arrive, and that the people in the adjacent office, including another doctor, saw her waiting.

By decision dated February 15, 2018, an OWCP hearing representative affirmed the June 23, 2017 decision. He found that no evidence was submitted to establish that appellant had good cause for not attending the scheduled second opinion examination or that Dr. Cohen's office was closed and unoccupied when she was scheduled to attend. The hearing representative noted that the claimant had not been paid total disability compensation benefits for the period May 13 through June 11, 2017 as a result of the suspension of benefits.

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.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's 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.⁸ Both FECA and OWCP's 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

⁵ On July 24, 2017 appellant filed three additional claims for compensation (Form CA-7) for wage-loss for the period May 27 to July 7, 2017. On July 25, 2017 OWCP paid appellant wage-loss compensation on the supplemental rolls for the claimed periods commencing June 12, 2017, which was the date that counsel indicated that appellant would attend another rescheduled examination. The record reveals that appellant was not paid for the wage loss claimed for the period May 13 to 26, 2017.

⁶ 5 U.S.C. § 8123.

⁷ *J.T.*, 59 ECAB 293 (2008); *S.B.*, 58 ECAB 267 (2007); *James C. Talbert*, 42 ECAB 974 (1991).

⁸ 20 C.F.R. § 10.320.

obstruction ceases.⁹ OWCP's procedures further 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

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.¹² The only limitation on this authority is that of reasonableness.¹³ OWCP's regulation, 20 C.F.R. § 10.320, provides that an injured employee "must submit to examination by a qualified physician as often and at such times and places as [OWCP] considers reasonably necessary."¹⁴

ANALYSIS

The Board finds that OWCP improperly suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d).

Appellant and counsel were both notified by letter dated April 18, 2017 that she was to attend a rescheduled second opinion examination with Dr. Cohen on May 16, 2017 at 10:00 a.m. EST. On June 1, 2017 QTC Medical Services notified OWCP that appellant did not appear for the scheduled appointment. On June 8, 2017 OWCP informed appellant that it proposed to suspend her compensation benefits pursuant to 5 U.S.C. § 8123. On June 12, 2017 counsel contended that appellant had, in fact, attended the May 16, 2017 examination and attached a photograph, stamped "May 16" and "10:00 a.m." showed Dr. Cohen's office door with a hand holding up OWCP's April 4, 2017 scheduling letter. Counsel requested that QTC contact Dr. Cohen's office to confirm that appellant did not appear at the appointed time. On June 14, 2017 a QTC Medical Services representative indicated that she had spoken with Dr. Cohen and he confirmed that he was in the office on May 16, 2017, that he had two secretaries in his office, and that appellant had not appeared for her 10:00 a.m. appointment. By decision dated June 23, 2017, OWCP finalized its proposed suspension, effective that same date.

During the telephonic hearing appellant testified that she had shown up for the appointment at 9:40 a.m. on May 16, 2017. She explained that she arrived at the location early at 9:45a.m. so that she could complete paperwork prior to the examination. Appellant testified that upon her arrival she had to be buzzed into the building, she was also required to sign in, but that nobody

⁹ *Supra* note 7; 20 C.F.R. § 10.323; *Dana D. Hudson*, 57 ECAB 298 (2006).

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

¹¹ *Id.*

¹² *James C. Talbert*, 42 ECAB 974 (1991).

¹³ *Raymond J. Hubenak*, 44 ECAB 395 (1993).

¹⁴ *Daniel J. Perea*, 42 ECAB 214 (1990).

answered Dr. Cohen's door when she knocked following her arrival. She also testified that she waited in a chair for Dr. Cohen to arrive, that the people in the adjacent office saw her waiting, and another doctor also saw her waiting. During the hearing counsel explained, and appellant testified, that she had called Dr. Cohen's office while she was waiting, that she had called her counsel's office to let him know Dr. Cohen was not in his office, and that she also took a picture of the door and her appointment letter with her cellular phone to prove she had attempted to attend the scheduled appointment at the correct time.

The Board finds that the evidence of record establishes that appellant has shown good cause for not completing the scheduled second opinion examination with Dr. Cohen on May 16, 2017, as required. The evidence of record establishes that she appeared for the examination, as scheduled, but that neither Dr. Cohen nor his staff were present to let her in the physician's office at the time of the scheduled examination. Her hearing testimony is unrefuted and contains persuasive evidence of her actions on the morning of May 16, 2017.

OWCP may only invoke the sanction provision of 5 U.S.C. § 8123(d) if good cause for the refusal or obstruction is not established. As appellant established that she attended and attempted to participate in the May 16, 2017 second opinion examination she has established good cause. Therefore, the Board finds that OWCP acted unreasonably and therefore abused its discretion in suspending her wage-loss compensation and medical benefits for the period May 13 through June 11, 2017.¹⁵

CONCLUSION

The Board finds that OWCP improperly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d).

¹⁵ *Andrew Sturzione, Sr.*, Docket No. 01-0836 (issued August 13, 2002).

ORDER

IT IS HEREBY ORDERED THAT the February 15, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 16, 2019
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