

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

E.S., Appellant

and

**DEPARTMENT OF THE ARMY, U.S. ARMY
PACIFIC, FORT SHAFTER, HI, Employer**

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**Docket No. 13-777
Issued: June 26, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 22, 2013 appellant filed a timely appeal from the September 12, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) and October 30 and December 14, 2012 nonmerit decisions. 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 the case.

ISSUES

The issues are: (1) whether OWCP properly suspended appellant's compensation effective September 12, 2012 for refusing to submit to an examination; and (2) whether it properly denied his request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

In September 1989, OWCP accepted that appellant, then a 28-year-old tools and parts attendant, sustained a temporary aggravation of bilateral pes planus and bilateral plantar fasciitis. Appellant received compensation for total disability on the periodic rolls.

In May 2012, appellant requested that OWCP authorize a full year of physical therapy from Dr. Gary Goodman, an attending podiatrist. OWCP requested additional information from Dr. Goodman regarding appellant's foot condition and the need for therapy. It did not receive an adequate response and it determined that a second opinion evaluation was appropriate.

In a July 24, 2012 letter, OWCP directed appellant to report at 11:30 a.m. on August 3, 2012 for a second opinion examination by Dr. William Dinenberg, a Board-certified orthopedic surgeon.² It advised him that, if he could not keep the scheduled appointment, he must immediately notify his claims examiner in writing of the reason. Appellant was informed that only legitimate, documented emergencies were adequate grounds for not keeping the appointment and, if he did not provide an acceptable reason for missing the appointment or if he obstructed the evaluation, his benefits would be suspended in accordance with section 8123(d) of FECA.

In an August 9, 2012 letter, Dr. Dinenberg's office advised OWCP that appellant did not appear for the appointment scheduled for August 3, 2012.

In an August 9, 2012 letter, appellant stated that he was unavailable to attend an OWCP-directed medical appointment scheduled for August 3, 2012 because he was out of town on "urgent" family business. He discussed his medical treatment and questioned whether a second opinion examination was necessary. Appellant also expressed his opinion that, if he was referred to a physician in the future, he should be referred to a podiatrist rather an orthopedic surgeon.

In an August 14, 2012 letter, OWCP advised appellant that it proposed to suspend his compensation under section 8123(d) of FECA due to his failure to appear for the examination scheduled for August 3, 2012.³ It allowed him 14 days from the date of the letter to provide good cause for his failure to appear at the scheduled examination.

In letters dated August 17, 18 and 20, 2012, appellant asserted that he was not given notice of the scheduled examination far enough in advance as he was out of town from around the time the letter advising him of the appointment was sent through the time that the examination was scheduled. He also claimed that Dr. Dinenberg's office was too far from his home and he again questioned the appropriateness of the second opinion examination.

In a September 12, 2012 decision, OWCP suspended appellant's compensation effective that date for refusing to submit to an examination. It found that he failed to establish good cause

² OWCP listed Dr. Dinenberg's address on North West Shore Boulevard in Tampa, Florida. It sent the July 24, 2012 letter to appellant's address of record in Seminole, Florida.

³ OWCP sent the letter to appellant's address of record.

for his failure to appear at the examination scheduled for August 3, 2012. Appellant did not establish that an emergency prevented him from attending the examination, that it would have been unduly burdensome for him to attend the examination or that the referral was inappropriate.

In a September 15, 2012 letter, appellant requested reconsideration of OWCP's September 12, 2012 decision suspending his compensation. He expressed disagreement with OWCP's development of his claim.

Appellant submitted copies of OWCP decisions, a referral letter for Dr. Dinenberg, a September 18, 2012 notarized affidavit discussing the traffic between his house and Dr. Dinenberg's office, a September 18, 2012 notarized affidavit from his cousin discussing the same subject and a September 24, 2012 letter from his mother-in-law indicating that in early August 2012 he was at her home in Alabama from July 25 to August 6, 2012 helping her with a personal problem. He also submitted a document from the Executive Director of the Southeast Regional Arthritis Center, a copy of his bank account dated August 7, 2012, a copy of an August 18, 2012 letter to the Secretary of Labor, copies of several medical reports and administrative documents and a September 17, 2012 letter from the practice manager at Foot and Ankle Physicians stating that he had notified the practice that he would be out of town for two weeks in July 2012.

By decision dated October 30, 2012, OWCP denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that the documents submitted by him were not relevant to the suspension of his compensation.

In a November 17, 2012 letter, appellant requested reconsideration of OWCP's September 12, 2012 decision. He made reference to medical evidence which he deemed to be relevant. Appellant discussed the notice standards for termination or reduction of compensation and opined that OWCP should have contacted his treating physician to provide the missing information rather than scheduling a second opinion examination.

Appellant submitted old medical records dated between January 1989 and December 2008, a May 2, 2008 affidavit of Dr. Michael K. Lee, an attending podiatrist, a May 24, 2010 narrative letter of Dr. Lee, an undated morphological data chart, office visit notes dated between January and October 2012 of Dr. Goodman, a Form CA-17 signed on November 1, 2012, and an October 29, 2012 statement in which Dr. Goodman described his medical history and disability status. He also submitted documents regarding the receipt of schedule awards, the Energy Employees Occupational Illness Compensation Program, several Notification of Personnel Action forms, an October 2012 request for treatment and an October 22, 2012 letter in which he discussed the sufficiency of medical evidence from his podiatrists.

In a December 14, 2012 decision, OWCP denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

Section 8123(a) of FECA provides that an employee shall submit to examination by a medical officer of the United States or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required.⁴ The regulations governing the administration of FECA also provide that the employee 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 provides that, if an employee refuses to submit to or obstructs an examination, his or her right to compensation under this subchapter is suspended until the refusal or obstruction stops.⁶

It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.⁷

ANALYSIS -- ISSUE 1

Appellant did not appear for a second opinion evaluation scheduled with Dr. Dinenberg, a Board-certified orthopedic surgeon, on August 3, 2012. OWCP suspended his compensation effective September 12, 2012 for failure to appear at an OWCP-directed examination.

Regarding his failure to appear for the examination, appellant stated that he was out of town on family business around the date of the second opinion appointment. Prior to the September 12, 2012 suspension of his compensation, he did not state the nature of the family business or provide evidence to support that he was out of town during the period. Appellant did not notify OWCP prior to the examination scheduled for August 3, 2012 that he would not be available. Nor did he seek to reschedule the examination. Therefore, appellant’s argument that family business precluded his attendance is not substantiated as good cause.

Appellant also argued that he was not adequately notified in time to keep the appointment. The letter notifying him of the date, time and location of the appointment was mailed to his address of record on July 24, 2012, some 10 days prior to the date of the scheduled examination. It is presumed that appellant received this letter in a timely manner and that he would have had sufficient time to respond to the letter.⁸ Appellant did not submit any evidence to rebut this presumption.

Appellant argued that a podiatrist would have been better suited to examine his condition than an orthopedic surgeon. The Board notes that podiatrists are qualified to render an opinion

⁴ 5 U.S.C. § 8123(a).

⁵ 20 C.F.R. § 10.320.

⁶ 5 U.S.C. § 8123(d).

⁷ *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

⁸ *See Kenneth E. Harris*, 54 ECAB 502 (2003).

on foot/ankle injuries. Orthopedic surgeons, as specialists in the musculoskeletal structure of the body, are also qualified to render such an opinion. It is further noted that the determination of the need for an examination, the type of examination, the choice of locale and the selection of medical examiners are matters within the province and discretion of OWCP.⁹

Appellant argued that the location of the examination scheduled for August 3, 2012 was, at best, an inconvenience and was overly burdensome. The Board notes that the location of the appointment was determined to be 22 miles from his residence, requiring a driving time of about 30 minutes. Appellant has not established good cause that getting to the examination would have been unduly burdensome.¹⁰

For these reasons, appellant failed to attend an examination directed by OWCP without good cause. Therefore, under 5 U.S.C. § 8123(d), his compensation was properly suspended effective September 12, 2012.

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

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹¹ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) establish that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹² To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹³ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁴ The Board has held that the submission of evidence

⁹ See *Dana D. Hudson*, 57 ECAB 298 (2006).

¹⁰ On appeal, appellant submitted argument concerning the manner in which his claim has been developed. However, he did not show that OWCP improperly suspended his compensation effective September 12, 2012.

¹¹ 5 U.S.C. § 8128(a). Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.606(b)(2).

¹³ *Id.* at § 10.607(a).

¹⁴ *Id.* at § 10.608(b).

or argument which repeats or duplicates evidence or argument already in the case record¹⁵ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁶ While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹⁷

ANALYSIS -- ISSUE 2

OWCP issued a decision on September 12, 2012. Appellant requested reconsideration of this decision on October 10 and November 17, 2012. OWCP denied merit review in decisions dated October 30 and December 14, 2012.

The Board finds that appellant met the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In connection with his October 2012 application for reconsideration, appellant submitted a September 24, 2012 letter from his mother-in-law indicating that in early August 2012 he was at her home in Alabama from July 25 to August 6, 2012 helping her with a personal problem. He also submitted a September 17, 2012 letter from the practice manager at Foot and Ankle Physicians stating that he had notified the practice that he would be out of town for two weeks in July 2012. These newly submitted documents are relevant to the issue of the suspension of appellant's compensation for failure to appear at an OWCP-directed examination on August 3, 2012. They pertain to his claim that he was out of town at the time of OWCP's July 24, 2012 notice of the appointment and the scheduled date for the appointment of August 3, 2012.

Given that appellant submitted new and relevant evidence, OWCP improperly denied merit review pursuant to 20 C.F.R. § 10.608.¹⁸ Therefore, the case shall be remanded to OWCP in order to conduct a merit review on the matter of the suspension of appellant's compensation effective September 12, 2012. After such proceedings as it deems necessary, OWCP shall issue an appropriate decision on the merits.

CONCLUSION

The Board finds that OWCP properly suspended appellant's compensation effective September 12, 2012 for refusing to submit to an examination. The Board further finds that it improperly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁵ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁶ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁷ *John F. Critz*, 44 ECAB 788, 794 (1993).

¹⁸ *See supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the September 12, 2012 decision of the Office of Workers' Compensation Programs is affirmed. The December 14 and October 30, 2012 decisions of OWCP are set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: June 26, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board