

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

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| C.R., Appellant |) | |
| |) | |
| and |) | Docket No. 20-1089 |
| |) | Issued: January 26, 2021 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Oscoda, MI, Employer |) | |
| |) | |

Appearances:
Paul Rekowski, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 27, 2020 appellant, through her representative, filed a timely appeal from January 22 and February 21, 2020 merit decisions of the Office of Workers' Compensation Programs (OWCP). 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.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional 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 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), effective August 27, 2019, due to her failure to attend a scheduled medical examination.

FACTUAL HISTORY

On January 27, 2011 appellant, then a 52-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a concussion injury when she fell on a snow-covered sidewalk and became unconscious due to hitting her head while in the performance of duty. She stopped work on January 28, 2011. OWCP accepted appellant's claim for concussion with loss of consciousness, post-traumatic headache, nausea, and vertigo/dizziness, and paid her wage-loss compensation on the supplemental rolls for disability from work commencing March 14, 2011. It paid appellant wage-loss compensation on the periodic rolls commencing April 10, 2011.

On November 1, 2013 OWCP referred appellant for a second opinion examination to Dr. Nael Tarakji, a Board-certified neurologist. It requested that he evaluate whether her continued to have residuals or disability causally related to her accepted January 27, 2011 employment injury. In a November 27, 2013 report, Dr. Tarakji diagnosed post-concussion syndrome (resolved), post-traumatic vestibulopathy (mild and improved), and back pain secondary to degenerative cervical spine disease, and opined that from a neurological perspective appellant could return to work without restrictions.

On April 22, 2016 OWCP referred appellant for another second opinion examination to Dr. Gavin Awerbuch, a Board-certified neurologist. It requested that he evaluate whether she continued to have residuals or disability causally related to her accepted January 27, 2011 employment injury. In a July 14, 2016 report, Dr. Awerbuch concluded that appellant continued to have residuals of her accepted January 27, 2011 employment injury.

In a June 18, 2019 letter, OWCP informed appellant that an appointment for a second opinion examination, designed to assess her accepted work-related condition, had been made for her and that the time, date, and location of the appointment would be detailed in a separate letter. It indicated that rescheduling the appointment date and time was strongly discouraged and should only be done in emergency situations. OWCP advised appellant, that if she failed to keep the scheduled appointment, she must advise it of the reason within seven days in writing. It noted that only a legitimate, documented emergency would be deemed as an adequate reason for not keeping the appointment. OWCP informed appellant that, if she failed to provide an acceptable reason for not appearing for the examination, or if she obstructed the examination, her benefits would be suspended in accordance with Section 8123(d) of FECA. It noted that this provision delineated that, if an employee refused to submit to or obstructed an examination, his or her right to compensation was suspended until the refusal or obstruction stopped.

In a July 8, 2019 letter, OWCP advised appellant of an appointment scheduled for August 7, 2019 at 11:30 a.m. with Dr. Martin N. Bleiberg, Board-certified in physical medicine

and rehabilitation. It requested that she call a provided telephone number to confirm the appointment.⁴

In an August 7, 2019 letter, QTC Medical Services, OWCP's scheduling service, advised OWCP that appellant did not keep the appointment scheduled for August 7, 2019 at 11:30 a.m. with Dr. Bleiberg.

In a letter dated August 9, 2019, OWCP advised appellant that, under 5 U.S.C. § 8123(d), it proposed to suspend her wage-loss compensation and medical benefits because she failed to report to a medical examination as directed by OWCP. It noted that its scheduling service had advised that she failed to attend the second opinion examination appointment scheduled with Dr. Bleiberg on August 7, 2019 at 11:30 a.m. and that, to date, it had not received a written explanation or reason for her nonattendance/obstruction of the examination. OWCP indicated that an employee's right to compensation under FECA shall be suspended during the period of a refusal or obstruction of an examination by a physician as required by OWCP, and that compensation was not payable while a refusal or obstruction continued. It afforded appellant 14 days to submit new and pertinent explanation in writing for not attending or obstructing the examination with Dr. Bleiberg. OWCP advised her that, if good cause was not established, her entitlement to wage-loss benefits and medical benefits would be suspended in accordance with 5 U.S.C. § 8123(d).

On August 19, 2019 OWCP received an April 3, 2019 note from Ms. Beatty-Page who diagnosed chronic central vertigo, chronic headache, tinnitus, visual disturbances (diplopia) and neck pain due to the January 27, 2011 employment injury and indicated that appellant could not return to work. On August 26, 2019 it received an August 22, 2019 letter in which the employing establishment maintained that "there is no current medical documentation to support this claim."

By decision dated August 27, 2019, OWCP suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective August 27, 2019, due to her failure to attend the second opinion examination with Dr. Bleiberg which had been scheduled for August 7, 2019. It found that she did not provide good cause for her failure to appear within 14 days of OWCP's August 9, 2019 notice of proposed suspension. OWCP advised appellant that her benefits would be reinstated only after it had been verified that she attended and fully cooperated with an OWCP-directed second opinion examination and noted that such reinstatement would be effective the date of her compliance.

The case record contains a September 5, 2019 telephone record in which an OWCP official advised that appellant's husband, who was not authorized to speak on appellant's behalf, had called on that date. Appellant's husband asserted that appellant had submitted a statement explaining her reasons for not attending the examination scheduled for August 7, 2019. In a September 5, 2019 letter, OWCP advised that, if she wished her husband to represent her, she needed to submit a signed and dated statement providing such authorization. It advised appellant that it had been unsuccessful in reaching her by telephone.

⁴ In a June 18, 2019 document provided to Dr. Bleiberg, OWCP had requested that Dr. Bleiberg evaluate whether appellant continued to have residuals or disability causally related to her accepted January 27, 2011 employment injury.

On September 16, 2019 appellant requested a review of the written record with respect to the August 27, 2018 decision by a representative of OWCP's Branch of Hearings and Review. She provided written authorization for her husband to serve as her representative. On September 16, 2019 OWCP received a statement in which appellant indicated that she was responding to OWCP's August 9, 2019 request for an explanation of her reason for missing the appointment with Dr. Bleiberg scheduled for August 7, 2019.⁵ Appellant indicated that on July 25, 2019 she underwent nonwork-related surgery and had been recovering at home since that time. She advised that she was in significant pain and that automobile travel was very difficult for her. Appellant asserted that "with all the stress, pain, and medication," she overlooked her appointment with Dr. Bleiberg and was not up to traveling on August 7, 2019. She indicated that she called OWCP's scheduling service (QTC Medical Services) on August 7, 2019 and, after explaining her situation, was advised that it would reschedule her appointment with Dr. Bleiberg. Appellant noted that she received a call from Dr. Bleiberg's office the following day, and was told that she did not have to do anything because QTC Medical Services was rescheduling the appointment for her. In handwritten notes on the statement, she asserted that she resent the document on September 13, 2019 after previously sending it on August 14, 2019. In these notes, appellant also indicated that she left a telephone message for an OWCP claims examiner on September 4, 2019 and asserted that a September 5, 2019 letter from OWCP revealed that an improper number had been used to call her back.

By decision dated January 22, 2020, OWCP's hearing representative affirmed the August 27, 2019 decision, noting that OWCP had properly suspended appellant's wage-loss compensation and medical benefits, effective August 27, 2019, due to her failure to attend the examination scheduled for August 7, 2019.

On January 23, 2020 OWCP referred appellant for a second opinion examination on the issues of continuing residuals and current work capacity. On January 30, 2020 it received a hard copy of a January 28, 2020 e-mail in which a scheduler for QTC Medical Services advised an OWCP claims examiner that appellant's husband/representative called on January 28, 2020 and asserted that appellant had previously called on August 7, 2019 to reschedule the examination scheduled for that date. The scheduler noted, "Unfortunately, I do n[o]t have my e[-]mails from August of 2019, and I only have notes in our system. You did authorize the reschedule and I reached out to Dr. Bleiberg to reschedule on August 9, 2019. However, I do n[o]t have any notes after that. I am not sure if I missed the reschedule because the provider never got back to me or it just felt through the cracks."

In a February 4, 2020 letter, OWCP advised appellant of the time and location of the second opinion examination that had been scheduled for February 21, 2020 with Michael Sperl, a Board-certified physical medicine and rehabilitation physician.

On February 4, 2020 appellant requested reconsideration of the January 22, 2020 decision. She submitted a February 4, 2020 statement in which she further discussed her actions around the time of the examination scheduled for August 7, 2019. Appellant argued that she had submitted

⁵ The typed statement bore a handwritten date of August 14, 2019, but was signed on September 13, 2019.

statements showing her willingness to appear for a second opinion examination and therefore had submitted evidence which would require OWCP to reinstate her compensation.

By decision dated February 21, 2020, OWCP denied modification of the January 22, 2020 decision. It noted, “Once the second opinion appointment dated [February 21, 2020] has been attended our office will process payment retroactive to the date on which you agreed to attend the appointment will be made.”

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.⁶ 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.⁷ 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.⁸ 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.⁹ 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.¹⁰ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.¹¹

ANALYSIS

The Boards finds that OWCP properly suspended appellant’s wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective August 27, 2019, due to her failure to attend a scheduled medical examination.

In letters dated June 18 and July 8, 2019, OWCP notified appellant that she was being referred for a second opinion examination on the issues of continuing residuals and current work capacity. The July 8, 2019 letter specifically advised her that the examination was scheduled with Dr. Bleiberg for August 7, 2019 at 11:30 a.m. and provided an address for Dr. Bleiberg’s office. In the June 18, 2019 letter, OWCP informed appellant of her obligation to attend and cooperate with the examination. It clearly explained that her compensation benefits would be suspended for

⁶ 5 U.S.C. § 8123(a).

⁷ *L.B.*, Docket No. 17-1891 (issued December 11, 2018); *J.T.*, 59 ECAB 293 (2008).

⁸ 20 C.F.R. § 10.320.

⁹ 5 U.S.C. § 8123(d); *id.* § 10.323; *D.K.*, Docket No. 18-0217 (issued June 27, 2018).

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

¹¹ *Id.* at Chapter 2.810.13e.

failure to report to or for obstruction of the examination. Appellant did not appear for the August 7, 2019 appointment, nor did she provide evidence within 14 days of OWCP's August 9, 2019 notice of proposed suspension that she attempt to reschedule the appointment prior to the designated time.

In its August 9, 2019 notice, OWCP provided appellant 14 days to submit a valid reason for her failure to attend the scheduled medical appointment. In a response received by OWCP on September 16, 2019, appellant asserted that, on August 7, 2019 the date of the examination scheduled with Dr. Bleiberg, she contacted OWCP's scheduling service (QTC Medical Services), and advised that she could not attend the examination because she had recently undergone surgery. She also asserted that she telephoned Dr. Bleiberg's office on August 7, 2019 and was told that the examination would be rescheduled.¹² The Board notes that this response was received more than 14 days after OWCP's August 9, 2019 notice of proposed suspension and that appellant has not provided any contemporaneous medical evidence establishing an inability to travel to the August 7, 2019 medical appointment due to her surgery.¹³

On January 30, 2020 OWCP received a hard copy of a January 28, 2020 e-mail in which a scheduler for QTC Medical Services noted that appellant's husband/representative called on January 28, 2020 and asserted that appellant had called on August 7, 2019 to reschedule the examination scheduled for that date. The scheduler further indicated that OWCP approved rescheduling of the appointment, but that the rescheduling did not, in fact, occur. The Board notes, however, that this document was not received within 14 days of OWCP's proposed notification of suspension and the document itself does not present a clear basis to find that appellant had good cause to reschedule the appointment originally scheduled for August 7, 2019. For these reasons, the Board finds that she has not established good cause for failing to appear for the scheduled examination on August 7, 2019.¹⁴

As appellant did not attend the examination as scheduled and failed to provide good cause for failing to appear within 14 days of OWCP's August 9, 2019 notice of proposed suspension, the Board finds that OWCP properly suspended her entitlement to future wage-loss compensation and medical benefits in accordance with 5 U.S.C. § 8123(d), effective August 27, 2019.¹⁵

CONCLUSION

The Boards finds that OWCP properly suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective August 27, 2019, due to her failure to attend a scheduled medical examination.

¹² Appellant *also* makes a similar argument on appeal to the Board.

¹³ *See generally* *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 not take breaks in her driving to the scheduled appointment).

¹⁴ *See R.L.*, Docket No. 20-0160 (issued October 30, 2020).

¹⁵ *See id.*

ORDER

IT IS HEREBY ORDERED THAT the February 21 and January 22, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 26, 2021
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