United States Department of Labor
Employees' Compensation Appeals Board

E.S., Appellant	)	
and	)	**Docket No. 18-1606**
	)	**Issued: April 16, 2019**
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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 20, 2018 appellant filed a timely appeal from March 5 and June 14, 2018 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether OWCP properly suspended appellant's entitlement to wage-loss compensation and medical benefits commencing May 17, 2017 under 5 U.S.C. § 8123(d).

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant also appealed a May 16, 2017 decision of OWCP. However, as more than 180 days elapsed from the issuance of the May 16, 2017 decision to the filing of the present appeal, the Board lacks jurisdiction over this decision. *See* 20 C.F.R. §§ 501.2(c), 501.3.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts of the case as set forth in the Board's prior decisions 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 bilateral plantar fasciitis and heel spur syndrome due to the extended periods of standing required by his job. He stopped work on December 17, 1988. OWCP initially accepted his claim for temporary aggravation of bilateral *pes planus* (flat feet) and bilateral plantar fasciitis.[4] Appellant returned to work on April 19, 1989 in a light-duty position for the employing establishment which required little walking or standing. He stopped work again on April 3, 1990 and OWCP paid him wage-loss compensation on the daily rolls commencing that date.[5]

Between 2010 and 2012, OWCP authorized physical therapy treatment for appellant's feet, including manual therapy.[6] Appellant requested authorization commencing January 1, 2013 for manual foot therapy, including use of a Hivamat deep oscillation machine.

Several of appellant's physicians recommended continuing foot therapy. For example, in multiple reports dated commencing in late 2012, Dr. Gary R. Goodman, a podiatrist, recommended that appellant continue with manual foot therapy, including use of a Hivamat machine, in order to treat and provide pain relief from his accepted work-related foot conditions. In a January 14, 2014 report, Dr. Robert R. Reppy, a Board-certified preventive medicine physician, noted that appellant needed to continue with an aggressive program of physical therapy using the Hivamat machine.

By decision dated June 5, 2014, OWCP denied modification of its prior decisions denying appellant's request for authorization of manual foot therapy commencing January 1, 2013, including use of the Hivamat machine.

Appellant subsequently requested reconsideration and submitted additional medical evidence. In a September 12, 2014 report, Dr. Howard Hogshead, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, described the Hivamat machine as a tool that is

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[3] *Order Dismissing Appeal*, Docket No. 17-1126 (issued September 21, 2017); Docket No. 15-0259 (issued November 3, 2015), *petition for recon. denied*, Docket No. 15-0259 (issued August 11, 2016); Docket No. 13-0777 (issued June 26, 2013); *Order Dismissing Appeal*, Docket No. 09-2085 (issued September 25, 2009); Docket No. 07-1206 (issued March 6, 2008); Docket No. 05-1349 (issued December 12, 2005); *Order Dismissing Appeal*, Docket No. 03-0582 (issued June 29, 2004); *Order Remanding Case*, Docket No. 02-1171 (issued November 26, 2002); Docket No. 98-1109 (issued May 17, 2000), *petition for recon. denied*, Docket No. 98-1109 (issued December 18, 2000).

[4] In mid-2014 OWCP updated the accepted conditions to include permanent aggravation of bilateral *pes planus* (flat feet), permanent aggravation of bilateral plantar fibromatosis, bilateral tarsal tunnel syndrome, and mood disorder due to chronic bilateral foot pain with major depressive-like episode.)

[5] OWCP paid appellant wage-loss compensation on the periodic rolls commencing January 17, 2010.

[6] The case record reveals that manual therapy techniques consisted of, but were not limited to, connective tissue massage, joint mobilization/manipulation, manual traction, passive range of motion, soft tissue mobilization and manipulation, and therapeutic massage.

supposed to introduce tissue vibrations thereby reducing edema and promoting continued local circulation. Dr. Hogshead noted, "Less exotic methods such as massage are available at less expense. Continued treatment with this device cannot be approved."

By decision dated October 28, 2014, OWCP denied modification of its June 5, 2014 decision denying appellant's request for authorization of foot therapy.

Appellant appealed to the Board and, by decision dated November 3, 2015,[7] the Board set aside OWCP's June 5 and October 28, 2014 decisions, finding that the case was not in posture for decision because there remained a conflict in the medical opinion evidence regarding appellant's need for foot therapy due to his accepted foot conditions. The Board remanded the case to OWCP for referral of appellant to an impartial medical specialist to resolve this outstanding conflict.

In a May 23, 2016 medical report, Dr. Goodman posited that appellant had employment-related bilateral Achilles tendinitis and bilateral posterior tibial tendinitis and he requested that appellant's accepted conditions be expanded to include these conditions.

On September 9, 2016 OWCP expanded appellant's accepted conditions to include bilateral Achilles tendinitis and bilateral posterior tibial tendinitis.

In December 2016 OWCP referred appellant to Dr. Mark Beylin, a podiatrist, for an impartial medical examination and opinion regarding appellant's need for foot therapy to treat his accepted medical conditions. Dr. Beylin's office was located in Melbourne, Florida. The record contains a document showing that numerous physicians were contacted before a physician deemed suitable to conduct an impartial medical examination was found. The appointment was originally scheduled for January 23, 2017 at 2:00 p.m. On the morning of January 23, 2017, appellant contacted Dr. Beylin's office to cancel the appointment; the appointment was later rescheduled for March 27, 2017.

In a January 26, 2017 statement, appellant objected to the referral to Dr. Beylin because he believed his physical condition prevented him from tolerating such a long trip from his residence in Seminole, Florida, to see Dr. Beylin. In a January 26, 2017 report, Dr. Goodman indicated that he did not believe "it would be easy" for appellant to travel to and from Dr. Beylin's office.

By letter dated March 9, 2017, OWCP advised appellant that there had been significant updates to his case in the several prior years, including the September 9, 2016 expansion of his accepted conditions to include bilateral tendinitis and bilateral posterior tibial tendinitis. It advised him that, therefore, it was appropriate to refer him for a second opinion specialist to evaluate his need for foot therapy to treat his accepted medical conditions.

In a separate March 9, 2017 letter, OWCP advised appellant that he would be referred to a second opinion specialist for examination and consideration of whether he required foot therapy for treatment of his accepted medical conditions. It informed him that it had cancelled the appointment with Dr. Beylin. OWCP advised appellant that, if he failed to keep the scheduled appointment for a second opinion examination, he must provide notice in writing within seven days from the time of the failure to appear. Only a legitimate, documented emergency would be

[7] *Supra* note 3.

deemed as an adequate basis for not keeping the appointment. OWCP further advised that, if appellant failed to provide an acceptable reason for not appearing for the examination, or if he obstructed the examination, his benefits would be suspended in accordance with section 8123(d) of FECA. The letter was sent to appellant's address of record in Seminole.

In a March 14, 2017 letter, appellant thanked OWCP for cancelling the appointment with Dr. Beylin and he requested that he be scheduled for an examination with an impartial medical specialist whose office was within 100 miles of his residence in Seminole, Florida.

By letter dated March 21, 2017, OWCP advised appellant of a second opinion examination scheduled for April 7, 2017 at 11:15 a.m. Eastern Standard Time (EST) with Dr. William Dinenberg, a Board-certified orthopedic surgeon, whose office was located in Tampa, Florida. This letter was sent to appellant's address of record in Seminole, Florida.

In an April 11, 2017 letter, a case coordinator for OWCP advised that appellant did not attend the examination scheduled with Dr. Dinenberg for April 7, 2017.

In an April 26, 2017 notice of proposed suspension, OWCP advised appellant that 5 U.S.C. § 8123(d) provides that, if an employee refuses to submit to or obstructs an examination, his or her right to compensation is suspended until the refusal or obstruction stops. It noted that he failed to report for the examination with Dr. Dinenberg scheduled for April 7, 2017 and indicated that it had not received a reason for his nonattendance. OWCP advised appellant that he must submit new and pertinent explanation for not attending the examination with Dr. Dinenberg within 14 days of the notice of proposed suspension. If good cause was not established, entitlement to wage-loss compensation or medical benefits would be suspended in accordance with 5 U.S.C. § 8123(d) until he attended and fully cooperated with the examination. Appellant did not submit any additional evidence/argument within the allotted period.

By decision dated May 16, 2017, OWCP suspended appellant's entitlement to wage-loss compensation and medical benefits, effective May 17, 2017, pursuant to 5 U.S.C. § 8123(d). It found that he had failed to appear for the examination with Dr. Dinenberg scheduled for April 7, 2017 and that he had not provided good cause for his nonattendance.

On December 5, 2017 appellant requested reconsideration and argued that he had not received the March 21, 2017 letter scheduling the examination with Dr. Dinenberg on April 7, 2017. He also submitted medical evidence concerning his foot condition, including a June, 22, 2017 report of Dr. Goodman. By decision dated March 5, 2018, OWCP denied modification of its May 16, 2017 decision suspending appellant's entitlement to wage-loss compensation and medical benefits commencing May 17, 2017 under 5 U.S.C. § 8123(d).

On March 16, 2018 appellant requested reconsideration and again argued that he had not received the March 21, 2017 letter scheduling the examination with Dr. Dinenberg. By decision dated June 14, 2018, OWCP again denied modification of its March 5, 2018 decision regarding the suspension of appellant's entitlement to wage-loss compensation and medical benefits.

LEGAL PRECEDENT

Section 8123(d) 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.[8] 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.[9] 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.[10] 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.[11] 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.[12] If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.[13]

ANALYSIS

The Board finds that OWCP properly suspended appellant's entitlement to wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective May 17, 2017.

The Board has reviewed the evidence of record and notes that the record contains sufficient evidence to establish that appellant failed to appear for a scheduled medical examination, without good cause, within the meaning of section 8123 of FECA. In a March 21, 2017 letter, OWCP advised appellant of a second opinion examination scheduled for April 7, 2017 at 11:15 a.m. EST with Dr. Dinenberg, whose office was located in Tampa, Florida. Appellant did not appear for the examination scheduled for April 7, 2017 and he failed to provide good cause for his nonattendance. In an April 26, 2017 notice of proposed suspension, OWCP advised him that 5 U.S.C. § 8123(d) provides that, if an employee refuses to submit to or obstructs an examination, his or her right to compensation is suspended until the refusal or obstruction stops. It noted that appellant failed to report for the examination with Dr. Dinenberg scheduled for April 7, 2017 and indicated that it had not received a reason for his nonattendance. OWCP further advised him that he must submit new and pertinent explanation for not attending the examination with Dr. Dinenberg within 14 days of the notice of proposed suspension. If good cause was not established, entitlement to wage-loss compensation or medical benefits would be suspended in accordance with 5 U.S.C. § 8123(d) until he attended and fully cooperated with the examination. Appellant did not submit any additional evidence/argument within the allotted period.

[8] 5 U.S.C. § 8123(d).

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

[10] 20 C.F.R. § 10.320.

[11] 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; *D.K.*, Docket No. 18-0217 (issued June 27, 2018).

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

[13] *Id.* at Chapter 2.810.13e.

On appeal appellant contends that he had not received OWCP's March 21, 2017 letter advising him of the examination scheduled for April 7, 2017 with Dr. Dinenberg. 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.[14] OWCP's March 21, 2017 letter was sent to appellant's address of record at the time and is presumed to have been received by him absent any notice of nondelivery. Appellant has not submitted evidence to rebut this presumption.[15]

On appeal appellant also questions the propriety of his referral to a second opinion specialist for an appointment in April 2017, rather than to an impartial medical specialist. The Board notes that OWCP had advised appellant through a March 9, 2017 letter that his referral to a second opinion specialist was appropriate given the updated nature of his case. OWCP explained to appellant that referral for a second opinion examination was appropriate due to significant changes in his case as evidenced by the September 9, 2016 expansion of his accepted conditions to include bilateral tendinitis and bilateral posterior tibial tendinitis. As noted above, in its April 26, 2017 notice of proposed suspension, OWCP afforded appellant 14 days to submit additional argument/evidence, but he did not submit any additional evidence/argument within the allotted period.

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.[16] Under the circumstances of the present case, the Board finds that OWCP did not abuse its discretion in directing appellant to appear for a second opinion examination with Dr. Dinenberg.[17] OWCP's actions in this regard were reasonable and it properly found that appellant failed to provide good cause for not appearing for the examination with Dr. Dinenberg scheduled for April 7, 2017.

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.

CONCLUSION

The Board finds that OWCP properly suspended appellant's entitlement to wage-loss compensation and medical benefits commencing May 17, 2017 under 5 U.S.C. § 8123(d).

[14] *See James A. Gray*, 54 ECAB 277 (2002).

[15] The Board notes that appellant had responded to a March 9, 2017 letter which OWCP sent to his address of record.

[16] *See supra* note 9.

[17] 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 deductions from established facts. *See C.F.*, Docket No. 18-0791 (issued February 26, 2019).

ORDER

IT IS HEREBY ORDERED THAT the June 14 and March 5, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 16, 2019
Washington, DC

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

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

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