

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

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**A.F., Appellant** )

**and** )

**U.S. POSTAL SERVICE, MYRTLE BEACH** )  
**POST OFFICE, Myrtle Beach, SC, Employer** )  
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**Docket No. 23-0661**  
**Issued: September 19, 2023**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On March 27, 2023 appellant filed a timely appeal from a September 28, 2022 merit decision and a December 2, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup>

**ISSUES**

The issues are: (1) whether OWCP properly suspended appellant's wage-loss compensation and medical benefits, pursuant to 5 U.S.C. § 8123(d), due to his failure to attend a

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<sup>1</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. See 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from September 28, 2022, the date of OWCP's decision, was March 27, 2023. Since using April 3, 2023, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 27, 2023, which renders the appeal timely filed relative to the September 28, 2022 merit decision of OWCP. See 20 C.F.R. § 501.3(f)(1).

scheduled medical examination; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

### **FACTUAL HISTORY**

On June 23, 2021 appellant, then a 56-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 26, 2021, he contracted COVID-19 while in the performance of duty. He alleged that after the acute illness had subsided, he was left with tinnitus, dizziness, hearing loss, brain fog, situational anxiety, and other symptoms. Appellant stopped work on June 2, 2021. On July 29, 2021 OWCP accepted his claim for COVID-19.

On October 20, 2021 appellant filed a claim for compensation (Form CA-7) for disability from work for the period June 7 through September 27, 2021.

By decision dated January 10, 2022, OWCP denied appellant's claim for compensation disability from work for the period June 7 through September 27, 2021, finding that he had not submitted sufficient medical evidence to establish that he was disabled as a result of his accepted condition of COVID-19.

On February 4, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated April 11, 2022, OWCP's hearing representative set aside OWCP's January 10, 2022 decision and remanded the case for further development. The hearing representative instructed OWCP to obtain a second opinion physician's report on the issues of whether the acceptance of appellant's claim should be expanded to include any additional work-related medical conditions causally related to his accepted COVID-19; and whether appellant was entitled to wage-loss compensation for any claimed period of disability from June 7 through September 24, 2021.

On July 8, 2022 OWCP notified appellant that he was being referred for a second opinion examination on August 22, 2022 with Dr. Theodore Stamatakos, a Board-certified urologist, for further development of appellant's claim. It advised him of his responsibility to attend the appointment and that, if he failed to do so, his compensation benefits could be suspended in accordance with 5 U.S.C. § 8123(d).

On August 23, 2022 OWCP learned from its scheduling service that appellant had not kept his scheduled appointment on August 22, 2022 with Dr. Stamatakos.

By letter dated September 2, 2022, OWCP advised appellant that it proposed to suspend his wage-loss compensation and medical benefits as he failed to attend the medical examination scheduled for August 22, 2022. It afforded him 14 days to respond in writing with an explanation as to why he did not attend the examination with Dr. Stamatakos. OWCP advised that if good cause was not established, appellant's compensation benefits would be suspended pursuant to 5 U.S.C. § 8123(d) until he attended and fully cooperated with the examination. It instructed him to contact OWCP immediately if he intended to report to a rescheduled examination with Dr. Stamatakos.

A memorandum of telephone call (Form CA-110) indicated that on September 23, 2022 appellant contacted OWCP and advised that he did not intend to attend any future second opinion examinations.

By decision dated September 28, 2022, OWCP suspended appellant's wage-loss compensation and medical benefits, effective that date, pursuant to 5 U.S.C. § 8123(d), finding that he failed to attend the scheduled medical examination with Dr. Stamatakos and had not provided written evidence justifying his failure to attend or cooperate with the examination.<sup>2</sup> On November 9, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated December 2, 2022, OWCP denied appellant's request for an oral hearing, finding that it was untimely filed. It informed him that his case had been considered in relation to the issues involved, and that the issues could equally well be addressed by requesting reconsideration and submitting evidence not previously considered establishing that he attended the medical examination scheduled and directed by OWCP.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8123(a) 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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 stops.<sup>6</sup> 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.<sup>7</sup> 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.

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<sup>2</sup> Appellant informed OWCP of a new home address on October 19, 2022.

<sup>3</sup> 5 U.S.C. § 8123(a).

<sup>4</sup> *R.L.*, Docket No. 20-0160 (issued October 30, 2020). *See also M.T.*, Docket No. 18-1675 (issued March 8, 2019); *L.B.*, Docket No. 17-1891 (issued December 11, 2018); *J.T.*, 59 ECAB 293 (2008).

<sup>5</sup> 20 C.F.R. § 10.320; 5 U.S.C. § 8123(a); *id.* at § 10.323; *A.P.*, Docket No. 19-0328 (issued August 6, 2019); *D.K.*, Docket No. 18-0217 (issued June 27, 2018).

<sup>6</sup> 5 U.S.C. § 8123(d); *id.* at § 10.323; *A.P.*, *id.*; *D.K.*, *id.*

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13d (September 2010); *R.L.*, *supra* note 3.

### **ANALYSIS -- ISSUE 1**

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

In a letter dated July 8, 2022, OWCP notified appellant that he was being referred for a second opinion examination on August 22, 2022 with Dr. Stamatakos to further develop his claim as to whether it should be expanded to include any additional work-related medical conditions causally related to his accepted COVID-19; and whether he was disabled from work during the period June 7 through September 24, 2021.<sup>8</sup> It informed him of his obligations to attend and cooperate with the examinations. The notice clearly explained that appellant's compensation benefits would be suspended for failure to report to or for obstruction of the examination. The letter also contained the date, time, and location of his appointment. Appellant did not appear for the appointment, nor did he attempt to reschedule the appointment prior to the designated time.

By letter dated September 2, 2022, OWCP provided appellant 14 days to submit a valid reason for his failure to attend the scheduled medical appointment. On September 23, 2022 appellant informed OWCP that he did not intend to attend any future second opinion examinations.

The Board thus finds that appellant has not established good cause for failing to appear for the scheduled examination on August 22, 2022. OWCP properly determined that he failed to attend a scheduled medical examination without good cause and suspended his wage-loss compensation and medical benefits.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124 of FECA provides that a claimant is entitled to a hearing before a representative of OWCP's Branch of Hearings and Review when a request is made 30 days after the issuance of an OWCP final decision.<sup>9</sup>

A hearing is a review by an OWCP hearing representative of a final adverse decision issued by an OWCP district office.<sup>10</sup> Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may

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<sup>8</sup> 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. *See R.D.*, Docket No. 20-1551 (issued November 8, 2021); *James A. Gray*, 54 ECAB 277 (2002). The July 8, 2022 letter was sent to appellant's last known address, and is presumed to have been received by him absent any notice of nondelivery.

<sup>9</sup> 5 U.S.C. § 8124(b)(1).

<sup>10</sup> 20 C.F.R. § 10.616.

submit new evidence to the hearing representative.<sup>11</sup> A request for either an oral hearing or a review of the written record must be sent, in writing, within 30 days of the date of the decision for which the hearing is sought.<sup>12</sup> A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision.<sup>13</sup>

### ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

Appellant had 30 days, following OWCP's September 28, 2022 merit decision, to request an oral hearing before a representative of OWCP's Branch of Hearings and Review. As his request for an oral hearing was postmarked November 9, 2022, more than 30 days after OWCP's September 28, 2022 decision, it was untimely filed. Appellant is, therefore, not entitled to an oral hearing as a matter of right.<sup>14</sup>

OWCP also has the discretionary power to grant an oral hearing or review of the written record even if the claimant is not entitled to a review as a matter of right. The Board finds that OWCP, in its December 2, 2022 decision, properly exercised its discretion. OWCP considered the matter and concluded that the issue could be equally well addressed through a reconsideration request and the submission of evidence to establish that he attended the medical examination scheduled and directed by OWCP. The Board has held that, as the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.<sup>15</sup>

Accordingly, the Board finds that OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124(b).

### CONCLUSION

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

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<sup>11</sup> *Id.* at § 10.615.

<sup>12</sup> *Id.* at § 10.616(a); *T.C.*, Docket No. 20-0090 (issued February 13, 2020); *M.H.*, Docket No. 19-1087 (issued October 17, 2019); *B.V.*, Docket No. 18-1473 (issued April 23, 2019).

<sup>13</sup> *T.C.*, *id.*; *K.L.*, Docket No. 19-0480 (issued August 23, 2019).

<sup>14</sup> Under OWCP's regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4a (September 2020); *see also G.S.*, Docket No. 18-0388 (issued July 19, 2018).

<sup>15</sup> *See T.G.*, Docket No. 19-0904 (issued November 25, 2019); *Daniel J. Perea*, 42 ECAB 214 (1990).

examination. The Board further finds that OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 28 and December 2, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 19, 2023  
Washington, DC

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

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

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