

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 her failure to attend a scheduled medical examination; and (2) whether it properly denied appellant's request for a review of the written record by an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On September 5, 1995 appellant, then a 62-year-old poultry line inspector, filed an occupational disease claim (Form CA-2) alleging that she sustained wrist and hand swelling and numbness, as well as soreness and pain due to factors of her federal employment, on or before September 5, 1995. On November 1, 1995 OWCP accepted bilateral wrist tendinitis and right carpal tunnel syndrome.

On January 15, 1996 appellant filed a notice of recurrence (Form CA-2a) commencing January 9, 1996. OWCP accepted the recurrence of disability claim and paid appellant wage-loss compensation. It placed her on the periodic rolls effective April 28, 1996.³ On May 7, 1996 OWCP expanded its acceptance of the claim to include aggravation of bilateral arthritis of the thumbs. Appellant underwent an authorized interpolation arthroplasty of the right thumb in June 1996.

Following a vocational rehabilitation effort, by decision dated April 30, 1998, OWCP reduced appellant's wage-loss compensation based on her ability to earn wages in the constructed position of nursery school attendant. It continued to pay her wage-loss compensation on the periodic rolls. Appellant did not return to work. She remained under medical care for bilateral thumb arthritis.

In letters dated April 12 and 16, 2019, OWCP notified appellant that it had scheduled a June 3, 2019 second opinion examination with Dr. Timothy G. Pettingell, a Board-certified anesthesiologist and pain management specialist, in Tulsa, Oklahoma. It explained that her entitlement to compensation could be suspended, pursuant to 5 U.S.C. § 8123(d), if she refused to submit to or obstructed an examination.

In response, appellant submitted a May 28, 2019 statement, noting that she cancelled the appointment as she was planning to retire under the Office of Personnel Management (OPM) and would no longer receive FECA compensation benefits. She commented that she lived in Southwest City, Missouri and that she cancelled the appointment because she was worried "about traveling hundreds of miles" to doctors' appointments.

In a June 4, 2019 memorandum, the medical scheduler notified OWCP that appellant did not attend the scheduled June 3, 2019 appointment with Dr. Pettingell.

³ By decision dated December 7, 1999, OWCP granted appellant a schedule award for 35 percent permanent impairment of the right thumb and 26 percent permanent impairment of the left thumb.

OWCP, in a June 6, 2019 letter, informed appellant that it proposed to suspend her wage-loss compensation and medical benefits due to her obstruction of a June 3, 2019 scheduled medical examination with Dr. Pettingell. It noted that, while she had indicated, in a May 28, 2019 statement that she would not attend the medical examination because she did not want to travel hundreds of miles to attend the medical examination, this was not a valid excuse to obstruct a mandatory medical examination. OWCP afforded appellant 14 days to submit evidence or argument challenging the proposed suspension action. It noted that if good cause was not established, entitlement to compensation and medical benefits would be suspended in accordance with 5 U.S.C. § 8123(d) until she attended and fully cooperated with the examination.

In response, appellant submitted statements dated June 9 and 10, 2019, noting that she did not attend the June 3, 2019, appointment with Dr. Pettingell as she was electing retirement under the Federal Employees Retirement System (FERS) and would no longer receive FECA compensation benefits. She also noted that a 2014 hip fracture made it difficult for her to travel by car and that she now used a cane to assist her to walk. Appellant provided a 1996 report regarding the accepted right thumb condition, and May 13, 2014 discharge instructions, for a right hip hemiarthroplasty post-fracture.

By decision dated July 2, 2019, OWCP suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective July 2, 2019. It found that she had failed to report to Dr. Pettingell's scheduled examination of June 3, 2019, and that she had obstructed such examination as she had failed to provide good cause for not attending the examination. OWCP advised appellant that her compensation would be reinstated effective the date she attended and fully cooperated with such examination.

OWCP subsequently received a copy of an election form showing that on June 8, 2019 appellant elected FERS retirement benefits. She retired from federal employment effective July 1, 2019. Appellant's monthly annuity payments commenced July 2, 2019, the date OWCP suspended her FECA benefits.

In a September 11, 2019 letter, postmarked September 12, 2019, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated September 30, 2019, OWCP denied appellant's request for a review of the written record finding, that the request was untimely filed. The request was postmarked September 12, 2019, more than 30 days following the July 2, 2019 decision. The hearing representative informed appellant that her case had been considered in relation to the issues involved, and that the issues could be equally addressed by requesting reconsideration and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

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.⁴ The determination of the need for an examination, the type of examination, the choice of locale, and

⁴ 5 U.S.C. § 8123(a).

the choice of medical examiners are matters within the province and discretion of OWCP.⁵ 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.⁶ 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.⁷ 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.⁸ 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.

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 her failure to attend a scheduled medical examination.

In letters dated April 12 and 16, 2019, OWCP notified appellant that she was being referred for a second opinion evaluation on June 3, 2019 with Dr. Pettingell on the issues of continuing residuals and current work capacity. It informed her of her 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 her appointment. Appellant did not appear for the appointment, nor did she attempt to reschedule the appointment prior to the designated time.

In a letter dated June 6, 2019, OWCP provided appellant 14 days to submit a valid reason for her failure to attend the scheduled medical appointment.

In response to the notice of proposed suspension, appellant asserted that she did not attend the June 3, 2019 appointment as she was electing retirement under FERS and would no longer receive FECA compensation benefits. However, at the time of the missed appointment appellant had not yet elected OPM retirement benefits under FERS. The record indicates that she did not begin receiving monthly annuity payments until July 2, 2019. Appellant further asserted that she was unable to travel by car to the appointment due to a 2014 hip fracture. Appellant provided May 13, 2014 discharge instructions for a right hip hemiarthroplasty post-fracture; however, she has not provided any contemporaneous medical evidence establishing an inability to travel to the

⁵ 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).

⁶ 20 C.F.R. § 10.320; 5 U.S.C. § 8123(a); *id.* at § 10.323; *A.P.*, Docket No. 19-0328 (issued August 6, 2019); *D.K.*, Docket No. 18-0217 (issued June 27, 2018).

⁷ 5 U.S.C. § 8123(d); *id.* at § 10.323; *A.P.*, *id.*; *D.K.*, *id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010).

June 3, 2019 medical appointment.⁹ The Board thus finds that appellant has not established good cause for failing to appear for the scheduled examination on June 3, 2019. OWCP properly determined that appellant failed to attend a scheduled medical examination without good cause and suspended her right to compensation.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP hearing representative, provides that a claimant is entitled to a hearing before an OWCP representative when a request is made 30 days after issuance of an OWCP final decision.¹⁰

A hearing is a review by an OWCP hearing representative of a final adverse decision issued by an OWCP district office.¹¹ Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.¹² A request for either an oral hearing or a review of the written record must be sent, in writing, within 30 days of the date of the decision for which the hearing is sought.¹³ A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision.¹⁴

Although there is no right to a review of the written record or an oral hearing, if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.¹⁵

⁹ See *D.K.*, Docket No. 14-0933 (issued April 15, 2015) (the Board found that OWCP properly suspended compensation where appellant did not submit any medical or factual evidence showing her inability to travel to the second opinion appointment by any mode of transportation other than driving or that she could take breaks in her driving to the scheduled appointment.)

¹⁰ 5 U.S.C. § 8124(b)(1).

¹¹ 20 C.F.R. § 10.616.

¹² *Id.* at § 10.615.

¹³ *Id.* at § 10.616(a); *W.F.*, Docket No. 19-1822 (issued June 4, 2020); *T.C.*, Docket No. 20-0090 (issued February 13, 2020); *M.H.*, Docket No. 19-1087 (issued October 17, 2019); *B.V.*, Docket No. 18-1473 (issued April 23, 2019).

¹⁴ *W.F.*, *id.*; *T.C.*, *id.*; *K.L.*, Docket No. 19-0480 (issued August 23, 2019).

¹⁵ *P.C.*, Docket No. 19-1003 (issued December 4, 2019); *M.G.*, Docket No. 17-1831 (issued February 6, 2018); *Eddie Franklin*, 51 ECAB 223 (1999).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for a review of the written record before an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124(b).

Appellant had 30 days following OWCP's July 2, 2019 merit decision to request a review of the written record before a representative of OWCP's Branch of Hearings and Review. As her request for a review of the written record was postmarked September 12, 2019, more than 30 days after OWCP's July 2, 2019 decision, it was untimely filed and she was, therefore, not entitled to a review of the written record as a matter of right.¹⁶ Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.¹⁷

OWCP also has the discretionary power to grant an oral hearing or review of the written record even if the claimant is not entitled to a review as a matter of right. The Board finds that OWCP, in its September 30, 2019 decision, properly exercised its discretion noting that it had considered the matter in relation to the issue of suspension of benefits and determined that the issue could be equally well addressed through a reconsideration application. The Board has held that as the only limitation on OWCP's authority is reasonableness, 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 deduction from established facts.¹⁸ The Board finds that the evidence of record does not indicate that OWCP abused its discretion in connection with its denial of appellant's request for a review of the written record.

Accordingly, the Board finds that OWCP properly denied appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b)(1).

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 scheduled medical examination. The Board further finds that OWCP properly denied appellant's request for a review of the written record by an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124(b).

¹⁶ Under OWCP's regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011); *see also G.S.*, Docket No. 18-0388 (issued July 19, 2018).

¹⁷ 5 U.S.C. § 8124(b)(1); *see M.K.*, Docket No. 19-0428 (issued July 15, 2019); *R.H.*, Docket No. 18-1602 (issued February 22, 2019); *William F. Osborne*, 46 ECAB 198 (1994).

¹⁸ *See T.G.*, Docket No. 19-0904 (issued November 25, 2019); *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the September 30 and July 2, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 30, 2020
Washington, DC

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

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

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