

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

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T.B., Appellant)	
)	
and)	Docket No. 22-0795
)	Issued: September 12, 2022
DEPARTMENT OF HOMELAND SECURITY,)	
U.S. CUSTOMS & BORDER PROTECTION,)	
Los Angeles, CA, Employer)	
)	

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On April 25, 2022 appellant filed a timely appeal from a March 31, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned the appeal Docket No. 22-0795.¹

On January 2, 1997 appellant, then a 45-year-old immigration inspector, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he sustained injuries to his hands, arms, shoulders, neck, back, and right knee while in the performance of duty. He explained that he was running in the rain while wearing a 60-pound backpack, and he slipped and fell, bracing his fall with outstretched arms. Appellant stopped work on the date of injury. OWCP accepted his claim for lesions of the bilateral ulnar nerves; opioid prescription; other affections of left shoulder region (not elsewhere classified); sprain of the elbows; localized primary osteoarthritis and articular cartilage disorder of the left shoulder; left lateral epicondylitis; other joint derangement of the left upper arm; sprain of the left forearm and radial collateral ligament; sprain of the shoulders and

¹ The Board notes that following the March 31, 2022 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.*

acromioclavicular (AC) joints; left carpal tunnel syndrome; tenosynovitis of the left hand and wrist; keloid scar; and pathologic fracture of distal radius and ulna. It paid appellant wage-loss compensation for total disability.

In a letter dated January 14, 2022, OWCP notified appellant that he was being referred for a second opinion examination on March 28, 2022 with Dr. William P. Curran, a Board-certified orthopedic surgeon, to determine the status of his accepted employment-related conditions. It informed him of his obligations to attend and cooperate with the examination and explained that his compensation benefits would be suspended, pursuant to 5 U.S.C. § 8123(d), for failure to report to or for obstruction of the examination. The letter also contained the date, time, and location of the appointment and was mailed by OWCP to appellant's last known address of record.

In a letter dated February 8, 2022, OWCP notified appellant that he was being referred for a second opinion examination on March 15, 2022 with Dr. Jon P. Kelly, a Board-certified orthopedic surgeon. The letter also contained the time and location of his appointment and was mailed to his last known address of record.

In a March 14, 2022 memorandum of telephone call (Form CA-110) an OWCP claims examiner noted that she advised appellant that the “[second opinion physician] [was] to determine work status and further treatment needed.”

In a letter dated March 15, 2022, QTC Medical Services (QTC), OWCP's scheduling service indicated that appellant failed to attend the scheduled appointment with Dr. Kelly on March 15, 2022.

In a March 16, 2022 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 refused to submit to the examination with Dr. Kelly on March 15, 2022. OWCP advised appellant that he must submit a pertinent explanation for not attending the examination within 14 days of the notice of proposed suspension. 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 he attended and fully cooperated with the examination.

On March 31, 2022 OWCP received a letter from appellant dated March 14, 2022, which indicated that he had received OWCP's January 14, 2022 letter for a March 28, 2022 examination by Dr. Curran and thereafter received a February 8, 2022 letter for a March 15, 2022 examination by Dr. Kelly. Appellant noted that he had undergone ulnar nerve revision surgery by Dr. John Lane, a Board-certified orthopedic surgeon, on October 29, 2021, and that the March 15, 2022 examination with Dr. Kelly conflicted with an existing follow-up appointment with Dr. Lane. He related that he, therefore, contacted QTC to reschedule the evaluation by Dr. Kelly. Appellant further related QTC advised him that the examination was canceled with Dr. Curran and rescheduled with Dr. Kelly. He indicated that he then contacted OWCP, and a claims examiner advised him that the March 28, 2022 appointment with Dr. Curran was still scheduled and that there was no other second opinion appointment in his record with OWCP. Attached to appellant's March 14, 2022 letter were the scheduling notices, as outlined above, and various medical reports, including a March 15, 2022 medical report by Dr. Lane.

By decision dated March 31, 2022, OWCP finalized its notice of proposed suspension, effective that date. It noted that it had not received an explanation from appellant of his failure to attend the examination with Dr. Kelly on March 15, 2022.

The Board has duly considered this matter and finds that this case is not in posture for decision.

In the case of *William A. Couch*,² the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. It is crucial that OWCP review and address all evidence relevant to the subject matter properly submitted prior to the issuance of its final decision, as the Board's decisions are final with regard to the subject matter appealed.³

When OWCP suspended appellant's compensation, it noted that appellant did not respond within the 14 days allotted to the March 16, 2022 notice of proposed suspension and, thus, he had failed to provide an explanation for his failure to attend the scheduled medical examination. The Board notes that on March 31, 2022, the same date OWCP issued its final decision, it received appellant's March 14, 2022 response with attachments. However, it did not acknowledge the response or address the reasons given for not attending the examination in its March 31, 2022 decision.

As OWCP did not review and address appellant's March 14, 2022 response when it suspended his compensation, the Board finds that this case is not in posture for decision.⁴ On remand, it shall review all evidence of record and, following any further development as it deems necessary, it shall issue a *de novo* decision.

² 41 ECAB 548 (1990).

³ See *C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); *Linda Johnson*, 45 ECAB 439 (1994) (wherein the Board found that the principle in *Couch* also applied to situations where evidence was received by OWCP on the same day it issued the decision); see also *William A. Couch, id.*

⁴ See *C.H.*, Docket No. 11-1624 (issued March 7, 2012) citing *Willie J. Everett*, Docket No. 03-991 (issued October 10, 2003) (where OWCP did not consider the claimant's August 26, 2002 response before suspending his compensation on August 30, 2002, the Board set aside the suspension and remanded the case for consideration of the evidence submitted, citing *Couch*).

IT IS HEREBY ORDERED THAT the March 31, 2022 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: September 12, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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