

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

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**M.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Birmingham, AL, Employer**

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**Docket No. 08-127  
Issued: May 7, 2008**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 11, 2007 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated June 29 and October 3, 2007. Under 20 C.F.R. §§ 501(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether the Office properly denied appellant's claim for an additional schedule award for his left lower extremity impairment on the basis that he refused to undergo a medical examination; and (2) whether the Office properly refused to reopen appellant's case for reconsideration of his claim under 5 U.S.C. § 8128.

**FACTUAL HISTORY**

On June 4, 1999 appellant, a 42-year-old mail handler, filed a Form CA-2 claim for benefits, alleging that he sustained a lower back condition causally related to factors of his employment. The Office accepted his claim for aggravation of herniated disc at L4-5. The Office commenced payment for temporary total disability compensation.

On January 28, 2005 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his right lower extremity.

In an August 12, 2005 report, Dr. Robert E. Kynerd, Board-certified in family practice and appellant's treating physician, determined that appellant had a nine percent permanent impairment of his right lower extremity based on nerve root impairment at L3-4, pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (fifth edition). He indicated his approval and adoption of a July 12, 2005 evaluation/impairment rating from a physical therapist that relied on Tables 15-16 and 15-18 of the A.M.A., *Guides*.

In an impairment evaluation dated December 15, 2005, an Office medical adviser found that appellant had a five percent permanent impairment of his left lower extremity based on the A.M.A., *Guides*. He stated:

"The basis for the impairment rating is unilateral impairment of the S1 nerve root for sensory deficit and/or pain. The maximum percent loss of function due to sensory deficit and pain at the S1 nerve root is five percent. This is multiplied by a Grade 1 sensory loss which is 99 percent. This results in a total of five percent impairment to this individual's right lower extremity."

The Office medical adviser derived this right-sided S1 nerve root impairment based on Tables 15-15 and 15-18 at page 424 of the A.M.A., *Guides*.

On May 10, 2006 the Office granted appellant a schedule award for a five percent permanent impairment of the right lower extremity for the period May 15 to June 22, 2000, for a total of 14.40 weeks of compensation.

On May 19, 2006 appellant requested an oral hearing, which was held on January 11, 2007. At the hearing, the hearing representative issued a summary decision in which he found that there was a conflict in the medical evidence between Dr. Kynerd, appellant's treating physician, and Dr. Thompson, the Office medical adviser, regarding the degree of right lower extremity impairment stemming from appellant's accepted conditions. The hearing representative set aside the May 10, 2006 decision and ordered the case to be remanded to the district Office for further development and clarification from both physicians to explain the discrepancy in their respective impairment ratings.

In order to resolve the conflict in the medical evidence, the Office referred appellant together with a statement of accepted facts and the case record, to Dr. Martin P. Jones, a Board-certified orthopedic surgeon, for an impartial medical evaluation. The referral letter, dated April 26, 2007, advised appellant that the examination was scheduled for May 31, 2007 and that under section 8123(d) of the Federal Employees' Compensation Act, an employee's right to compensation was subject to suspension if the employee refuses to submit or obstructs a medical examination.

By letter dated June 11, 2007, the Office issued a notice of proposed suspension of the determination of his schedule award based on appellant's failure to appear at his scheduled

examination.<sup>1</sup> The Office noted that appellant had been advised in the April 26, 2007 letter that his right to compensation and a schedule award 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. Jones and that, if he did not respond or if his reasons for refusing to keep the appointment were found to be unacceptable, the determination of his entitlement to a schedule award would be suspended until he agreed to submit to the examination as directed.

By decision dated June 29, 2007, the Office denied appellant's request for an additional schedule award based on his failure to attend a medical examination scheduled with Dr. Jones. The Office found that appellant had not responded to the June 11, 2007 letter and had not rescheduled his missed appointment.

On September 24, 2007 appellant's attorney requested reconsideration. Accompanying the letter was documentation from appellant indicating that he had been incarcerated at the Federal Prison Camp at Talladega, Alabama, for the period February through August 24, 2007. An August 24, 2007 memorandum from the Federal Bureau of Prisons indicated that appellant had been released from Birmingham Community Service Center on August 24, 2007.

By decision dated October 3, 2007, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

### **LEGAL PRECEDENT**

Section 8123(a)<sup>2</sup> of the Act provides:

"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.... If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

### **ANALYSIS**

In this case, the Office determined that there was a conflict in medical opinion regarding the degree of right lower extremity impairment appellant had sustained due to his accepted conditions and scheduled him for an examination by an impartial medical specialist to resolve the conflict in medical opinion.<sup>3</sup>

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<sup>1</sup> The Office indicated in a June 11, 2007 memorandum that Dr. Jones' office had advised it that appellant did not show up for his scheduled examination.

<sup>2</sup> 5 U.S.C. § 8123(a).

<sup>3</sup> When a conflict in medical opinion arises, section 8123(a) of the Act requires the Office to appoint a third physician, also known as a referee or impartial medical specialist. *Dallas E. Mopps*, 44 ECAB 454, 456 (1993).

By letter dated April 26, 2007, the Office referred appellant to Dr. Jones for an examination scheduled on May 11, 2007. The Office apprised appellant of the requirements for examination under section 8123(d), which provides: "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."<sup>4</sup>

The Board has held a time must be set for a medical examination and the employee must fail to appear for the appointment, without an acceptable excuse or reason, before the Office can suspend or deny the employee's entitlement to compensation on the grounds that the employee failed to submit to or obstructed a medical examination.<sup>5</sup> In this case, the time for an impartial medical examination by Dr. Jones was set, appellant was duly advised of his scheduled appointments and failed to appear. The Office's Federal (FECA) Procedure Manual provides:

"Failure to Appear. If the claimant does not report for a scheduled appointment, he or she should be asked in writing to provide an explanation within 14 days. If good cause is not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d), until the claimant reports for examination."<sup>6</sup>

Following notice that appellant failed to appear for his scheduled examination with Dr. Jones, the Office in a June 11, 2007 letter, allowed him 14 days to explain why he failed to keep the May 11, 2007 appointment and advised him that, if he did not respond or if his reasons were found unacceptable, his entitlement to compensation would be suspended until he agreed to submit to examination as directed. No response was received. The Office then denied appellant's claim for further compensation. The Office did not suspend compensation.

The Board finds that the Office improperly denied appellant's request for an additional schedule award. Section 8123(d) of the statute and Chapter 2.810.14(c) of the procedural manual direct that entitlement to compensation should be suspended until appellant's refusal or obstruction of the scheduled examination ceases. The Office, however, rather than suspending issued a decision on June 29, 2007 denying appellant's claim which is not in accordance with the provisions of the Act and the procedure manual governing a claimant's failure to attend a scheduled medical examination. Thus, the Office acted improperly in denying appellant's claim for an additional schedule award.

### **CONCLUSION**

The Board reverses the Office's determination denying appellant's request for an additional schedule award for his left lower extremity.

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<sup>4</sup> 5 U.S.C. § 8123(d).

<sup>5</sup> *Margaret M. Gilmore*, 47 ECAB 718 (1996); *Herbert L. Dazey*, 41 ECAB 271 (1989); *Delores W. Loges*, 38 ECAB 834 (1987).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Suspension of Benefits*, Chapter 2.810.14(c) (January 1992).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 29, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 7, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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