

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

A.P., Appellant	)	
	)	
and	)	Docket No. 19-0328
	)	Issued: August 6, 2019
U.S. POSTAL SERVICE, POST OFFICE, Bound Brook, NJ, Employer	)	
	)	

*Appearances:*  
James D. Muirhead, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 26, 2018 appellant, through counsel, filed a timely appeal from an August 28, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (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 wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), due to his failure to attend

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

scheduled medical examinations; and (2) whether it properly denied appellant's requests to reschedule medical examinations following a suspension of benefits pursuant to 5 U.S.C. § 8123(d).

### **FACTUAL HISTORY**

On November 18, 2015 appellant, then a 51-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on November 13, 2015 a dog bit him on his left thigh when he was delivering mail while in the performance of duty. He stopped work on November 13, 2015 and did not return. OWCP accepted appellant's claim for dog bite, left thigh and paid wage-loss compensation benefits on the supplemental rolls as of January 4, 2016. It placed him on the periodic compensation rolls effective July 24, 2016.

By decision dated April 26, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits effective that day. It determined that the weight of the medical evidence rested with the second opinion physicians, Dr. Timothy Henderson, a Board-certified orthopedic surgeon, and Dr. Melvin Vigman, a Board-certified neurologist, who opined that appellant no longer had any residuals or disability resulting from the work-related condition.

Appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held September 26, 2017. He also submitted additional medical evidence. By decision dated November 15, 2017, OWCP's hearing representative set aside the April 26, 2017 decision and remanded the case for further development and a *de novo* decision. She found that OWCP had failed to properly notify appellant's counsel of the second opinion appointments at the time they were scheduled and thus appellant was deprived of his statutory right under 5 U.S.C. § 8123 to have a physician present during the second opinion examination. OWCP was directed to reinstate appropriate wage-loss compensation and medical benefits retroactive to the date of the decision and to refer appellant for another second opinion evaluation.

In a December 12, 2017 letter, OWCP notified appellant that he was receiving, or might be entitled to receive, benefits provided by the Office of Personnel Management (OPM). Explaining that annuity benefits from OPM and benefits for wage loss were not payable for the same period of time, OWCP provided appellant with an election form.

On December 19, 2017 OWCP notified appellant that it had scheduled a January 3, 2018 second opinion medical examination with Dr. Daniel Feuer, a Board-certified neurologist, in Bloomfield, New Jersey. It explained that his entitlement to compensation could be suspended, pursuant to 5 U.S.C. § 8123(d), if he refused to submit to or obstructed an examination.

On December 27, 2017 OWCP received appellant's Form CA-1105 Election of Benefits dated December 18, 2017 in which he elected retirement benefits under OPM effective December 5, 2017.

On January 2, 2018 OWCP notified appellant that another second opinion medical examination had been scheduled on January 19, 2018 with Dr. Stanley Askin, a Board-certified orthopedic surgeon, in Willingboro, New Jersey. It explained that his entitlement to compensation

could be suspended, pursuant to 5 U.S.C. § 8123(d), if he refused to submit to or obstructed an examination.

In a January 2, 2018 CA-110 note of a telephone call, appellant indicated that he had retired and would not be attending the January 3 and 19, 2018 second opinion appointments. OWCP advised him that his medical benefits would be suspended if he did not attend the second opinion appointments.

In a January 9, 2018 letter, OWCP informed appellant that it proposed to suspend his wage-loss compensation and medical benefits due to his obstruction of a January 3, 2018 scheduled medical examination with Dr. Feuer. It noted that, while appellant had indicated, in a telephone call, that he did not attend the medical examination because he was retired, retirement was not a valid excuse to obstruct a mandatory medical examination as his case remained open for continued medical benefits. OWCP afforded appellant 14 days to submit evidence or argument challenging the proposed suspension action. It noted, "If good cause is not established, entitlement to compensation and medical benefits will be suspended in accordance with 5 U.S.C. § 8123(d) until you attend and fully cooperate with the examination." Appellant failed to respond to OWCP's January 9, 2018 letter within the afforded period.

In a January 23, 2018 letter, OWCP informed appellant that it proposed to suspend his wage-loss compensation and medical benefits due to his obstruction of the January 19, 2018 scheduled medical examination with Dr. Askin. It noted that no reason(s) for his nonattendance/obstruction of the scheduled examination had been received. OWCP afforded appellant 14 days to submit evidence or argument challenging the proposed suspension action. It noted, "If good cause is not established, entitlement to compensation and medical benefits will be suspended in accordance with 5 U.S.C. § 8123(d) until you attend and fully cooperate with the examination." Appellant failed to respond to OWCP's January 23, 2018 letter within the afforded time period.

By decision dated January 24, 2018, OWCP suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective that day. It found that he had failed to report to Dr. Feuer's scheduled examination of January 3, 2018 and that he had obstructed such examination as he had failed to provide good cause for not attending the examination. OWCP advised appellant that his compensation would be reinstated effective the date he attended and fully cooperated with such examination.

In a January 25, 2018 letter, OWCP advised appellant that he was required to attend scheduled second opinion examinations, that his "case cannot move forward" unless he attends the examinations, and that he should notify OWCP if he intended to do so.

By decision dated February 7, 2018, OWCP suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective February 7, 2018. It found that he had failed to report to Dr. Askin's January 19, 2018 scheduled examination and that he had failed to provide an explanation of his failure to attend the examination within the allotted 14 days. OWCP advised appellant that his compensation would be reinstated effective the date he attended and fully cooperated with such examination.

In a February 13, 2018 letter, counsel indicated that appellant would attend second opinion examinations. He noted that appellant's father had died in Florida on November 10, 2017 and that appellant remained in Florida with his mother. Counsel further noted that appellant had assumed it was not necessary to go to the scheduled medical appointments as he had elected Federal Employees Retirement System (FERS) disability benefits.

In a February 15, 2018 letter, OWCP advised appellant and counsel that, because he had elected retirement and OPM benefits, the second opinion evaluations would not be currently rescheduled. Appellant was also advised that he could pursue his appeal rights regarding the suspension of his compensation benefits.

On February 20, 2018 counsel requested a telephonic hearing before an OWCP hearing representative with regard to OWCP's January 24 and February 7, 2018 suspension decisions. During the hearing, held on July 2, 2018, appellant indicated that he had relocated to Florida as his mother was in poor health.<sup>3</sup> Both appellant and counsel indicated that appellant would attend the second opinion medical examinations, if OWCP rescheduled.<sup>4</sup>

By decision dated August 28, 2018, OWCP's hearing representative affirmed the January 24 and February 7, 2018 decisions with regard to the suspension of appellant's wage-loss compensation and medical benefits. He noted that "In turn, the claimant's election of [Civil Service] retirement as of December 5, 2017 effectively obstructed medical review of any entitlement to compensation, because as of such date entitlement to compensation ceased."

### **LEGAL PRECEDENT -- ISSUES 1 & 2**

Section 8123(a) 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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 stops.<sup>8</sup> OWCP's 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

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<sup>3</sup> On July 2, 2018 OWCP received a change of address from appellant.

<sup>4</sup> On July 3, 2018 OWCP transferred appellant's case record to its Jacksonville, Florida office.

<sup>5</sup> 5 U.S.C. § 8123(a).

<sup>6</sup> See *M.T.*, Docket No. 18-1675 (issued March 8, 2019); *L.B.*, Docket No. 17-1891 (issued December 11, 2018); *J.T.*, 59 ECAB 293 (2008).

<sup>7</sup> 20 C.F.R. § 10.320.

<sup>8</sup> 5 U.S.C. § 8123(a); *id.* at § 10.323; *D.K.*, Docket No. 18-0217 (issued June 27, 2018).

his or her reasons for the refusal or obstruction.<sup>9</sup> If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA until the date on which the claimant agrees to attend the examination. Such agreement may be expressed in writing or by telephone (documented on Form CA-110). When the claimant actually reports for examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), due to his failure to attend scheduled medical examinations.

In letters dated December 19, 2017 and January 2, 2018, OWCP notified appellant that he was being referred for a second opinion evaluation with Dr. Feuer, a Board-certified neurologist, and with Dr. Askin, a Board-certified orthopedic surgeon, respectively, on the issues of continuing residuals and current work capacity. It informed him of his obligations to attend and cooperate with the examinations. The notices clearly explained that appellant's compensation benefits would be suspended for failure to report to or for obstruction of the examination. The letters also contained the date, time, and location of his appointments. Appellant did not appear for either appointment, nor did he attempt to reschedule the appointments prior to the designated time or explain why he was unable to attend.

By January 9 and 23, 2018 letters, OWCP provided appellant 14 days to submit a valid reason for his failure to attend the scheduled medical appointments. In this case, its hearing representative properly found that counsel had only advised OWCP on February 13, 2018, more than 14 days after both notices of proposed suspension, that appellant had been in Florida due to the death of his father on November 10, 2017 and that he remained in Florida with his mother. Furthermore, no supporting evidence was submitted establishing that appellant was unable to attend the scheduled appointments of January 3 and 19, 2018, due to the death of his father. Because appellant failed to attend the January 3 and 19, 2018 medical examinations, and because he did not provide good cause for the failure to attend within 14 days of OWCP's January 9 and 23, 2018 notices of proposed suspension, the Board finds that OWCP properly suspended his compensation benefits.<sup>11</sup>

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.

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010).

<sup>10</sup> 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

<sup>11</sup> See *M.T.*, *supra* note 6.

## **ANALYSIS -- ISSUE 2**

The Board finds that OWCP improperly denied appellant's requests to reschedule medical examinations following its suspension of his benefits.

By decisions dated January 24 and February 7, 2018, OWCP suspended appellant's wage-loss compensation and medical benefits due to his failure to attend scheduled second opinion medical examinations. In a February 13, 2018 letter, counsel indicated that appellant would attend the second opinion examinations. During the July 2, 2018 telephonic hearing, both appellant and counsel reiterated that appellant would attend the second opinion medical examinations, if rescheduled. In the August 28, 2018 decision, OWCP's hearing representative affirmed the suspension of appellant's wage-loss compensation and medical benefits. He noted that "In turn, the claimant's election of [Civil Service] retirement as of December 5, 2017 effectively obstructed medical review of any entitlement to compensation, because as of such date entitlement to compensation ceased."

OWCP's procedures provide that when a claimant is entitled to disability benefits under FECA and retirement annuity OPM, the employee must make an election between OWCP benefits and OPM benefits. The employee has the right to elect the monetary benefit which is the more advantageous.<sup>12</sup> The procedures further provide that, "Regardless of which monetary benefits the claimant elects, any medical treatment required for the effects of the compensable injury will continue to be provided under FECA."<sup>13</sup> The Board therefore finds that the hearing representative improperly denied appellant's requests to reschedule the second opinion examinations as appellant remained entitled to medical benefits following his election of retirement benefits.

Accordingly, upon return of the case record OWCP shall reschedule the appropriate second opinion examinations.

## **CONCLUSION**

The Board finds that OWCP properly suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), due to his failure to attend schedule medical examinations. The Board further finds that OWCP improperly denied appellant's requests to reschedule medical examinations following its suspension of his benefits.

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<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4.a (February 1995 and January 1997).

<sup>13</sup> *Id.* at Chapter 2.1000.6.a (February 1995).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 28, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part.

Issued: August 6, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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