

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

_____)	
D.P., Appellant)	
)	
and)	Docket No. 23-0785
)	Issued: December 20, 2023
U.S. POSTAL SERVICE, JACKSONVILLE)	
POST OFFICE, Jacksonville, FL, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 5, 2023 appellant filed a timely appeal from a March 28, 2023 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 over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 28, 2023 decision, appellant submitted 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.*

ISSUE

The issue is whether OWCP properly suspended appellant's wage-loss compensation and medical benefits, effective March 28, 2023, pursuant to 5 U.S.C. § 8123(d), due to his failure to attend a scheduled medical examination.

FACTUAL HISTORY

On August 19, 2021 appellant, then a 57-year-old heavy truck driver, filed a traumatic injury claim (Form CA-1) alleging that on August 11, 2021 he strained his neck and back when pushing over-the-road mail containers on a narrow steep lift gate while in the performance of duty. OWCP accepted his claim for strains of the thoracic, cervical, and lumbar regions. It paid appellant wage-loss compensation on the supplemental rolls, effective September 25, 2021, and on the periodic rolls, effective January 2, 2022.

In a January 12, 2023 letter, OWCP advised appellant that it was in the process of scheduling a second opinion examination for his attendance. In a memorandum of telephone call (Form CA-110) of even date, it reported that he indicated that he would not be available for a second opinion examination from February 1 through 12, 2023.

In a January 30, 2023 letter, OWCP notified appellant that he was being referred for a second opinion examination on February 27, 2023 at 1:30 p.m. Eastern Standard Time (EST) with Dr. Gerard M. Gerling, a Board-certified neurologist, to determine the status of his accepted employment-related conditions. The letter informed him of his obligation 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, pursuant to 5 U.S.C. § 8123(d). The letter also contained the date, time, and location of appellant's appointment and was mailed to his last known address of record.

In a February 24, 2023 Form CA-110, OWCP reported that appellant indicated that he recently had undergone emergency surgery and was not feeling well, and therefore would not be able to attend the second opinion examination with Dr. Gerling. Appellant advised that he attended an examination with Dr. Gerling in 2015 relating to prior claim and stated that, "he did me horribly wrong." He indicated that he would also be sending a letter to OWCP.

In an undated letter received by OWCP on February 26, 2023, appellant noted that he was still recovering from emergency surgery he had a few weeks prior and would not be able to attend the appointment with Dr. Gerling. He reported that he sustained an unrelated head injury at work on December 26, 2014 and OWCP referred him for an examination with Dr. Gerling. Appellant described the examination as brief and incomplete, and declined to be examined by Dr. Gerling again.

In a February 28, 2023 Form CA-110, OWCP noted that appellant reported that he did not attend the second opinion examination on February 27, 2023 due to a recent surgery.

In a letter dated February 28, 2023, QTC Medical Services, OWCP's scheduling contractor, advised OWCP that appellant did not attend the appointment scheduled for February 27, 2023 with Dr. Gerling.

In a March 1, 2023 notice, OWCP proposed to suspend appellant's wage-loss compensation and medical benefits because he failed to attend the February 27, 2023 medical examination with Dr. Gerling without providing good cause for his nonattendance. It again informed him 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 noted that appellant had claimed he could not attend a second opinion examination due to the effects of recent surgery, and it afforded him 14 days to submit new and pertinent explanation and evidence of good cause for not attending the examination with Dr. Gerling. It instructed him to contact OWCP immediately if he intended to report to a rescheduled second opinion examination.

In Form CA-110's dated March 3, 7, and 13, 2023 appellant indicated that he attended an examination with Dr. Gerling in 2015 in an unrelated claim and asserted that he misdiagnosed him and improperly returned him to full-duty work. He declined to attend any examinations by an OWCP referral physician, including Dr. Gerling.

In a letter dated March 12, 2023, appellant responded to the notice of proposed suspension and indicated that he chose not to attend the appointment with Dr. Gerling because he recently underwent surgery and was still recovering. He indicated that before the scheduled appointment he informed OWCP by telephone and letter that he would not be able to attend the appointment. Appellant reiterated that he previously attended an appointment with Dr. Gerling for an unrelated claim and asserted that he was corrupt.

In a March 23, 2023 Form CA-110, OWCP noted that appellant called and expressed his disagreement with the suspension of benefits for not attending the second opinion examination. In a Form CA-110 dated March 27, 2023, it advised that he again claimed that Dr. Gerling misdiagnosed him and improperly returned him to full-duty work. Appellant indicated that he would not attend another appointment.

By decision dated March 28, 2023, OWCP suspended appellant's wage-loss compensation and medical benefits effective that date, pursuant to 5 U.S.C. § 8123(d), due to his failure, without good cause, to attend the medical examination scheduled for February 27, 2023.

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.³ The determination of the need for an examination, the type of examination, the choice of locale, and

³ 5 U.S.C. § 8123.

the choice of medical examiners are matters within the province and discretion of OWCP.⁴ 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.⁵ 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.⁶ 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.⁷ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.⁸

ANALYSIS

The Board finds that OWCP properly suspended appellant's wage-loss compensation and medical benefits, effective March 28, 2023, pursuant to 5 U.S.C. § 8123(d), due to his failure to attend a scheduled medical examination.

In a letter dated January 30, 2023, OWCP notified appellant that he was being referred for a second opinion examination on February 27, 2023 with Dr. Gerling regarding the status of his accepted employment-related condition. The letter, sent to his last known address of record, informed appellant of his obligation 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, pursuant to 5 U.S.C. § 8123(d). The letter also contained the date, time, and location of his appointment.

Appellant did not appear for the February 27, 2023 appointment and, although he had previously expressed reservations about attending the scheduled appointment, he did not attempt to reschedule it prior to the designated appointment time.

The record reflects that on February 24 and 28, 2023 appellant called OWCP and reported that he was recovering from surgery and would not be attending the second opinion examination with Dr. Gerling. He further indicated that he was seen by Dr. Gerling in 2015 and stated, "he did me horribly wrong."

In an undated letter received on February 26, 2023 appellant indicated that he had emergency surgery a few weeks prior and he was still recovering and he would not be able to attend the appointment with Dr. Gerling. He reported attending an OWCP referral examination

⁴ See *Q.V.*, Docket No. 21-1188 (issued May 26, 2022); *R.D.*, Docket No. 20-1551 (issued November 8, 2021); *L.B.*, Docket No. 17-1891 (issued December 11, 2018); *J.T.*, 59 ECAB 293 (2008).

⁵ 20 C.F.R. § 10.320.

⁶ 5 U.S.C. § 8123(d); see also *id.* at § 10.323; *Q.V.*, *supra* note 4; *D.K.*, Docket No. 18-0217 (issued June 27, 2018).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13d (September 2010).

⁸ *Id.* at Chapter 2.810.13e.

with Dr. Gerling after a work-related head injury on December 26, 2014 and declined to see him again.

In a notice dated March 1, 2023, OWCP provided appellant 14 days to submit a valid reason in writing for obstructed the medical examination scheduled for February 27, 2023. It further advised that, under 5 U.S.C. § 8123(d), if an employee refuses to submit to or obstructs an examination, his right to compensation is suspended until the refusal or obstruction stops.

In a letter dated March 12, 2023, appellant responded to the notice of proposed suspension and indicated that he chose not to attend the appointment with Dr. Gerling because he recently underwent surgery and was still recovering. He indicated that before the scheduled appointment he notified OWCP by telephone and letter that he would not be able to attend the scheduled appointment.

The Board notes that appellant failed to submit medical evidence supporting that he recently had surgery. Nor did he provide any medical evidence indicating that he was physically unable to attend the examination due to a medical condition.

Additionally, appellant reported previously attending an OWCP referral examination with Dr. Gerling for another claim and asserted that he was corrupt.⁹ He also failed to support his allegation that he could not attend the second opinion examination because Dr. Gerling was not suited to carry out a second opinion examination. As noted above, the Board has held that 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.¹⁰

For these reasons, the Board finds that appellant did not provide good cause for his failure to attend the scheduled examination.¹¹

As appellant did not attend the medical examination as scheduled and failed to provide good cause for failing to appear within 14 days of OWCP's March 1, 2023 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 28, 2023.¹²

CONCLUSION

The Board finds that OWCP properly suspended appellant's wage-loss compensation and medical benefits, effective March 28, 2023, pursuant to 5 U.S.C. § 8123(d), due to his failure to attend a scheduled medical examination.

⁹ On March 3, 7, 13, 23, and 27, 2023 appellant called OWCP and reported attending an examination with Dr. Gerling in an unrelated claim and asserted that he misdiagnosed him and improperly returned him to work. He declined to be examined by any OWCP referral physician.

¹⁰ *Supra* note 4.

¹¹ *See B.C.*, Docket No. 21-1327 (issued January 31, 2023); *G.R.*, Docket No. 20-0915 (issued January 29, 2021).

¹² *See G.R.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 20, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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