

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

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<b>R.D., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-1551</b>
	)	<b>Issued: November 8, 2021</b>
<b>U.S. POSTAL SERVICE, AMBLER POST</b>	)	
<b>OFFICE, Ambler, PA, Employer</b>	)	
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*Appearances:*  
*Appellant, pro se*  
*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 August 4, 2020 appellant filed a timely appeal from July 9 and 21, 2020 merit decisions of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees'

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<sup>1</sup> Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of his oral argument request, appellant asserted that oral argument should be granted because it would provide him an opportunity to discuss the deficiencies of the second opinion physician relied upon by OWCP to reduce his compensation. The Board, in exercising its discretion, denies appellant's request for oral argument because this matter requires an evaluation of the medical evidence required. As such, the arguments on appeal can be adequately addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board. Further, the Board notes that appellant indicated on the AB-1 Form that he was appealing from a purported May 13, 2020 OWCP decision. However, there is no May 13, 2020 OWCP decision of record. The only final adverse decisions over which the Board may exercise jurisdiction are the July 9 and 21, 2020 merit decisions. See 20 C.F.R. §§ 501.2(c) and 501.3.

Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

### **ISSUES**

The issues are: (1) whether OWCP properly reduced appellant's wage-loss compensation, effective December 12, 2019, under 20 C.F.R. § 10.500(a); and (2) whether OWCP properly suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective March 3, 2020, due to his failure to attend a scheduled medical examination.

### **FACTUAL HISTORY**

On September 28, 2015 appellant, then a 50-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained a left hand/wrist injury when he slipped on acorns and fell to the ground while in the performance of duty. He stopped work on the date of the claimed injury and returned to light-duty work on a full-time basis on September 30, 2015. Appellant stopped work again on October 2, 2015.

OWCP accepted appellant's claim for left wrist sprain. It paid him wage-loss compensation for disability from work on the supplemental rolls commencing November 15, 2015. OWCP paid appellant wage-loss compensation for disability from work on the periodic rolls, commencing April 2, 2017.

On May 11, 2016 OWCP expanded the accepted conditions to include aggravation of preexisting degenerative tear of the left triangular fibrocartilage complex (TFC).

On January 2, 2018 OWCP referred appellant and the case record and a series of questions to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, for a second opinion evaluation. It requested that Dr. Didizian provide an opinion regarding appellant's injury-related condition and his ability to work.

In a January 18, 2018 report, Dr. Didizian discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He found that appellant continued to have residuals of the accepted TFC condition of the left wrist. Dr. Didizian determined that appellant was capable of working on a full-time basis with restrictions. In a January 18, 2018 work capacity evaluation (Form OWCP-5c), he indicated that appellant could not engage in repetitive motion with his left wrist or push/pull with his left arm. Dr. Didizian advised that appellant was restricted from lifting more than 10 pounds, for up to two hours per day, with his left arm.

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the July 21, 2020 decision, appellant submitted additional evidence to OWCP. 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.*

On October 10, 2018 the employing establishment offered appellant a temporary light-duty assignment in the form of a modified city carrier position, which involved working six hours per day. The position required casing mail one to four ounces, for two hours per day, handling curtailed mail as needed, light maintenance, dusting, emptying trash, for two hours, and answering telephones to address customer complaints for four hours. All of these actions were to be performed only with the right hand. The physical requirements included sitting four to six hours per day, standing up to four hours, and lifting no more than 10 pounds with the right arm for up to four hours. Appellant did not accept the position.

On August 7, 2019 the employing establishment confirmed that the temporary light-duty assignment originally offered on October 10, 2018 was still available to appellant.

In an August 28, 2019 letter, OWCP notified appellant of the proposed reduction of his compensation for wage loss in accordance with 20 C.F.R. § 10.500(a) based upon his declination of a temporary light-duty assignment deemed by OWCP to appropriately accommodate his current work restrictions. It advised appellant that his current work restrictions were represented by those provided on January 18, 2018 by Dr. Didizian, OWCP's referral physician, and informed him that, if he continued to decline the position, he had to provide adequate justification for such declination. OWCP advised appellant, "[y]our case will be held open for 30 days to afford you an opportunity to accept the assignment and report to duty, or arrange for a report date without penalty. If you fail to accept this assignment, you must provide a written explanation of your reasons during the allotted period."

In response, appellant submitted a September 10, 2019 statement in which he referenced his "injuries." In an October 15, 2019 statement, he requested that OWCP reconsider its "decision" as his medical conditions were "more than the hand" and he had no use of his left hand. Appellant did not accept the temporary light-duty assignment.

By decision dated December 12, 2019, OWCP reduced appellant's wage-loss compensation, effective that date, under 20 C.F.R. § 10.500(a). It found that he did not provide adequate justification for not accepting the offered temporary light-duty assignment, which was within his medical restrictions. In reducing appellant's wage-loss compensation, OWCP applied the *Shadrick* formula to calculate his loss of wage-earning capacity, a formula that was derived from principles contained in the case of *Albert C. Shadrick*.<sup>4</sup>

In February 11 and 12, 2020 letters, OWCP notified appellant that he was being referred for a second opinion examination on March 3, 2020 with Dr. Steven J. Valentino, a Board-certified orthopedic surgeon, to determine the status of his accepted employment-related conditions. The letters informed appellant of his obligations to attend and cooperate with the examination and explained that his 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 his appointment and were mailed to his address of record in the ordinary course of business. On March 30, 2020 Dr. Valentino's office advised OWCP that appellant did not attend the examination scheduled for that date.

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<sup>4</sup> 5 ECAB 376 (1953); codified at 20 C.F.R. §§ 10.403(d)-(e).

In a notice dated April 10, 2020, OWCP proposed to suspend appellant's wage-loss compensation and medical benefits as he failed to attend the medical examination scheduled for March 3, 2020. It afforded him 14 days to respond in writing with an explanation as to why he did not attend the examination with Dr. Valentino. OWCP advised that, if good cause was not established, appellant's compensation benefits would be suspended pursuant to 5 U.S.C. § 8123(d) until he attended and fully cooperated with the examination. It instructed him to contact OWCP immediately if he intended to report to a rescheduled examination with Dr. Valentino. Appellant did not respond within the afforded period.

By decision dated July 9, 2020, OWCP suspended appellant's wage-loss compensation and medical benefits effective March 3, 2020, pursuant to 5 U.S.C. § 8123(d), due to his failure, without good cause, to attend the medical examination scheduled for March 3, 2020.

Appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review regarding the December 12, 2019 decision, which reduced his compensation under 20 C.F.R. § 10.500(a). During the hearing held on May 13, 2020, appellant's then-counsel argued that appellant had multiple medical conditions, other than his accepted conditions, which prevented him from performing the assignment offered by the employing establishment.

By decision dated July 21, 2020, OWCP's hearing representative affirmed the December 12, 2019 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>5</sup> OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>6</sup>

Section 10.500(a) of OWCP's regulations provides that benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage-loss claimed on a claim for wage-loss compensation (Form CA-7) to the extent that evidence contemporaneous with the period claimed on a Form CA-7 establishes that an employee had medical work restrictions in place, that light duty within those work restrictions was available, and that the employee was previously notified in writing that such duty was available.<sup>7</sup>

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<sup>5</sup> *L.L.*, Docket No. 18-1426 (issued April 5, 2019); *C.C.*, Docket No. 17-1158 (issued November 20, 2018); *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>6</sup> *A.D.*, Docket No. 18-0497 (issued July 25, 2018). In general, the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury. *See* 20 C.F.R. § 10.5(f).

<sup>7</sup> 20 C.F.R. § 10.500(a); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9a (June 2013).

When a claimant is on the periodic rolls, OWCP's procedures similarly provide that, if the evidence establishes that injury-related residuals continue and result in work restrictions, light duty within those work restrictions is available, that the employee was notified in writing that such light duty was available, then wage-loss benefits are not payable for the duration of light-duty availability.<sup>8</sup> OWCP's procedures explain that this is because such benefits are payable only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.<sup>9</sup> When a claimant is on the periodic rolls, a pretermination notice must be issued if the claims examiner is removing the claimant from the periodic rolls and ceasing his/her wage-loss compensation payments.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly reduced appellant's wage-loss compensation, effective December 12, 2019, under 20 C.F.R. § 10.500(a).

On October 10, 2018 the employing establishment offered appellant a temporary light-duty assignment on a full-time basis. Appellant did not accept the position and, in a December 12, 2019 decision, OWCP reduced his wage-loss compensation, effective December 12, 2019, under 20 C.F.R. § 10.500(a).

The Board finds that OWCP properly reduced appellant's wage-loss compensation, effective December 12, 2019, under 20 C.F.R. § 10.500(a). Appellant did not accept a temporary light-duty assignment offered by the employing establishment, which was within his medical restrictions. With reference to the wages paid by the assignment, OWCP properly applied the *Shadrick* formula in calculating the proper reduction in appellant's wage-loss compensation given the wages paid by his date-of-injury position.<sup>11</sup> Therefore, the reduction of appellant's wage-loss compensation, effective December 12, 2019, was justified under 20 C.F.R. § 10.500(a).<sup>12</sup>

The Board finds that the medical evidence of record shows that appellant was capable of performing the temporary light-duty assignment offered by the employing establishment in October 2018. The modified city carrier assignment involved working six hours per day. The assignment required casing mail, one to four ounces, for two hours per day; handling curtailed mail as needed; light maintenance, dusting, emptying trash, for two hours; and answering telephones to address customers' complaints for four hours. All of these actions were to be performed only with the right hand. The physical requirements included sitting four to six hours per day, standing up to four hours, and lifting no more than 10 pounds with the right arm for up to four hours.

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9c(1)(a) (June 2013).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at Chapter 2.814.9c(1)(b).

<sup>11</sup> *Supra* note 5.

<sup>12</sup> *Id.*

The physical requirements of the offered temporary light-duty assignment were within appellant's medical restrictions as provided by Dr. Didizian, the OWCP referral physician. In reports dated January 18, 2018, Dr. Didizian determined that appellant was capable of working on a full-time basis with restrictions. He indicated that appellant could not engage in repetitive motion with his left wrist or push/pull with his left arm. Dr. Didizian noted that appellant was restricted from lifting more than 10 pounds (for up to two hours per day) with his left arm. The Board finds that the medical restrictions provided by Dr. Didizian, in his January 18, 2018 reports, constitute an accurate representation of appellant's ability to work around the time that the employing establishment offered him the temporary light-duty assignment. After the December 12, 2019 reduction of compensation, appellant's then-counsel argued that appellant had multiple medical conditions, other than his accepted conditions, which prevented him from performing the assignment offered by the employing establishment.<sup>13</sup> However, appellant did not submit medical evidence, which supported this assertion.

The evidence of record reflects that appellant did not accept a temporary light-duty assignment offered by the employing establishment, which was suitable and would have paid him wages constituting a portion of those of his date-of-injury job and, therefore, OWCP properly reduced his wage-loss compensation, effective December 12, 2019, under 20 C.F.R. § 10.500(a).

### **LEGAL PRECEDENT -- ISSUE 2**

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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> If good cause for the refusal or

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<sup>13</sup> OWCP's procedures provide that the offered light-duty assignment must take into account the claimant's work-related conditions, as well as any preexisting medical conditions and any conditions, which have arisen since the compensable injury. *See supra* note 9 at Chapter 2.814.9c(2)(b).

<sup>14</sup> 5 U.S.C. § 8123.

<sup>15</sup> *L.B.*, Docket No. 17-1891 (issued December 11, 2018); *J.T.*, 59 ECAB 293 (2008).

<sup>16</sup> 20 C.F.R. § 10.320.

<sup>17</sup> *See* 5 U.S.C. § 8123; 20 C.F.R. § 10.323; *D.K.*, Docket No. 18-0217 (issued June 27, 2018).

<sup>18</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13d (September 2010).

obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.<sup>19</sup>

### ANALYSIS -- ISSUE 2

The Board finds that OWCP properly suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective March 3, 2020, due to his failure to attend a scheduled medical examination.

In February 11 and 12, 2020 letters, OWCP notified appellant that he was being referred for a second opinion examination on March 3, 2020 with Dr. Valentino to determine the status of his accepted employment-related conditions. The letters informed appellant of his obligations to attend and cooperate with the examination and explained that his 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 appellant's appointment.

Absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is known as the mailbox rule.<sup>20</sup> The February 11 and 12, 2020 letters were sent to appellant's address of record and are presumed to have been received by him absent any notice of nondelivery. Appellant has not submitted evidence to rebut this presumption.

Appellant did not appear for the March 3, 2020 appointment, nor did he attempt to reschedule the appointment prior to the designated time. In a notice dated April 10, 2020, OWCP provided appellant 14 days to submit a valid reason for his failure to attend the scheduled medical appointment. Appellant did not respond.

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 April 10, 2020 notice of proposed suspension, the Board finds that OWCP properly suspended his wage-loss compensation and medical benefits in accordance with 5 U.S.C. § 8123(d), effective March 3, 2020.<sup>21</sup>

### CONCLUSION

The Board finds that OWCP properly reduced appellant's wage-loss compensation, effective December 12, 2019, under 20 C.F.R. § 10.500(a). The Board further finds that OWCP properly suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective March 3, 2020, due to his failure to attend a scheduled medical examination.

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<sup>19</sup> *Id.* at Chapter 2.810.13e.

<sup>20</sup> *See James A. Gray*, 54 ECAB 277 (2002).

<sup>21</sup> *See G.R.*, Docket No. 20-0915 (issued January 29, 2021).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 9 and 21, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 8, 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