

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

_____)	
E.S., Appellant)	
)	
and)	Docket No. 23-0801
)	Issued: December 13, 2023
DEPARTMENT OF THE ARMY, U.S. ARMY)	
PACIFIC, Fort Shafter, HI, Employer)	
_____)	

Appearances:
Appellant, pro se
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 May 2, 2023 appellant filed a timely appeal from December 9, 2022 and March 6, 2023 merit decisions 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.

ISSUE

The issue is whether OWCP properly suspended appellant's medical benefits pursuant to 5 U.S.C. § 8123(d), effective December 9, 2022, due to his failure to attend a scheduled medical examination.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On May 5, 1989 appellant, then a 28-year-old tools and parts attendant, filed an occupational disease claim (Form CA-2) alleging that he developed severe bilateral plantar fasciitis and heel spur syndrome due to factors of his federal employment, specifically standing on his feet for extended periods of time. He stopped work on December 17, 1988 and returned to limited duty on April 19, 1989. OWCP accepted appellant's claim for temporary aggravation of bilateral pes planus, and temporary aggravation of bilateral plantar fibromatosis. Appellant stopped work again on April 3, 1990. OWCP paid wage-loss compensation on the supplemental rolls, effective April 3, 1990.

By decisions dated June 9 and July 17, 2014, OWCP expanded the acceptance of appellant's claim to include permanent aggravation of bilateral flat feet (pes planus), permanent aggravation of bilateral plantar fibromatosis, mood disorder due to chronic bilateral foot pain -- major depressive, and bilateral tarsal tunnel syndrome.

On March 6, 2016 OWCP terminated appellant's wage-loss compensation benefits as appellant elected to receive Office of Personnel Management retirement benefits in lieu of FECA wage-loss compensation benefits.

By decisions dated July 20 and September 9, 2016, OWCP expanded the acceptance of appellant's claim to include bilateral Achilles tendinitis and bilateral posterior tibial tendinitis.

In a letter dated August 5, 2022, QTC Medical Services (QTC), OWCP's scheduling service, notified appellant that it had scheduled an August 18, 2022 second opinion examination with Dr. Thomas M. DeBerardino, a Board-certified orthopedic surgeon, to determine whether he was entitled to an increased schedule award due to his accepted conditions. It explained that appellant's entitlement to medical 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 and was mailed to his last known address of record.

By letter dated August 19, 2022, QTC notified OWCP that appellant failed to attend the August 18, 2022 appointment with Dr. DeBerardino.

In a notice dated August 24, 2022, OWCP advised appellant that it proposed to suspend medical benefits because he failed to attend the August 18, 2022 appointment with Dr. DeBerardino without providing good cause for his nonattendance. It informed him that

² Docket No. 98-1109 (issued May 17, 2000), *petition for recon. denied*, Docket No. 98-1109 (issued December 18, 2000); *Order Remanding Case*, Docket No. 02-1171 (issued November 26, 2002); Docket No. 05-1349 (issued December 12, 2005); Docket No. 07-1206 (issued March 6, 2008); Docket No. 13-0777 (issued June 26, 2013); Docket No. 15-0259 (issued November 3, 2015), *petition for recon., denied*, Docket No. 15-0259 (issued August 16, 2016); Docket No. 18-1606 (issued April 16, 2019); *Order Remanding Case*, Docket No. 20-0656 (issued April 28, 2020); *Order Remanding Case*, Docket No. 20-0565 (issued February 5, 2021).

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. DeBerardino. 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. DeBerardino, he should contact OWCP immediately in order to reschedule the examination.

In a letter dated August 27, 2022, appellant informed OWCP that he was currently out of town in Florida in preparation of selling his home. He indicated that he anticipated being back in Texas no later than September 15, 2022. Appellant noted that OWCP could schedule his appointment after that date.

In an October 7, 2022 letter, QTC notified appellant that he was being referred for a second opinion examination at 11:00 a.m. on November 21, 2022 with Dr. Charles W. Kennedy, Jr., a Board-certified orthopedic surgeon, to determine whether he was entitled to an increased schedule award due to his accepted conditions. The letter again informed him 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 letter contained the date, time, and location of appellant’s appointment.

In a letter dated October 12, 2022, appellant informed OWCP that he had returned from Florida and requested that OWCP reschedule his examination for a schedule award due to his accepted foot conditions.

In a letter dated October 17, 2022, appellant indicated that he had received OWCP’s notice for a second opinion evaluation on November 21, 2022. He requested that OWCP confirm that the appointment was for a “second opinion schedule award.”

In an October 27, 2022 letter, appellant alleged that OWCP had not responded to any of his letters. He provided a list of questions for OWCP regarding his second opinion evaluation.

In a November 4, 2022 letter, appellant requested that his records reflect that his foot condition was permanently aggravated. He noted that this case had been pending before OWCP for some time, and alleged that OWCP was delaying the process.

On November 28, 2022 QTC notified OWCP that appellant did not attend the appointment scheduled for November 21, 2022 with Dr. Kennedy.

By decision dated December 9, 2022, OWCP suspended appellant’s medical benefits, effective that date, pursuant to 5 U.S.C. § 8123(d), due to his failure, without good cause, to attend the August 18, 2022 appointment with Dr. DeBerardino.

On January 3, 2023 appellant requested reconsideration. He alleged that OWCP did not provide him with at least 30 days’ notice to attend the second opinion evaluation. Appellant also requested that the physician be specialized in the foot and ankle. He noted that OWCP had not informed him of the specific physician title, provided a statement of accepted facts or questions

for the second opinion evaluation, nor provided a copy of the physician's curriculum vitae. Appellant further asserted that OWCP failed to issue an appropriate notice of proposed suspension of compensation.

By decision dated March 6, 2023, OWCP denied modification of the December 9, 2022 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.³ 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.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 medical benefits pursuant to 5 U.S.C. § 8123(d), effective December 9, 2022, due to his failure to attend a scheduled medical examination.

In an August 5, 2022 letter, QTC notified appellant that he was being referred for a second opinion examination on August 18, 2022 with Dr. DeBerardino to determine whether appellant was entitled to an increased schedule award due to his accepted employment-related conditions. The letter informed him 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

³ 5 U.S.C. § 8123.

⁴ *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); *id.* § 10.323; *S.S.*, Docket No. 22-1291 (issued April 26, 2023); *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.

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.⁹ The August 5, 2022 letter was sent to appellant's address of record and is 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 August 18, 2022 appointment, and he did not attempt to reschedule the appointment prior to the designated time. In a notice dated August 24, 2022, OWCP provided him 14 days to submit a valid reason for his failure to attend the scheduled medical appointment. In an August 27, 2022 letter, appellant explained that he was currently out of town in Florida and requested that OWCP schedule his appointment after he returned to Texas. OWCP subsequently rescheduled his second opinion evaluation for November 21, 2022. However, appellant also failed to keep the November 21, 2022 appointment. Therefore, the Board finds that he did not provide good cause for not appearing at the appointment scheduled for August 18, 2022.

As appellant did not attend the August 18, 2022 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 his medical benefits in accordance with 5 U.S.C. § 8123(d), effective December 9, 2022.¹⁰

CONCLUSION

The Board finds that OWCP properly suspended appellant's medical benefits pursuant to 5 U.S.C. § 8123(d), effective December 9, 2022, due to his failure to attend a scheduled medical examination.

⁹ See *R.D.*, Docket No. 20-1551 (issued November 8, 2021); *James A. Gray*, 54 ECAB 277 (2002).

¹⁰ See *C.W.*, Docket No. 21-0943 (issued February 17, 2023); see also *G.R.*, Docket No. 20-0915 (issued January 29, 2021).

ORDER

IT IS HEREBY ORDERED THAT the March 6, 2023 and December 9, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 13, 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