

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

E.J., Appellant

and

**U.S. POSTAL SERVICE, MORRISANIA
STATION, Bronx, NY, Employer**

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**Docket No. 18-1428
Issued: March 5, 2019**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 18, 2018 appellant filed a timely appeal from an April 24, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d), effective July 23, 2017, due to his failure to attend a scheduled medical examination.

¹ Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated December 6, 2018, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 18-1428 (issued December 6, 2018).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 13, 2004 appellant, then a 32-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 27, 2004 he injured his left knee while in the performance of duty delivering mail. He stopped work on the date of injury. On October 6, 2004 OWCP accepted the claim for left patella dislocation. It subsequently expanded acceptance of the claim to include tear of medial meniscus of left knee. Appellant received wage-loss compensation and medical benefits on the periodic rolls as of December 26, 2004.

By decision dated June 14, 2006, OWCP terminated appellant's compensation benefits, pursuant to section 8106(c)(2) of FECA,³ because he refused an offer of suitable employment. In a March 15, 2007 decision, an OWCP hearing representative reversed the June 14, 2006 termination decision and remanded the case to OWCP to reinstate wage-loss compensation benefits retroactive to the date of termination. By decision dated October 1, 2008, OWCP again terminated appellant's compensation benefits. In a December 23, 2008 decision, an OWCP hearing representative again reversed the October 1, 2008 decision and remanded the case to OWCP to again reinstate his compensation benefits retroactive to the date of termination. OWCP returned appellant to the periodic compensation rolls.

By letter dated February 27, 2017, OWCP informed appellant that a second-opinion evaluation would be scheduled and that he would receive an appointment letter from its scheduler. The letter informed appellant that, if he failed to keep the appointment without an acceptable reason, his benefits would be suspended in accordance with section 8123(d) of FECA (5 U.S.C. § 8123(d)). The appointment was scheduled on April 3, 2017 with Dr. Arnold Goldman, a Board-certified orthopedic surgeon. Appellant telephoned OWCP on April 5, 2017 indicating that he was out of the country and asked that the appointment be rescheduled. By notice dated May 19, 2017, he was informed that the examination was rescheduled with Dr. Goldman at 1:00 p.m. on June 5, 2017. OWCP sent the notice to appellant's last known address. Appellant did not attend the scheduled examination.

On June 26, 2017 OWCP proposed to suspend appellant's compensation benefits pursuant to section 8123(d) of FECA as he failed to attend the examination scheduled for June 5, 2017 with Dr. Goldman. It advised him that he should provide a written explanation of his reasons, with substantive corroborating evidence, within 14 days for failing to attend the scheduled examination. OWCP mailed the notice to appellant's last known address. No response was received.

By decision dated July 20, 2017, OWCP finalized its proposed suspension, effective July 23, 2017. It noted that, on May 19, 2017, it directed appellant to report for examination by Dr. Goldman, scheduled for June 5, 2017, but that he did not attend the examination or show good cause for his failure to attend the examination. OWCP noted that appellant did not respond to its June 26, 2017 letter.

On August 17, 2017 appellant requested a hearing with OWCP's Branch of Hearings and Review. He maintained that he did not receive the May 19 and June 26, 2017 correspondence. Appellant attached a booking confirmation of flights to the Philippines on March 20, 2017,

³ *Id.* at § 8106(c)(2).

returning on April 11, 2017 to substantiate that he had advised his claims examiner that he was out of the country during that period of time. He contended that the claims examiner did not contact him when he returned, did not ask him for anything, and did not reschedule his appointment.⁴

During the hearing, held on February 13, 2018, appellant testified that he did not receive the May 19, 2017 appointment letter, the June 26, 2017 notice of proposed suspension, or the July 20, 2017 decision.

By decision dated April 24, 2018, OWCP's hearing representative affirmed the July 20, 2017 decision. He found that appellant's testimony that he did not receive the appointment letter was unsubstantiated, noting that in the absence of contrary evidence, a notice mailed to an individual in the ordinary course of business was presumed to be received by the individual. The hearing representative concluded that OWCP, therefore, properly suspended appellant's compensation 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.⁵ 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.⁶ OWCP's 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 OWCP considers reasonably necessary.⁷ Section 8123(d) of FECA and section 10.323 of 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 obstruction ceases.⁸ 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 his or her reasons for the refusal or obstruction.⁹ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.¹⁰

⁴ On October 3, 2017 appellant telephoned OWCP and requested that it reschedule his second-opinion evaluation. On October 18, 2017 OWCP notified him that his appointment with Dr. Goldman was rescheduled for 12:30 p.m. on November 6, 2017. Appellant attended that examination, and his compensation was reinstated effective October 4, 2017. He was returned to the periodic compensation rolls.

⁵ 5 U.S.C. § 8123.

⁶ See *P.B.*, Docket No. 17-1426 (issued June 19, 2018).

⁷ 20 C.F.R. § 10.320.

⁸ 5 U.S.C. § 8123(d); *Id.* at § 10.323.

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

¹⁰ See *D.K.*, Docket No. 18-0217 (issued June 27, 2018).

ANALYSIS

The Board finds that OWCP properly suspended appellant's compensation pursuant to 5 U.S.C. § 8123(d) of FECA, effective July 23, 2017, for failure to attend a medical examination.

OWCP scheduled a second-opinion evaluation on June 5, 2017 with Dr. Goldman. Appellant did not appear for the scheduled examination. By decision dated July 20, 2017, OWCP suspended his compensation benefits, effective July 23, 2017, based on his failure to appear. On April 24, 2018 OWCP's hearing representative affirmed the July 20, 2017 decision.

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.¹¹ 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.¹²

On February 26, 2017 OWCP advised appellant that it would refer him for a second-opinion evaluation and that, if he did not keep the appointment, his benefits would be suspended. Appellant's initial appointment of April 3, 2017 with Dr. Goldman was rescheduled. In correspondence dated May 19, 2017, the scheduler informed appellant of the new examination appointment at 1:00 p.m. on June 5, 2017. Appellant did not attend the scheduled June 5, 2017 examination.

In a notice dated June 26, 2017, OWCP informed appellant that he had 14 days to provide reasons for failing to appear. Appellant did not respond to the June 26, 2017 notice. By decision dated July 20, 2017, OWCP suspended his compensation, effective July 23, 2017, for failure to attend the scheduled examination.

Appellant testified during the February 13, 2018 hearing that he did not receive the May 19, 2017 appointment letter which informed him of the June 5, 2017 second-opinion evaluation, the June 26, 2017 notice of proposed suspension, or the July 20, 2017 decision.

Under the mailbox rule, it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.¹³ The case record supports that each piece of correspondence listed above was addressed to appellant's last known address of record and there is no evidence of record that the mailing was undeliverable. Thus, the Board finds that there is no evidence to rebut the presumption of receipt by him under the mailbox rule.¹⁴

¹¹ *Id.*

¹² *Id.*

¹³ *See P.P.*, Docket No. 18-0706 (issued October 26, 2018).

¹⁴ *See C.S.*, Docket No. 11-1366 (issued December 12, 2011).

Because appellant failed to attend the June 5, 2017 medical examination and did not provide good cause for the failure to appear within 14 days of OWCP's June 26, 2017 notice of proposed suspension, the Board finds that OWCP properly suspended his wage-loss compensation, effective July 23, 2017, in accordance with section 8123(d) of FECA.¹⁵

CONCLUSION

The Board finds that OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d), effective July 23, 2017, due to his failure to attend a scheduled medical examination.

ORDER

IT IS HEREBY ORDERED THAT the April 24, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2019
Washington, DC

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

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

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

¹⁵ See *P.K.*, Docket No. 18-0179 (issued May 22, 2018).