

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

T.A., Appellant

and

**DEPARTMENT OF JUSTICE, FEDERAL
MEDICAL CENTER DEVENS, Ayer, MA,
Employer**

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**Docket No. 21-0582
Issued: December 14, 2021**

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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On March 3, 2021 appellant filed a timely appeal from a November 20, 2020 merit decision and a February 19, 2021 nonmerit 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

ISSUES

The issues are: (1) whether OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d), effective November 20, 2020, due to his failure to attend a

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the February 19, 2021 decision, OWCP received 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.*

scheduled medical examination; and (2) whether OWCP properly denied appellant's request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On January 19, 2005 appellant, then a 35-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on January 17, 2005 he sustained a left tibial fracture when he was assaulted by an inmate while in the performance of duty. He stopped work on the date of injury. OWCP accepted the claim for left tibial fracture and authorized intramedullary rodding with proximal and distal interlock left tibia surgery, which occurred on January 18, 2005. It paid appellant on the supplemental rolls as of March 4, 2005 and on the periodic rolls from April 17, 2005 through June 9, 2007. On May 12, 2010 OWCP expanded acceptance of the claim to include lumbar radiculopathy, low back strain, and L5-S1 herniated lumbar disc. Appellant again received wage-loss compensation on the supplemental and periodic rolls from March 29 to July 3, 2010. OWCP accepted a recurrence of disability in an August 16, 2019 decision. Appellant was paid appropriate wage-loss compensation on the supplemental rolls as of March 29, 2019 and on the periodic rolls as of September 15, 2019.

In a letter dated August 21, 2020, OWCP notified appellant that it had scheduled a November 2, 2020 second opinion examination with Dr. Hyman Glick, a Board-certified orthopedic surgeon, to determine appellant's work capacity. It explained that appellant's entitlement to compensation could be suspended, pursuant to 5 U.S.C. § 8123(d), if he refused to submit to or obstructed an examination.

In a memorandum of telephone call (Form CA-110) dated September 21, 2020, appellant related that he planned to return to work on November 1, 2020 and would call to verify his return to work. OWCP informed him that if he returned to work that his second opinion evaluation would be cancelled.

In a letter dated September 29, 2020, the employing establishment requested that OWCP retain appellant's second opinion appointment until his return to work was verified by a Form CA-3.

In a letter dated October 29, 2020 to the employing establishment, OWCP advised that it would not cancel the second opinion appointment until it verified that appellant returned to work in a Form CA-3.

In a November 3, 2020 memorandum, the medical scheduler notified OWCP that appellant did not attend the scheduled November 2, 2020 appointment with Dr. Glick.

In a November 3, 2020 notice, OWCP proposed to suspend appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d) as he failed to attend the examination as directed by OWCP that was scheduled on November 2, 2020 with Dr. Glick. It advised appellant to provide a written explanation of his reasons for failing to attend the scheduled examination, with substantive corroborating evidence, within 14 days.

On November 10, 2020 OWCP received a report of work status (Form CA-3) indicating that appellant had returned to part-time modified work on November 3, 2020. A note on the form indicated that he had worked a half day and had then taken sick leave.

In a letter dated November 10, 2020, OWCP acknowledged appellant's return to part-time limited-duty work on November 3, 2020.

A compensation termination report dated November 10, 2020 indicated that appellant's wage-loss compensation would be terminated effective November 3, 2020 as he had returned to work. OWCP's records reflect that appellant received wage-loss compensation on the periodic rolls through November 7, 2020.

On November 20, 2020 OWCP received an October 27, 2020 note from Dr. Andrew P. White, a Board-certified orthopedic surgeon, releasing appellant to return to full-duty work on November 3, 2020.

By decision dated November 20, 2020, OWCP suspended appellant's wage-loss compensation and medical benefits effective that day for failure to attend the November 2, 2020 examination with Dr. Glick. It noted that on November 3, 2020 appellant had been advised that he had 14 days to provide written evidence justifying his failure to attend the examination; however, he had not provided an explanation of his failure to attend.

In a letter dated November 23, 2020, the employing establishment noted that the Form CA-3 contained erroneous information as appellant had returned to full-duty work on November 3, 2020 not part time as noted on the form. It also noted that he worked four hours that day and then went out on sick leave.

In letters dated December 11, 2020 and January 8, 2021, appellant stated that he returned to full-duty work based on an October 27, 2020 report from Dr. White and following an approved work hardening program. He stated that he communicated with OWCP regarding the scheduled November 2, 2020 appointment and was advised that he was no longer required to attend as he had been released to return to full duty on November 3, 2020.

On January 27, 2021 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated February 19, 2021, OWCP denied appellant's request for a review of the written record, finding that the request was untimely filed. The request was dated January 27, 2021, more than 30 days following the November 20, 2020 decision. The hearing representative informed appellant that his case had been considered in relation to the issues involved, and that the issues could be equally addressed by requesting reconsideration and submitting evidence not previously considered.

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.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 stops.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 until the date on which the claimant agrees to attend the examination.

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d).

On August 21, 2020 OWCP notified appellant that it had scheduled a November 2, 2020 second opinion examination with Dr. Glick a Board-certified orthopedic surgeon. It explained that his entitlement to compensation could be suspended, pursuant to 5 U.S.C. § 8123(d), if he refused to submit to or obstructed an examination. On September 21, 2020 appellant notified OWCP that he planned to return to work on November 1, 2020 and would call to verify his return to work. On October 29, 2020 OWCP informed the employing establishment that it would not cancel the second opinion appointment until verification was received in a Form CA-3 that had returned to work. In a November 3, 2020 memorandum, the medical scheduler notified OWCP that appellant did not attend the scheduled November 2, 2020 appointment with Dr. Glick.

On November 3, 2020 OWCP informed appellant that it proposed to suspend his compensation benefits pursuant to 5 U.S.C. § 8123. It requested that he provide an explanation for his failure to attend the scheduled examination. On November 10, 2020 OWCP received a Form CA-3 verifying appellant had returned to work on November 3, 2020. On November 10, 2020 it terminated his wage-loss compensation, noting that he had returned to full-duty work on

³ 5 U.S.C. § 8123(a).

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

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

⁶ *Id.* at § 8123(d); *id.* at § 10.323; *R.L.*, *id.*; *A.P.*, *id.*; *D.K.*, *id.*

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

November 3, 2020. On November 20, 2020 OWCP received an October 27, 2020 note from Dr. White, a Board-certified orthopedic surgeon, releasing appellant to return to full-duty work on November 3, 2020. However, by decision dated November 20, 2020, it suspended his wage-loss compensation and medical benefits effective that day, finding that he had not provided an explanation for his failure to attend the scheduled second opinion examination on November 2, 2020.

The Board thus finds that OWCP improperly suspended appellant's compensation benefits on November 20, 2020. OWCP had advised him that the scheduled second opinion evaluation would be unnecessary if he was released to return to work on November 3, 2020 and he did in fact return to work. It also advised the employing establishment that the scheduled examination would be unnecessary if it received a CA-3 form that appellant had returned to work. OWCP received a CA-3 form on November 10, 2020 verifying his return to work on November 3, 2020. The evidence of record establishes that appellant had been released to full-duty work by his treating physician, Dr. White, effective November 3, 2020 and that appellant returned to work that day. The evidence of record also establishes that OWCP had terminated appellant's wage-loss compensation on November 10, 2020. In the decision dated November 20, 2020, OWCP found that he had not explained his failure to attend the November 2, 2020 second opinion evaluation. However, the record establishes that OWCP was given an explanation regarding appellant's good cause for not attending the scheduled second opinion examination with Dr. Glick on November 2, 2020. The evidence of record establishes that appellant had been released to full-duty work by his treating physician, Dr. White, effective November 3, 2020 and that he returned to work that day. Thus, as OWCP had previously informed appellant, a second opinion evaluation to determine appellant's work capability was unnecessary.

OWCP may only invoke the sanction provision of 5 U.S.C. § 8123(d) if good cause for the refusal or obstruction is not established. As appellant established that he returned to full-duty work on November 3, 2020, he has established good cause. Therefore, the Board finds that OWCP acted unreasonably and therefore abused its discretion in suspending his wage-loss compensation and medical benefits effective November 20, 2020.

CONCLUSION

The Board finds that OWCP improperly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d).⁸

⁸ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 20, 2020 is reversed. The February 19, 2021 nonmerit decision is set aside as moot.

Issued: December 14, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board