

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

M.N., Appellant)	
)	
and)	Docket No. 19-1865
)	Issued: May 29, 2020
DEPARTMENT OF THE ARMY, TANK)	
AUTOMOTIVE & ARMAMENTS COMMAND,)	
RED RIVER ARMY DEPOT, Texarkana, TX,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 12, 2019 appellant filed a timely appeal from an August 8, 2019 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.

ISSUE

The issue is whether OWCP properly suspended appellant's entitlement to compensation benefits pursuant to 5 U.S.C. § 8123(d), effective August 7, 2019, due to his obstruction of a scheduled medical appointment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and the circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference. The relevant facts are set forth below.

On February 14, 2017 appellant, then a 54-year-old mechanic, filed an occupational disease claim (Form CA-2) alleging that, on February 10, 2017, he noted that he first became aware of his binaural sensorineural hearing loss and that his condition was caused or aggravated by his federal employment exposure to high noise levels from impact guns, rotor machines, sledge hammers, and motor vehicles.

By decision dated June 30, 2017, OWCP denied appellant's claim. It found that he had not established that his hearing loss was causally related to his accepted hazardous noise exposure at work.

By decision dated June 22, 2018, the Board set aside the June 30, 2017 OWCP decision denying appellant's hearing loss claim. The Board found that clarification from Dr. Mark D. Gibbons, a Board-certified otolaryngologist and second opinion examiner, was required with regard to whether appellant's workplace exposure had contributed in any degree to his bilateral hearing loss.

Following the Board's June 22, 2018 decision, OWCP sought additional clarification from Dr. Gibbons.

In a September 6, 2018 report, Dr. Gibbons discussed the results of the audiometric testing from November 6, 2012, January 14, 2013 and February 10, 2017. He opined that appellant's hearing loss was not due to federal employment because the recent audiograms presented significant inconsistencies. Dr. Gibbons recommended a repeat audiogram.

OWCP arranged for another second opinion examination to determine the relationship between appellant's hearing loss and the accepted factors of his federal employment. By letter dated June 4, 2019, it referred appellant to Thomas D. Burns, an audiologist, for a 9:00 a.m. hearing test and Dr. Charles Hollingsworth, a Board-certified otolaryngologist, for a 10:00 a.m. examination on July 1, 2019.

In a July 1, 2019 letter, Dr. Hollingsworth indicated that appellant entered his medical office that day, but was not examined. He indicated that, upon entering the office, appellant advised that "he did not know why he was here, he was not going to get any money out of this visit, and he did not want to waste his time seeing the doctor." Appellant then left after tossing his paper work to the office manager.

On July 9, 2019 OWCP received appellant's audiometric testing from July 1, 2019.

² Docket No. 17-1729 (issued June 22, 2018).

In a July 9, 2019 notice of proposed suspension, OWCP advised appellant that 5 U.S.C. § 8123(d) provides that, if an employee refuses to submit to or obstructs an examination, his or her right to compensation is suspended until the refusal or obstruction stops. It found that he obstructed the examination with Dr. Hollingsworth on July 1, 2019 as he left the medical office before being seen by the physician. OWCP advised appellant that he must submit a new and pertinent explanation for obstructing the examination with Dr. Hollingsworth within 14 days of the notice of proposed suspension. If good cause was not established, entitlement to wage-loss compensation and medical benefits would be suspended in accordance with 5 U.S.C. § 8123(d) until he attended and fully cooperated with the examination. Appellant did not submit any additional evidence/argument within the allotted period.

By decision dated August 8, 2019, OWCP finalized its proposed suspension, effective August 7, 2019.

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.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 ceases.⁶ 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.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.⁸

ANALYSIS

The Board finds that OWCP properly suspended appellant's entitlement to compensation benefits pursuant to 5 U.S.C. § 8123(d), effective August 7, 2019, due to his obstruction of a scheduled medical appointment.

³ 5 U.S.C. § 8123.

⁴ *L.B.*, Docket No. 17-1891 (issued December 11, 2018); *J.T.*, 59 ECAB 293 (2008).

⁵ 20 C.F.R. § 10.320.

⁶ *Id.* at § 10.323; *L.B.*, *supra* note 4.

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

⁸ *Id.*

The evidence of record is sufficient evidence to establish that appellant obstructed a scheduled medical examination, without good cause, within the meaning of 5 U.S.C. § 8123(d). In a June 4, 2019 letter, OWCP advised appellant of a second opinion examination with Dr. Hollingsworth following audiological testing on July 1, 2019. Appellant attended the audiological testing and entered Dr. Hollingsworth's office, but left prior to being examined by Dr. Hollingsworth. In a July 9, 2019 notice of proposed suspension, OWCP advised him that 5 U.S.C. § 8123(d) provides that, if an employee refuses to submit to or obstructs an examination, his or her right to compensation is suspended until the refusal or obstruction stops. It noted that appellant obstructed the examination with Dr. Hollingsworth scheduled for July 1, 2019. OWCP further advised him that he must submit a new and pertinent explanation for obstructing the examination with Dr. Hollingsworth within 14 days of the notice of proposed suspension. If good cause was not established, entitlement to wage-loss compensation and medical benefits would be suspended in accordance with 5 U.S.C. § 8123(d) until he attended and fully cooperated with the examination. Appellant did not submit any additional evidence/argument within the allotted period.

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.⁹ Under the circumstances of the present case, the Board finds that OWCP did not abuse its discretion in directing appellant to appear for a second opinion examination with Dr. Hollingsworth.¹⁰ OWCP's actions in this regard were reasonable and it properly found that appellant failed to provide good cause for obstructing the examination with Dr. Hollingsworth on July 1, 2019.¹¹ Additionally, 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. If appellant actually attends the directed examination, payment retroactive to the date on which he agreed to attend the examination may be made.¹²

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.

CONCLUSION

The Board finds that OWCP properly suspended appellant's entitlement to compensation benefits pursuant to 5 U.S.C. § 8123(d), effective August 7, 2019, due to his obstruction of a scheduled medical appointment.

⁹ See *supra* note 5.

¹⁰ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. See *C.F.*, Docket No. 18-0791 (issued February 26, 2019).

¹¹ *E.S.*, Docket No. 18-1606 (issued April 16, 2019).

¹² See *A.E.*, Docket No. 18-1155 (issued February 21, 2019).

ORDER

IT IS HEREBY ORDERED THAT the August 8, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 29, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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