

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

A.F., Appellant	)	
	)	
and	)	<b>Docket No. 18-1155</b>
	)	<b>Issued: February 21, 2019</b>
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Seattle, WA, Employer	)	
	)	

*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 14, 2018 appellant filed a timely appeal from an April 25, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d), effective April 25, 2018, due to his failure to attend a scheduled medical examination.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that appellant submitted new evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.* *Sandra D. Pruitt*, 57 ECAB 126 (2005).

## **FACTUAL HISTORY**

On November 29, 2015 appellant, then a 51-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that he developed right arm/shoulder and joint pain/stiffness on the left side of his body as a result of his repetitive work duties and increased work hours.<sup>3</sup> He first became aware of his conditions and their relationship to his federal employment on November 23, 2015. Appellant stopped work on November 24, 2015. OWCP accepted the claim for unspecified sprain of the left shoulder joint and adhesive capsulitis of the left shoulder. On March 8, 2016 appellant returned to full-time, limited-duty work.

In a February 25, 2016 medical report, Dr. Charles A. Peterson, a Board-certified orthopedic surgeon, diagnosed left shoulder rotator cuff tendinitis/adhesive capsulitis. He determined that appellant had reached maximum medical improvement (MMI) on the date of his examination.

By decision dated January 24, 2017, OWCP granted four hours of wage-loss compensation for temporary total disability on December 1, 2015, but denied compensation for the remaining hours of temporary total disability which had been claimed for the period November 23, 2015 through September 19, 2016.<sup>4</sup>

On June 16, 2017 appellant filed a claim for a schedule award (Form CA-7). In a development letter dated July 3, 2017, OWCP requested that he submit additional medical evidence establishing his schedule award claim. It afforded appellant 30 days for a response. Appellant did not submit the requested medical evidence.

By letters dated March 1 and 6, 2018, OWCP referred appellant to Dr. Jeffrey L. Holtgrewe, a Board-certified orthopedic surgeon, for a second opinion medical examination to determine the extent of his permanent impairment, if any, based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>5</sup> and establish the date on which he reached MMI. It advised that an appointment had been scheduled for March 28, 2018 at 1:00 p.m. Appellant was further advised that, if he refused or obstructed the examination, his compensation could be suspended under 5 U.S.C. § 8123(d).

On March 19, 2018 appellant informed OWCP that he was not going to attend the March 28, 2018 appointment because something was going on with his social security benefits and he did not have an attorney.

A March 28, 2018 e-mail reflects that OWCP was notified by Medical Consultants Network, OWCP's scheduling contractor, that appellant did not appear for his March 28, 2018 examination.

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<sup>3</sup> Prior to the filing of his occupational disease claim, appellant worked in a temporary assignment as a casual employee, which ended on December 24, 2004. He was rehired on December 1, 2012. Appellant became a career employee on May 30, 2015.

<sup>4</sup> On July 12, 2016 the employing establishment placed appellant off work due to his conduct. Appellant was terminated on February 8, 2017.

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

In an April 6, 2018 notice, OWCP proposed to suspend appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d) as he failed to attend the examination scheduled for March 28, 2018 with Dr. Holtgrewe. Appellant was advised that he should provide a written explanation of his reasons, with substantive corroborating evidence, within 14 days for failing to attend the scheduled examination.

By telephone conversation on April 16, 2018, appellant initially advised OWCP of his refusal to attend an examination. Subsequently during the conversation, he related that he needed to talk to someone about the examination. No further response was received from appellant.

By decision dated April 25, 2018, OWCP finalized its proposed suspension, effective that day. It noted that it directed appellant on March 1, 2018 to report for the examination scheduled on March 28, 2018, but he did not attend the examination or explain why he had refused to attend or had obstructed the examination.

### **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.<sup>6</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>7</sup> OWCP regulations at section 10.320 provide that a claimant must submit to an examination by a qualified physician as often and at such times and places as it considers reasonably necessary.<sup>8</sup> Section 8123(d) of FECA and section 10.323 of its 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.<sup>9</sup> 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.<sup>10</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.<sup>11</sup>

### **ANALYSIS**

The Board finds that OWCP properly suspended appellant's compensation, pursuant to 5 U.S.C. § 8123(d), for failure to attend a medical examination.

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<sup>6</sup> 5 U.S.C. § 8123.

<sup>7</sup> *J.T.*, 59 ECAB 293 (2008); *S.B.*, 58 ECAB 267 (2007).

<sup>8</sup> 20 C.F.R. § 10.320.

<sup>9</sup> 5 U.S.C. § 8123; 20 C.F.R. § 10.323; *Dana D. Hudson*, 57 ECAB 298 (2006).

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

<sup>11</sup> *Id.*

By letter dated March 1 2018, OWCP notified appellant that he was being referred for a second opinion evaluation on March 28, 2018 with Dr. Holtgrewe to determine the extent of his permanent impairment and the date in which he reached MMI. Appellant was advised of the need for the examination and the time and place for the scheduled appointment and the notices clearly explained that appellant's entitlement to compensation benefits would be suspended for failure to report or if he obstructed the examination. Additionally, in a record of a telephone conversation dated March 6, 2018, appellant inquired about the scheduled appointment for a second opinion and was advised that OWCP arranged the appointment to obtain an impairment rating for his left arm. As noted, he did not appear for the scheduled 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 regard to instructing a claimant to undergo a medical examination, is that of reasonableness.<sup>12</sup> 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 unless appellant can establish good cause for failing to report at the scheduled time.<sup>13</sup>

OWCP subsequently allowed appellant 14 days to provide reasons for failing to appear.<sup>14</sup> In response, appellant advised that he would not attend an examination with Dr. Holtgrewe. He failed to explain why he did not attend the scheduled examination and did not indicate his intent to reschedule the appointment in his response. Thus, the Board finds that he has not provided good cause for refusing to attend the March 28, 2018 appointment.

As appellant did not attend the March 28, 2018 scheduled examination and failed to provide good cause for failing to appear within 14 days of OWCP's April 6, 2018 notice of proposed suspension, the Board finds that OWCP properly suspended entitlement to future compensation in accordance with 5 U.S.C. § 8123(d) until the date on which he agrees to attend the examination.<sup>15</sup> When appellant actually reports for examination, payment retroactive to the date on which he agreed to attend the examination may be made.<sup>16</sup>

On appeal, appellant alleges that he was intentionally infected with an illness and sustained work-related injuries because he filed an Equal Employment Opportunity (EEO) complaint. The Board finds that the fact that appellant claimed that he sustained employment-related injuries is not a sufficient reason for his failure to attend the March 28, 2018 medical examination.

Appellant further contends that he was not required to attend the scheduled examination because he was wrongfully terminated by the employing establishment. The fact that he claimed that he may have been wrongfully terminated from employment is not a sufficient reason for his

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<sup>12</sup> *D.K.*, Docket No. 18-0217 (issued June 27, 2018); *Lynn C. Huber*, 54 ECAB 281 (2002).

<sup>13</sup> *D.K.*, *id.*; *M.B.*, Docket No. 10-1755 (issued March 24, 2011); *supra* note 9.

<sup>14</sup> 5 U.S.C. § 8123; *D.K.*, *supra* note 12; *S.B.*, 58 ECAB 267 (2007).

<sup>15</sup> *D.K.*, *supra* note 12; *L.B.*, Docket No. 14-2005 (issued January 28, 2015).

<sup>16</sup> *Id.*; *C.S.*, Docket No. 11-1366 (issued December 12, 2011); *E.B.*, 59 ECAB 298 (2008).

failure to attend the scheduled medical examination. Appellant has not otherwise explained why he did not attend the scheduled examination. The Board thus finds that OWCP properly suspended his entitlement to future compensation, in accordance with 5 U.S.C. § 8123(d), until the date on which he agrees to attend the examination.

**CONCLUSION**

The Board finds that OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d), effective April 25, 2018, due to his failure to attend a scheduled medical examination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 25, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 21, 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