

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

K.W., Appellant)	
)	
and)	Docket No. 18-0490
)	Issued: October 24, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Brooklyn, NY, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 8, 2018 appellant filed a timely appeal from a December 19, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the December 19, 2017 decision, OWCP received additional evidence. 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 additional evidence for the first time on appeal. *Id.*

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 27, 2016 appellant, then a 35-year-old city carrier assistant 2, filed a traumatic injury claim (Form CA-1) alleging that on September 26, 2016 she injured her lower back unloading totes from her vehicle while in the performance of duty. She stopped work on September 26, 2016. On January 6, 2017 OWCP accepted appellant's claim for neck joint and ligament, cervical spine, and lumbar spine sprains. By decision dated January 18, 2017, it denied expansion of the acceptance of her claim to include the additional conditions of cervical, thoracic, and lumbar radiculopathy. Appellant received continuation of pay through November 10, 2016, and thereafter, OWCP paid her wage-loss compensation on the supplemental rolls.

On June 16, 2017 appellant returned to work as a part-time (six hours/day), modified city carrier assistant.

In a June 27, 2017 note, Dr. Marina Neystat, Board-certified in internal medicine and neurology, diagnosed cervical and lumbar sprains and advised that appellant was unable to work more than eight hours per day or to lift more than 15 pounds.

On July 5, 2017 appellant accepted a full-time position as a modified city carrier assistant.

In an August 1, 2017 follow-up report, Dr. Neystat continued to diagnose cervical and lumbar sprains and indicated that appellant remained partially disabled. He noted that she had returned to work in a modified-duty capacity.

On September 25, 2017 OWCP notified appellant that she was being referred for an additional second opinion examination on November 8, 2017 with Dr. Mark Kramer, a Board-certified orthopedic surgeon. It advised her that it should be contacted by telephone if this appointment needed to be rescheduled or if she was unable to attend as scheduled and they would review the request to reschedule her appointment. OWCP explained that only legitimate, documented emergencies would be considered a basis for not keeping the appointment. It also advised appellant of her responsibility to attend the appointment and that, if she failed to do so without an acceptable reason, her compensation benefits could be suspended in accordance with section 5 U.S.C. § 8123(d).

Appellant had another follow-up examination with Dr. Neystat on September 27, 2017. Her diagnosis and work status remained unchanged.

On November 13, 2017 OWCP learned that appellant had not attended the November 8, 2017 examination with Dr. Kramer, as scheduled.

In a letter dated November 14, 2017, OWCP proposed to suspend appellant's wage-loss compensation and medical benefits as she failed to attend the medical examination scheduled for

November 8, 2017. It afforded her 14 days to respond, in writing with supporting evidence, for her failure to attend the scheduled examination. OWCP advised that, if appellant did not show good cause, her FECA benefits would be suspended pursuant to 5 U.S.C. § 8123(d) until she attended and fully cooperated with the examination. Appellant was instructed to contact OWCP immediately if she intended to report to a rescheduled examination with Dr. Kramer.

In a November 14, 2017 note, Dr. Neystat indicated that she saw appellant on that same date. She further indicated that appellant was currently under her medical care and supervision and was diagnosed with cervical and lumbar sprains.

By decision dated December 19, 2017, OWCP suspended appellant's wage-loss compensation and medical benefits, effective December 20, 2017, finding that she failed to attend the medical examination scheduled for November 8, 2017 and had not provided written evidence justifying her failure to attend or cooperate with the examination.

LEGAL PRECEDENT

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.³ 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.⁴ 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.⁵ 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.⁶

OWCP's procedures provide that, before it 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.⁷ 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,

³ 5 U.S.C. § 8123(a).

⁴ 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).

⁵ 20 C.F.R. § 10.320.

⁶ *Supra* note 3; *id.* at § 10.323; *D.K.*, Docket No. 18-0217 (issued June 27, 2018).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010).

payment retroactive to the date on which the claimant agreed to attend the examination may be made.⁸

ANALYSIS

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 her failure to attend a scheduled medical examination.

On September 25, 2017 OWCP notified appellant of her rights and responsibilities with respect to the November 8, 2017 scheduled medical examination. The notice properly contained a warning that benefits may be suspended pursuant to section 8123(d) of FECA for failure to report for the scheduled examination. OWCP explained that the physician was selected to obtain additional expert medical opinion. It properly determined that it required an assessment of appellant's continuing employment-related disability. The Board notes that OWCP also properly advised her by letter that she had an appointment with Dr. Kramer on November 8, 2017. However, appellant did not attend the scheduled medical examination.

On November 14, 2017 OWCP issued a notice of proposed suspension and afforded appellant a 14-day period within which to provide an explanation for her failure to attend the previously scheduled medical examination. It further explained that, if she failed to demonstrate good cause for her failure to attend the scheduled examination, her wage-loss compensation and medical benefits would be suspended until she attended and fully cooperated with the examination.

OWCP subsequently received additional medical evidence from Dr. Dr. Neystat, but appellant did not otherwise explain her failure to attend the November 8, 2017 scheduled examination with Dr. Kramer. Accordingly, the Board finds that appellant has not established good cause for her failure to report to the scheduled appointment. The Board further finds that OWCP's September 25 and November 14, 2017 notices advised her of her rights and responsibilities pursuant to 5 U.S.C. § 8123(d). Because appellant failed to attend the November 8, 2017 medical examination, and because she has not provided good cause for the failure to attend within 14 days of OWCP's November 14, 2017 notice of proposed suspension, the Board finds that OWCP properly suspended her wage-loss compensation and medical benefits.⁹

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 her failure to attend a schedule medical examination.

⁸ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

⁹ See *M.T.*, *supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 24, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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