

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

_____)	
A.H., Appellant)	
)	
and)	Docket No. 21-0688
)	Issued: October 6, 2021
U.S. POSTAL SERVICE, KILLEEN POST OFFICE, Killeen, 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 March 28, 2021 appellant filed a timely appeal from a March 22, 2021 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 to consider the merits of this case.²

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 November 21, 2020, due to her failure to attend a scheduled medical examination.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 22, 2021 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.*

FACTUAL HISTORY

On August 8, 2019 appellant, then a 46-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on July 29, 2019 she sustained a left foot injury when she slipped when stepping from her delivery vehicle while in the performance of duty. She explained that she became ill while delivering her route and her supervisor instructed her to return to the employing establishment so that another carrier could complete her route and, upon exiting her long life vehicle (LLV), she slipped on the dismount twisting her left foot. Appellant stopped work on August 8, 2019. OWCP accepted her claim for left ankle sprain and stress fracture of the left ankle.³ It paid appellant wage-loss compensation on the supplemental rolls for disability from work commencing September 22, 2019 and on the periodic rolls commencing October 13, 2019.

On August 20, 2020 appellant retired from the employing establishment. She elected to receive disability retirement benefits through the Office of Personnel Management (OPM).

In a September 22, 2020 letter, OWCP notified appellant that she was being referred for a second opinion examination, designed to assess her accepted work-related condition, the extent of disability, and appropriate treatment 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 (5 U.S.C. § 8123(d)). 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 September 23, 2020 letter, OWCP advised appellant of an appointment scheduled for October 13, 2020 at 11:30 a.m. with Dr. Fred K. Cunningham, a Board-certified orthopedic surgeon serving as the second opinion physician. It requested that she call a provided telephone number to confirm the appointment.⁴

In a statement received by OWCP on October 6, 2020, appellant noted her receipt of the second opinion referral letter and requested a copy of her claim files. She questioned why OWCP would refer her for an examination regarding the left foot injury under OWCP File No. xxxxxx902

³ OWCP previously accepted a July 17, 2013 occupational disease claim (Form CA-2) for thoracic sprain, lumbar sprain, and displacement of lumbar intervertebral disc without myelopathy under OWCP File No. xxxxxx768. Additionally, it had previously accepted a December 12, 2017 traumatic injury claim for a left rotator cuff strain and left upper arm strain under OWCP File No. xxxxxx586. On November 21, 2019 OWCP administratively combined OWCP File Nos. xxxxxx586 and the instant claim, OWCP File No. xxxxxx902, under OWCP File No. xxxxxx768 as the master file.

⁴ In a September 22, 2020 document provided to Dr. Cunningham, OWCP had requested that he evaluate whether appellant continued to have residuals or disability causally related to the employment injuries accepted under OWCP File Nos. xxxxxx902, xxxxxx768, and xxxxxx586, and whether additional treatment was warranted.

after OPM approved disability retirement for the back injury accepted under OWCP File No. xxxxxx768.

In an October 15, 2020 letter, OWCP's scheduling service informed OWCP that appellant did not keep the appointment scheduled for October 13, 2020 at 11:30 a.m. with Dr. Cunningham.

In a letter dated October 23, 2020, 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. Cunningham on October 13, 2020 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. Cunningham. 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 October 27, 2020 OWCP received a statement from appellant alleging that the scheduled examination was a pretext to end her FECA compensation as she had already retired on OPM disability benefits for spinal conditions accepted under OWCP File No. xxxxxx902. Appellant asserted that she would bring a civil lawsuit against OWCP and the employing establishment. She also submitted printouts of employing establishment personnel records, excerpts from an employing establishment website about payments to injured employees, and copies of OPM documents approving her application for disability retirement benefits.

By decision dated November 16, 2020, OWCP suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective November 21, 2020, due to her failure to attend the October 13, 2020 second opinion examination with Dr. Cunningham. It found that she did not provide good cause for her failure to appear within 14 days of OWCP's October 23, 2020 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.

In a November 23, 2020 appeal request form received by OWCP on November 25, 2020, appellant requested a review of the written record with respect to the November 16, 2020 decision by a representative of OWCP's Branch of Hearings and Review. In correspondence received by OWCP on December 17, 2020, appellant contended that OWCP had not promptly advised her that it had administratively combined her claim files and that she remained entitled to compensation for the accepted employment injuries.⁵ She provided copies of OWCP case tracking forms, a December 20, 2017 letter from the employing establishment regarding OWCP File No. xxxxxx586, a January 23, 2020 functional capacity evaluation indicating that she should remain off from work due to lumbar conditions, and reports dated March 3 and May 19, 2020 by

⁵ *Id.*

Dr. Thomas Martens, an osteopathic physician Board-certified in family practice, finding appellant disabled for work due to the accepted conditions.

By decision dated March 22, 2021, OWCP's hearing representative affirmed the November 16, 2020 decision, noting that OWCP had properly suspended appellant's wage-loss compensation and medical benefits, effective November 21, 2020, pursuant to 5 U.S.C. § 8123(d), due to her failure to attend the examination scheduled for October 13, 2020. The hearing representative found that appellant's response that she had filed a civil suit was not a reasonable explanation nor valid reason for failing to attend the scheduled second opinion 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.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 Board finds that OWCP properly suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective November 21, 2020, due to her failure to attend a scheduled medical examination.

In letters dated September 22 and 23, 2020, OWCP notified appellant that she was being referred for a second opinion examination on the issues of continuing disability and residuals, appropriate treatment, and current work capacity. In the September 22, 2020 letter, it informed her of her obligation to attend and cooperate with the examination. OWCP clearly explained that appellant's compensation benefits would be suspended for failure to report to or for obstruction of

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; *C.R.*, Docket No. 20-1089 (issued January 26, 2021); *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.

the examination. The September 23, 2020 letter specifically advised appellant that the examination was scheduled with Dr. Cunningham for October 13, 2020 at 11:30 a.m. and provided his office address. Appellant did not appear for the October 13, 2020 appointment.

In its October 23, 2020 notice, OWCP provided appellant 14 days to submit a valid reason for her failure to attend the scheduled medical appointment. In response, appellant submitted a statement received on October 27, 2020, contending she would file a civil lawsuit against OWCP and the employing establishment for attempting to stop her FECA compensation before her OPM disability retirement began. She also submitted claim documents from OWCP and OPM, and excerpts from an employing establishment website. While these documents were received by OWCP within 14 days of the proposed notification of suspension, they do not present a clear basis to find that appellant had good cause for refusing to attend the scheduled appointment.¹² For this reason, the Board finds that she has not established good cause for failing to appear for the scheduled examination on October 13, 2020.

On appeal appellant acknowledged that she should have attended the scheduled second opinion examination, but was concerned its results could be used to terminate her compensation. She contended that OWCP had not responded promptly or completely to her requests for information. As explained above, appellant did not demonstrate a valid reason for refusing to attend the second opinion examination.

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 October 23, 2020 notice of proposed suspension, the Board finds that OWCP properly suspended her wage-loss compensation and medical benefits in accordance with 5 U.S.C. § 8123(d), effective November 21, 2020.¹³

CONCLUSION

The Board finds that OWCP properly suspended appellant's wage-loss compensation and medical benefits, pursuant to 5 U.S.C. § 8123(d), effective November 21, 2020, due to her failure to attend a scheduled medical examination.

¹² See *R.C.*, Docket No. 09-2328 (issued July 12, 2010).

¹³ See *id.*

ORDER

IT IS HEREBY ORDERED THAT the March 22, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 6, 2021
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