

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

_____)	
B.C., Appellant)	
)	
and)	Docket No. 21-1327
)	Issued: January 31, 2023
DEPARTMENT OF THE NAVY, NAVAL AIR)	
STATION PATUXENT RIVER,)	
Patuxent River, MD, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 1, 2021 appellant filed a timely appeal from March 18 and June 24, 2021 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.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the June 24, 2021 decision, appellant submitted additional evidence to OWCP. 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.” 20C.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 pursuant to 5 U.S.C. § 8123(d), effective March 18, 2020, due to his failure to attend a scheduled medical examination.

FACTUAL HISTORY

This case has previously been before the Board on different issues.³ The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On February 17, 2000 appellant, then a 46-year-old systems accountant, filed a traumatic injury claim (Form CA-1) alleging that on February 12, 2000 he sustained a neck injury due to slipping and falling at a bowling alley when he was on travel duty status while in the performance of duty. He stopped work on March 6, 2000. OWCP accepted appellant's claim for aggravation of cervical stenosis with myelopathy, Brown-Sequard syndrome of the cervical spine, and myelomalacia of the cervical spine. It paid him wage-loss compensation for disability from work on the periodic rolls commencing June 16, 2002.

Appellant subsequently claimed that he sustained a spinal subluxation due to his February 12, 2000 work injury. He submitted several reports by attending chiropractors, but they did not provide an opinion that he sustained a spinal subluxation due to the February 12, 2000 injury as demonstrated by x-rays. OWCP denied appellant's claim in merit decisions dated August 5 and December 9, 2011.

Appellant subsequently submitted additional evidence, including reports of attending chiropractors. By decision dated May 11, 2012, OWCP denied his claim for a work-related spinal subluxation. Appellant requested reconsideration of his claim on May 25 and June 19, 2012 and, by decisions dated June 6 and July 23, 2012, OWCP denied his requests for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). He appealed his case to the Board and, by decision dated June 13, 2013,⁴ the Board affirmed OWCP's May 11, June 6, and July 23, 2012 decisions.

On January 29, 2016 appellant requested reconsideration and submitted additional evidence. By decision dated February 17, 2016, OWCP denied his request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. Appellant appealed to the Board and, by decision dated July 25, 2016,⁵ the Board affirmed OWCP's February 17, 2016 decision.

³ Docket No. 05-0232 (issued September 2, 2005); Docket No. 09-1928 (issued January 14, 2010), *petition for recon. denied*, Docket No. 09-1928 (issued July 9, 2010); Docket No. 13-0128 (issued June 13, 2013); Docket No. 16-0971 (issued July 25, 2016).

⁴ *See id.*

⁵ *Id.*

OWCP continued to pay appellant wage-loss compensation on the periodic rolls for disability related to his accepted February 12, 2000 employment injury. In a January 12, 2021 letter, it notified him that he was being referred for a second opinion examination on February 9, 2021 with Dr. Kimberly A. Tobon, an osteopath and Board-certified neurologist, to determine the status of his accepted employment-related conditions.⁶ The letter contained the date, time, and location of appellant's appointment.

In a January 21, 2021 letter received by OWCP on the same date, appellant argued that it was not necessary to refer him for a second opinion examination as the case record already contained rationalized medical evidence.

Appellant did not appear for the February 9, 2021 appointment, nor did he attempt to reschedule the appointment prior to the designated time.

In a notice of proposed suspension dated February 12, 2021, OWCP indicated that, because no rationalized opinion had been received from appellant's treating physicians, it arranged for a medical examination with a Board-certified neurologist to evaluate his medical condition. 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. OWCP afforded appellant 14 days to submit a valid reason for his failure to attend the scheduled medical appointment.

On February 28, 2021 OWCP received a letter from appellant, dated February 28, 2021, in which he asserted that the medical evidence already of record was sufficiently rationalized to support his claim and that a second opinion examination was not "necessary or justified." Appellant requested that OWCP issue a formal decision explaining, with citations, under which circumstances a chiropractor report would not be considered probative medical evidence. He indicated that he would use the formal decision to decide whether to accept OWCP's demand that he attend an appointment with a second opinion examiner, or to appeal his case to the Board.

By decision dated March 18, 2021, OWCP suspended appellant's wage-loss compensation and medical benefits, effective March 18, 2021. It found that he did not attend the February 9, 2021 second opinion examination and failed to provide good cause for his failure to appear.

On March 26, 2021 appellant requested reconsideration of the March 18, 2021 decision, and provided argument similar to that provided in previously submitted letters.

By decision dated June 24, 2021, OWCP denied modification of its March 18, 2021 decision.

⁶ OWCP more-fully explained the need for a second opinion examination in more detail in a November 4, 2020 notice of a second opinion examination scheduled for December 18, 2020 with a different physician.

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.⁷ 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.⁸ 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.⁹ 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.¹⁰ 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.¹¹ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA until the date on which the claimant agrees to attend the examination.¹²

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 March 18, 2020, due to his failure to attend a scheduled medical examination.

In a January 12, 2021 letter, OWCP notified appellant that he was being referred for a second opinion examination on February 9, 2021 with Dr. Tobon to determine the status of his accepted employment-related conditions. The letter contained the date, time, and location of appellant's appointment. OWCP had advised appellant of his obligations to attend and cooperate with a second opinion examination and explained that his compensation benefits would be suspended for failure to report to or for obstruction of the examination.

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.¹³ The January 12, 2021 letter was sent to appellant's address of record, and is presumed to have been

⁷ 5 U.S.C. § 8123.

⁸ *L.B.*, Docket No. 17-1891 (issued December 11, 2018); *J.T.*, 59 ECAB 293 (2008).

⁹ 20 C.F.R. § 10.320.

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

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13d (September 2010).

¹² *Id.* at Chapter 2.810.13e.

¹³ *See R.D.*, Docket No. 20-1551 (issued November 8, 2021); *James A. Gray*, 54 ECAB 277 (2002).

received by him absent any notice of nondelivery. Appellant has not submitted evidence to rebut this presumption.

Appellant did not appear for the February 9, 2021 appointment, nor did he attempt to reschedule the appointment prior to the designated time. In a notice dated February 12, 2021, OWCP provided him 14 days to submit a valid reason for his failure to attend the scheduled medical appointment. 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.

On February 28, 2021 OWCP received a letter from appellant, dated February 28, 2021, in which he asserted that the medical evidence already of record was sufficiently rationalized to support his claim, and that a second opinion examination was not “necessary or justified.” Appellant requested that OWCP issue a formal decision explaining, with citations, under which circumstances a chiropractor report would not be considered probative medical evidence.

As noted above, 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.¹⁴ OWCP reasonably required a second opinion examination in further development of the medical evidence. Therefore, appellant did not present good cause for not appearing at the appointment scheduled for February 9, 2021.

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 February 12, 2021 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 18, 2021.¹⁵

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 March 18, 2020, due to his failure to attend a scheduled medical examination.

¹⁴ See *supra* note 9.

¹⁵ See *G.R.*, Docket No. 20-0915 (issued January 29, 2021).

ORDER

IT IS HEREBY ORDERED THAT the March 18 and June 24, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 31, 2023
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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