



returned to work intermittently and the Office commenced payment for temporary total disability compensation for appropriate periods. The Office placed him on the periodic rolls.

In order to determine appellant's current condition and to ascertain whether he still suffered residuals from his accepted conditions, the Office referred appellant to Dr. Mark L. Kahn, Board-certified in internal medicine. In a report dated October 1, 1998, he stated that it was difficult to determine whether appellant's condition was disabling given the fact that he did not give his full effort with regard to the physical examination. Dr. Kahn opined that appellant was magnifying his symptoms. He advised that appellant should be referred for a functional capacity evaluation to determine his actual capabilities. In a December 15, 1998 supplemental report, Dr. Kahn stated that he had reviewed the functional capacity test and considered it invalid in light of the physical therapist's opinion that appellant was uncooperative and displayed inconsistent, exaggerated pain behaviors.

In a work capacity evaluation dated May 3, 1999, Dr. Kahn opined that appellant was capable of working an 8-hour day with restrictions of no more than 6 hours of walking and standing, 4 hours of reaching above the shoulder and twisting and no more than 4 hours of pushing, pulling, lifting more than 20 pounds. He limited appellant to two hours a day of squatting and kneeling.

In a report dated September 7, 1999, Dr. Mark J. Reiner, an osteopath and appellant's treating physician, stated that appellant continued to experience pain in his back which radiates down to his left leg. He related that appellant was still unable to return to work with the employing establishment and noted that he experienced pain with any bending, lifting and twisting. He also stated that appellant was unable to do any significant walking. Dr. Reiner concluded that appellant continued to have significant symptoms regarding his back and his radiculopathy. He recommended additional diagnostic testing.

The Office determined that there was a conflict in the medical evidence between Dr. Kahn and Dr. Reiner regarding whether appellant still had residual disability stemming from his work-related lumbar condition. In order to determine appellant's current condition, the Office referred him, together with a statement of accepted facts and the case record, to Dr. John LaRatta, an osteopath, for an impartial medical evaluation. The referral letter dated September 19, 2000, advised appellant that the examination was scheduled for October 2, 2000 and that under section 8123(d) of the Federal Employees' Compensation Act, an employee's right to compensation is subject to suspension if the employee refuses to submit or obstructs a medical examination. Appellant failed to attend the examination.

By letter dated October 2, 2000, the Office issued a notice of proposed suspension of compensation based on appellant's failure to appear at the scheduled October 2, 2000 appointment. The Office noted that appellant had been advised in the September 19, 2000 letter that his right to compensation could be suspended if he refused to submit to a medical examination. The Office stated that appellant had 14 days to explain why he failed to keep the appointment with Dr. LaRatta and that, if he did not respond or if his reasons for refusing to keep the appointment were found to be unacceptable, his entitlement to compensation would be suspended until he agreed to submit to the examination as directed.

By decision dated October 18, 2000, the Office suspended appellant's right to compensation effective October 8, 2000, based on his failure to submit to the medical examination scheduled with Dr. LaRatta on October 2, 2000. The Office found that appellant failed to submit a satisfactory explanation justifying his refusal to attend the impartial medical evaluation.

By letter dated October 31, 2000, appellant's attorney stated that he remained cooperative and willing to comply with the requirement to submit to a physical examination. He requested that the Office reschedule the examination.<sup>1</sup> On November 6, 2000 the Office reinstated appellant's compensation and restored him to the periodic rolls. By letter dated November 8, 2000, the Office scheduled another appointment with Dr. LaRatta for November 27, 2000. Appellant attended the examination, as scheduled.

In a report dated November 28, 2000, Dr. LaRatta stated that appellant still had some degree of lumbosacral injury. However, Dr. LaRatta stated that due to appellant's apparent inability to undergo complete testing, he was unable to determine whether appellant's injury was chronic or acute in nature, whether it was preexisting or whether it was purely an injury that was directly caused by his 1994 employment injury. Dr. LaRatta advised that he was unable to determine whether appellant was able to perform his preinjury job of clerk carrier on the basis of his physical examination. He further stated that it was difficult to determine whether appellant had reached maximum medical improvement. Dr. LaRatta concluded that due to the incomplete nature of appellant's examination and the inability as a result to fully determine his clinical status, he was referring appellant to the department of physical medicine and rehabilitation at Cooper Hospital for further evaluation and testing.

In accordance with Dr. LaRatta's recommendation, the Office referred appellant for an examination with Dr. Willa Greenberg, a physician Board-certified in physical medicine and rehabilitation, for January 12, 2001. The referral letter dated December 14, 2000, advised appellant that the examination was scheduled for January 12, 2001 and that under section 8123(d) of the Act, an employee's right to compensation is subject to suspension if the employee refuses to submit or obstructs a medical examination. Appellant failed to attend the examination.

By letter dated February 7, 2001, the Office issued a notice of proposed suspension of compensation based on appellant's failure to appear at the scheduled January 12, 2001 appointment. The Office noted that he had been advised in the December 14, 2000 letter, that his right to compensation could be suspended if he refused to submit to a medical examination. The Office stated that appellant had 14 days to explain why he failed to keep the appointment with Dr. Greenberg and that, if he did not respond or if his reasons for refusing to keep the appointment were found to be unacceptable, his entitlement to compensation would be suspended until he agreed to submit to the examination as directed.

By decision dated March 20, 2001, the Office suspended appellant's right to compensation effective that date based on his failure to submit to the medical examination

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<sup>1</sup> In an October 23, 2000 letter, appellant asserted that he had called the Office on October 2, 2000 the date of the appointment. Appellant implied that he had tried to inform the Office that he would be unable to attend his examination that day and would be amenable to having the appointment rescheduled.

scheduled with Dr. Greenberg on January 12, 2001. The Office found that appellant failed to submit a satisfactory explanation justifying his refusal to attend the impartial medical evaluation.

By letter dated March 19, 2001, received by the Office on March 22, 2001 appellant's attorney stated that appellant remained cooperative and willing to comply with the requirement to submit to a physical examination. He requested that the Office reschedule the examination.<sup>2</sup>

The Office scheduled another examination for appellant with Dr. Greenberg for May 11, 2001. The referral letter dated April 26, 2001, advised appellant that the examination was scheduled for May 11, 2001 and that under section 8123(d) of the Act, an employee's right to compensation is subject to suspension if the employee refuses to submit or obstructs a medical examination.

On June 27, 2001 an Office memorandum indicated that appellant had failed to attend the May 11, 2001 examination.

Appellant's attorney requested an oral hearing, which was scheduled for March 12, 2002.<sup>3</sup> By letter to the Branch of Hearings and Review dated February 21, 2002, appellant's attorney requested postponement of the hearing on the grounds that appellant had recently been incarcerated. The hearing, however, took place as scheduled on March 12, 2002. Appellant was not present, but was represented by his attorney. At the hearing, appellant's attorney indicated that appellant told him he had recently been incarcerated, but stated that he lacked specific information regarding this incarceration. He requested 30 days to hold the record open so that he could obtain documentation and clarification regarding appellant's incarceration. The hearing representative granted the request for 30 additional days, in which to hold the record open.

By decision dated June 20, 2002, an Office hearing representative affirmed the March 20, 2001 decision suspending compensation based on appellant's refusal to attend the January 12, 2001 impartial medical examination. The hearing representative noted that she had granted the request of appellant's attorney to hold open the record for 30 days so that he could provide detailed and specific information regarding when appellant expected to be released and what his reasons were for not appearing at the January 12, 2001 examination. The hearing representative noted, however, that appellant's attorney had indicated appellant's willingness to appear for an examination and, therefore, tentatively ended appellant's suspension as of the date of the hearing. The hearing representative returned the case file for rescheduling of another examination pending a determination of appellant's status. She instructed the Office to reinstate appellant's compensation only after he attended the required medical examination and after he came forward with documentation pertaining to his alleged incarceration.

By letter dated November 7, 2002, appellant's attorney requested reconsideration. Accompanying the letter was a letter from appellant dated October 24, 2002, in which he

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<sup>2</sup> In a letter dated March 3, 2001, received by the Office on March 14, 2001 appellant indicated that he had missed the January 12, 2001 appointment because he had been experiencing anxiety and a diminished mental state due to several recent deaths and illnesses in his family.

<sup>3</sup> The letter from appellant's attorney requesting a hearing is not contained in the case file.

asserted that he had been incarcerated as of December 7, 2001 and expected to be released March 6, 2003. Appellant also stated that he “may have” been in court on January 12, 2001, the date of his scheduled examination with Dr. Greenberg.

By decision dated February 7, 2003, the Office denied appellant’s application for review on the ground that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision. The Office noted that appellant had noted in his letter, that he had been incarcerated on December 7, 2001, which failed to account for his absence at the scheduled January 12, 2001 examination. The Office further stated that appellant’s attorney was informed at the March 12, 2002 hearing that he needed to provide evidence regarding the details of appellant’s incarceration; however, no such evidence had been submitted. In addition, the Office noted that, although appellant had repeatedly stated his desire to cooperate and attend the required medical examinations, he had repeatedly failed to appear as he had promised. Finally, the Office stated that if appellant had been found guilty of a felony and incarcerated, he would forfeit his compensation.

### **LEGAL PRECEDENT**

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.<sup>4</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>5</sup>

### **ANALYSIS**

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. The evidence appellant submitted is not pertinent to the issue on appeal. In the June 20, 2002 Office decision, the hearing representative tentatively ended the suspension of appellant’s compensation as of the date of the hearing, March 12, 2002, and had allowed the record to be held open so that appellant’s attorney could provide detailed and specific information as to when appellant expected to be released from incarceration and what his reasons were for not appearing at the January 12, 2001 impartial medical examination. The hearing representative returned the case file for rescheduling of another examination pending a determination of appellant’s status and instructed the Office to reinstate appellant’s compensation only after he attended the required medical examination and came forward with documentation pertaining to his alleged incarceration. However, appellant’s attorney failed to submit evidence regarding the details of appellant’s incarceration with his reconsideration request. Appellant stated in his letter that he had been incarcerated on December 7, 2001, but this assertion failed to account for his absence at the scheduled January 12, 2001 examination.

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<sup>4</sup> 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

<sup>5</sup> *Howard A. Williams*, 45 ECAB 853 (1994).

Thus, the evidence submitted by appellant on reconsideration did not address the relevant issue on appeal. The Board has held that the submission of evidence, which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.<sup>6</sup> Appellant's reconsideration request failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. The Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

**CONCLUSION**

The Board finds that the Office properly refused to reopen appellant's case for reconsideration on the merits of his claim under 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 7, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>6</sup> See *David J. McDonald*, 50 ECAB 185 (1998).