

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

S.S., Appellant)	
)	
and)	Docket No. 22-1291
)	Issued: April 26, 2023
DEPARTMENT OF THE TREASURY,)	
INTERNAL REVENUE SERVICE,)	
Martinsburg, WV, Employer)	

Appearances:
Jason S. Lomax, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 7, 2022 appellant, through counsel, filed a timely appeal from a March 11, 2022 merit decision 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.

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.*

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 January 31, 2021, due to her failure to attend a scheduled medical examination.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.³ The facts and circumstances surrounding the prior appeal are incorporated herein by reference. The relevant facts of the case are set forth below.

On February 11, 1994 appellant, then a 49-year-old computer operator, filed a traumatic injury claim (Form CA-1) alleging that on February 10, 1994 she sustained injury to the back of her head, arms, and back when she slipped and fell stepping out of her vehicle onto an icy parking lot while in the performance of duty. She stopped work on the date of the claimed injury. OWCP initially accepted appellant's claim for contusions of the head, neck, and left ankle. It later expanded acceptance of her claim to include post-traumatic headache syndrome, cerebral concussion with brief loss of consciousness, dysthymic disorder, and disc subluxation at C4 through C7. OWCP paid appellant wage-loss compensation on the supplemental rolls effective April 5, 1998, and on the periodic rolls effective, July 13, 2003.

In an August 10, 2020 letter, OWCP notified appellant that she was being referred for a second opinion examination at 11:00 a.m. Eastern Standard Time (EST) on September 10, 2020 with Dr. Taghi Kimyai-Asadi, a Board-certified neurologist, to determine the status of her accepted employment-related conditions. The letter explained that her compensation benefits would be suspended for failure to report to or for obstruction of the examination. Appellant advised OWCP on September 1, 2020 that she did not drive and that she would not attend the September 10, 2020 appointment even if OWCP provided transportation to and from the appointment. She did not attend the September 10, 2020 appointment and on September 14, 2020 she advised OWCP that on September 7, 2020 she fell down a flight of stairs and broke her right wrist.

In a notice dated October 5, 2020, OWCP advised appellant that it proposed to suspend her wage-loss compensation and medical benefits because she failed to attend the September 10, 2020 appointment with Dr. Kimyai-Asadi without providing good cause for her nonattendance. It informed her that 5 U.S.C. § 8123(d) provided that, if an employee refused to submit to or obstructed an examination, his or her right to compensation would be suspended until the refusal or obstruction stops. OWCP afforded appellant 14 days to submit new and pertinent explanation for not attending the examination with Dr. Kimyai-Asadi. It noted, "[i]f good cause is not established, entitlement to compensation and medical benefits will be suspended in accordance with 5 U.S.C. § 8123(d) until you attend and fully cooperate with the examination." OWCP further indicated that, if appellant intended to report to, and fully cooperate with, any rescheduled examination with Dr. Kimyai-Asadi, she should contact OWCP immediately in order to reschedule

³ Docket No. 01-652 (issued August 13, 2002).

the examination. In an October 15, 2020 letter received by OWCP on the same date, appellant expressed her intent to undergo a second opinion examination.

In a December 4, 2020 letter, OWCP notified appellant that she was being referred for a second opinion examination at 12:00 p.m. EST on December 21, 2020 with Dr. Michael S. Sellman, a Board-certified neurologist, to determine the status of her accepted employment-related conditions. The letter again informed her of her obligations to attend and cooperate with the examination and explained that her compensation benefits would be suspended for failure to report to or for obstruction of the examination. The letter contained the date, time, and location of appellant's appointment. On December 21, 2020 QTC Medical Services, OWCP's scheduling contractor, advised OWCP that appellant did not attend the appointment scheduled for December 21, 2020 with Dr. Sellman.

In a December 22, 2020 notice, OWCP advised appellant that it proposed to suspend her wage-loss compensation and medical benefits because she failed to attend the December 21, 2020 appointment with Dr. Sellman without providing good cause for her nonattendance. It again informed her that 5 U.S.C. § 8123(d) provided that, if an employee refused to submit to or obstructed an examination, his or her right to compensation would be suspended until the refusal or obstruction stops. OWCP afforded appellant 14 days to submit new and pertinent explanation for not attending the examination with Dr. Sellman. In a January 3, 2021 statement, appellant asserted that she did not receive the notice of the appointment scheduled for December 21, 2020 until she received a text from Dr. Sellman's office on December 18, 2020 regarding the appointment. She maintained that she then contacted Dr. Sellman's office and was told that she "was not scheduled" for an appointment on December 21, 2020.

By decision dated January 20, 2021, OWCP suspended appellant's wage-loss compensation and medical benefits effective January 31, 2021, pursuant to 5 U.S.C. § 8123(d), due to her failure to attend the December 21, 2020 appointment with Dr. Sellman. It found that she had not presented good cause for not attending the appointment.

On March 1, 2021 appellant requested reconsideration of the January 20, 2021 decision.

In an April 7, 2021 letter, OWCP notified appellant that she was being referred for a second opinion examination at 2:15 p.m. EST on April 27, 2021 with Dr. Sellman. The letter informed her of her obligations to attend and cooperate with the examination and explained that her compensation benefits would be suspended for failure to report to or for obstruction of the examination. The letter contained the date, time, and location of appellant's appointment.

In an April 7, 2021 letter to OWCP, appellant acknowledged the April 27, 2021 appointment with Dr. Sellman and expressed her intent to attend the appointment. On April 28, 2021 QTC Medical Services advised OWCP that she did not attend the appointment scheduled for April 27, 2021.

By decision dated April 28, 2021, OWCP denied modification of its January 20, 2021 decision.

On December 14, 2021 appellant requested reconsideration of OWCP's April 28, 2021 decision.

By decision dated March 11, 2022, OWCP denied modification of its April 28, 2021 decision.

LEGAL PRECEDENT

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.⁴ 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.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 ceases.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.⁹

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 January 31, 2021, due to her failure to attend a scheduled medical examination.

In a December 4, 2020 letter, OWCP notified appellant that she was being referred for a second opinion examination on December 21, 2020 with Dr. Sellman to determine the status of her accepted employment-related conditions. The letter informed her of her obligations to attend and cooperate with the examination and explained that her compensation benefits would be suspended for failure to report to or for obstruction of the examination. It 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.¹⁰ The

⁴ 5 U.S.C. § 8123.

⁵ *L.B.*, Docket No. 17-1891 (issued December 11, 2018); *J.T.*, 59 ECAB 293 (2008).

⁶ 20 C.F.R. § 10.320.

⁷ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; *D.K.*, Docket No. 18-0217 (issued June 27, 2018).

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

⁹ *Id.* at Chapter 2.810.13e.

¹⁰ *See R.D.*, Docket No. 20-1551 (issued November 8, 2021); *James A. Gray*, 54 ECAB 277 (2002).

December 4, 2020 letter was sent to appellant's address of record and is presumed to have been received by her absent any notice of nondelivery. Appellant has not submitted evidence to rebut this presumption.

Appellant did not appear for the December 21, 2020 appointment, and she did not attempt to reschedule the appointment prior to the designated time. In a notice dated December 22, 2020, OWCP provided her 14 days to submit a valid reason for her failure to attend the scheduled medical appointment. In a January 3, 2021 statement, appellant asserted that she did not receive the notice of the appointment scheduled for December 21, 2020. However, as noted above, there was an unrebutted presumption that she received the notice *via* the mail. Appellant asserted that she received a text message from Dr. Sellman's office on December 18, 2020 regarding the appointment and then contacted Dr. Sellman's office and was told that she "was not scheduled" for an appointment on December 21, 2020. However, she has not presented evidence supporting this assertion.

As appellant did not attend the December 21, 2020 examination as scheduled and failed to provide good cause for failing to appear within 14 days of OWCP's 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 January 31, 2021.¹¹ The Board has reviewed the evidence of record and notes that the record contains sufficient evidence to establish that appellant failed to appear for a medical examination without good cause within the meaning of section 8123 of FECA.

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 January 31, 2021, due to her failure to attend a scheduled medical examination.

¹¹ See *G.R.*, Docket No. 20-0915 (issued January 29, 2021).

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board