U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTY CARTER and DEPARTMENT OF THE TREASURY, MINT, West Point, NY

Docket No. 99-2458; Submitted on the Record;
Issued February 16, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly suspended appellant's compensation under 5 U.S.C. § 8123 on the grounds that she refused to submit to a medical examination; and (2) whether the Office properly terminated appellant's compensation on the grounds that she had no continuing residuals or disability causally related to her February 23, 1994 work injury.

This case has previously been on appeal before the Board. In a decision and order dated February 4, 1999, the Board found that there was a conflict of medical opinion on whether appellant's continuing disability was causally related to the work injury of February 23, 1994.[1] The Board set aside the Office's decision terminating appellant's compensation benefits and remanded the case to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an evaluation, diagnosis and opinion on whether appellant had continuing disability or residuals due to the February 23, 1994 work injury.

By letter dated March 19, 1999, the Office scheduled an impartial medical evaluation with Dr. Robert C. Hendler. The physician's referral letter listed the date of appointment as April 8, 1999. However, the March 19, 1999 copy letter to appellant notifying her of the examination with Dr. Hendler listed the date of appointment as March 8, 1999.

A report dated April 6, 1999 indicates that appellant left a message with the Office requesting that the medical appointment be rescheduled. The Office tried to return appellant's call but was unable to get an answer at the number she listed. Appellant subsequently failed to attend the April 8, 1999 appointment with Dr. Hendler.

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[1] The Board incorporates the February 4, 1999 decision and order with its summary of the factual and medical evidence of record; *see Betty Carter*, Docket No. 97-948 (issued February 4, 1999).

On April 13, 1999 the Office notified appellant that she had 14 days to show good cause why she failed to attend the examination. The Office informed appellant that, if she failed to respond to the letter or if her explanation failed to show good cause, the Office would suspend her compensation until her refusal or obstruction of the examination with the medical specialist ended. The Office also informed appellant that if her benefits were suspended she would not be able to recoup them.

In a separate letter dated April 13, 1999, the Office rescheduled an examination with Dr. Hendler for May 5, 1999. Appellant was advised to contact the Office if she intended to keep the appointment or refused to attend.

In an April 27, 1999 letter, the Office indicated that appellant had not responded within the 14 days allotted and therefore suspended her compensation beginning April 8, 1999.

In an April 29, 1999 letter, appellant alleged that she had not received the Office's March 19, 1999 letter scheduling the examination until March 30, 1999. She also noted that the Office's March 19, 1999 scheduling letter stated that the examination was to be held on "March 8, 1999" instead of April 8, 1999.

In a May 6, 1999 report, Dr. Hendler noted that appellant had reported for the May 5, 1999 examination as scheduled. He stated that appellant injured both of her knees in a work injury on February 23, 1994, at which time "she was taking out the garbage when she and slipped and fell on the ice." Dr. Hendler related that appellant had a partial meniscectomy on each knee during June through July 1994 and that appellant's treating physician considered her totally disabled from her work as a coin checker. He also reported that appellant complained of dull, nagging aches and pain in her knees.

On physical examination, appellant had full range of motion, no joint effusion and no appreciable atrophy, with a normal gait. X-rays taken on May 5, 1999 showed "genu valgum deformity with mild to moderate lateral compartment arthritis." Dr. Hendler opined that appellant's arthritis was not causally related to her work injury and was secondary to the genu valgum deformity and appellant's obesity. He stated that the pathology found at the time of her arthroscopic surgery involved the opposite side of the knee joint, *i.e.*, the medial compartment. "This would not cause her to have any significant disability which would preclude her from doing a sedentary type job such as that of a coin checker." According to Dr. Hendler, appellant had a preexisting condition that predisposed her to lateral compartment degenerative disease of the knees. He opined that appellant "is not totally disabled at this time due to a work-related condition."

In a decision dated May 10, 1999, the Office terminated appellant's compensation effective December 10, 1996. The Office specifically held that the weight of the medical evidence resided with the impartial medical specialist, Dr. Hendler, who opined that appellant had no continuing disability causally related to the February 23, 1994 work injury.

The Board finds that the Office improperly suspended appellant's compensation benefits from April 8 to May 5, 1999 on the grounds that she refused to attend a medical evaluation.

Section 8123 of the Federal Employees' Compensation Act authorizes the Office to require an employee who claims disability as a result of an employment injury to undergo such physical examination as it deems necessary.[2] Determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are within the province and discretion of the Office. The only limitation on this authority is that of reasonableness.[3] Subsection (d) of section 8123 states: "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops."[4] However, before the Office may invoke this provision, the employee is provided a period of 14 days within which to present, in writing, his reasons for the refusal or obstruction.[5]

In this case, appellant contended that she did not receive proper notice of the examination with Dr. Hendler since the letter she received on March 30, 1999 indicated that her appointment with Dr. Hendler had been scheduled for March 8, 1999. As such, when she received the scheduling letter she assumed she had already missed the appointment. Appellant contacted the Office by telephone on April 6, 1999 and left a message that she was out of town on an emergency. Appellant requested that an appointment be rescheduled and left a number where she could be reached. The Office attempted to contact appellant on April 7, 1999 but did not reach her. The Office sent a letter advising appellant she should attend an examination on April 8, 1999.

Contrary to the Office's analysis, the Board finds that the record supports appellant had good cause for failing to attend the April 8, 1999 examination. It is unreasonable to hold appellant responsible for the Office's error in first notifying her of a March 8, 1999 examination with Dr. Hendler. Appellant promptly informed the Office of the error and requested that an examination be rescheduled. Under the circumstances, it was unreasonable for the Office on April 7, 1999 to require appellant to attend an April 8, 1999 examination. Thus, the Board finds that the Office abused its discretion in suspending appellant's compensation from April 8 to May 5, 1999.

The Board, however, finds that the Office properly terminated appellant's compensation.

The Board previously remanded this case for an impartial medical examination to determine whether appellant's disability due to the February 23, 1994 work injury had ceased. When a conflict exists in the medical record and the case is referred to an impartial medical

[2] 5 U.S.C. § 8123(a) states: "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 that may be reasonably required."

[3] *William G. Saviolidis*, 35 ECAB 283 (1983); *Dorothy Louise Peyton*, 30 ECAB 1461 (1979).

[4] 5 U.S.C. § 8123(d).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (November 1998).

specialist for the purpose of resolving that conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

The Board finds that the opinion of Dr. Hendler that appellant is not totally disabled from her last sedentary job as a coin checker due to her work injury of February 23, 1994 is rationalized and based on a proper factual background. Accordingly, the weight of the evidence rests with the opinion of the impartial medical specialist in this case and supports the Office's decision to terminate appellant's compensation.

Although the Board finds that appellant is no longer totally disabled due to her work injury, the Board finds that the Office improperly terminated appellant's compensation effective December 10, 1996. In his May 6, 1999 report, Dr. Hendler opined that appellant was not totally disabled "at this time," but he did not specifically address when appellant's disability ceased. The doctor based his disability opinion on the objective and physical findings obtained during his May 5, 1999 evaluation and not on any prior medical evidence of record. Because the record only supports a finding that appellant was not totally disabled as of the May 5, 1999 examination with Dr. Hendler, the Board modifies the Office's decision to reflect that appellant's compensation is terminated effective May 5, 1999 and not December 10, 1996.

The May 10, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed as modified.

Dated, Washington, DC
February 16, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[6] *Charles E. Burke*, 47 ECAB 185 (1995); *Roger Dingess*, 47 ECAB 123 (1995).