United States Department of Labor
Employees' Compensation Appeals Board

L.K., Appellant	)	
and	)	**Docket No. 07-1004**
	)	**Issued: December 19, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Ocean City, MD, Employer	)	

Appearances:
Scott B. Baron, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 9, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 13, 2006 merit decision concerning the suspension of her compensation and a December 8, 2006 nonmerit decision denying her request for further review of the merits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly suspended appellant's entitlement to compensation effective September 3, 2006 for obstruction of a scheduled medical examination; and (2) whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

The Office accepted that, on November 5, 1994, appellant, then a 31-year-old letter carrier, sustained a lumbar strain while lifting a mail tray and catching falling mail.[1] Her accepted conditions were later expanded to include myositis and myofascial strain. The Office paid appellant appropriate compensation for periods of disability. Appellant participated in vocational rehabilitation efforts which were authorized by the Office. The Office also accepted that appellant developed depression due to pain related to her employment injuries.

In a July 21, 2006 letter, the Office advised appellant that an appointment had been made for her to be examined by Dr. Frederick A. Dittmer, a Board-certified psychiatrist, in order to evaluate the current state of her employment-related emotional condition. The letter indicated that the examination was scheduled to take place at Dr. Dittmer's office in Salisbury, MD, on August 22, 2006 at 3:00 p.m.[2]

On August 30, 2006 an employee from QTC Medical Services stated, "The claimant arrived at Dr. Dittmer's office for appointment on August 22, 2006 but refused to stay for the appointment because Dr. Dittmer schedules [impartial medical examinations] for two hours and she stated that she had other appointments to attend."

In a August 30, 2006 notice, the Office advised appellant that it proposed to suspend her entitlement to compensation under 5 U.S.C. § 8123(d) because she failed to report for an examination on August 22, 2006 with Dr. Dittmer as directed by the Office. It informed appellant that if she had a valid reason for failing to submit or cooperate with the scheduled examination she should submit her reasons in writing within 14 days of the notice. The Office advised her that if she did not show good cause, her entitlement to compensation would be suspended until she attended and fully cooperated with the examination.

In an August 30, 2006 letter received by the Office on September 8, 2006, appellant's attorney stated:

> "Pursuant to your request, my client was scheduled to see Dr. Frederick Dittmer on August 22, 2006 at 3:00 p.m. My client arrived on time but was forced to wait 45 minutes while Dr. Dittmer reviewed her medical records. While waiting, she was advised that the appointment would last over two hours. She was not aware of this before the appointment and her husband had driven her to the appointment and had his own appointment to attend at 4:30 p.m. Therefore, the August 22, 2006 appointment was cancelled."

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[1] Appellant previously sustained employment injuries in April 1989 and November 1990 and nonwork-related vehicular accidents in July 1990 and April 1994.

[2] In a July 17, 2006 letter, the Office advised appellant that her entitlement to compensation would be suspended under 5 U.S.C. § 8123(d) if she refused to submit to or obstructed an examination that the Office directed her to attend. The Office stated, "Only legitimate, documented emergencies may be deemed as adequate grounds for not keeping the appointment. NO ONE, OTHER THAN OUR OFFICE, IS AUTHORIZED TO CHANGE THE SCHEDULED APPOINTMENT." (Emphasis in the original.)

In a September 13, 2006 decision, the Office suspended appellant's entitlement to compensation effective September 3, 2006 for failure to cooperate with the examination scheduled with Dr. Dittmer on August 22, 2006. The Office discussed appellant's response to the proposed notice of suspension but found that she did not show good cause for not undergoing the scheduled examination.

Appellant submitted an August 23, 2006 statement addressed to counsel in which she indicated that she and her husband arrived at Dr. Dittmer's office at 3:00 p.m. on August 22, 2006 but had to wait 45 minutes while Dr. Dittmer reviewed her case. She stated that, after inquiring what was taking so long, the receptionist advised her that the examination would take two hours. Appellant asserted that she was not previously advised that the examination would take two hours and that she had to leave because her husband, who drove her to the appointment, had his own appointment to attend at 4:30 p.m. in Ocean City, MD.[3] In letters dated October 12 and 28, 2006, counsel stated that appellant arrived on time on August 22, 2006 but had to wait 45 minutes while Dr. Dittmer reviewed her case. He indicated that appellant would have stayed for the August 22, 2006 examination if she had known that it would last two hours.

On November 28, 2006 appellant requested reconsideration of the Office's September 13, 2006 decision. In a December 8, 2006 decision, the Office denied her request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).[4]

LEGAL PRECEDENT -- ISSUE 1

Section 8123(a) of the Act[5] authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examinations as it deems necessary. The determination of the need for an examination, the type of examination, the choice of local and the choice of medical examiners are matters within the province and discretion of the Office. The only limitation on this authority is that of reasonableness.[6] Section 8123(d) of the Act provides that, "[i]f an employee refuses to submit to or obstructs an examination, his right to compensation is suspended until refusal or obstruction stops."[7] If an employee fails to appear for an examination, the Office must ask the employee to provide in writing an explanation for the failure within 14 days of the scheduled examination.[8]

[3] Appellant also submitted an undated statement which contained a similar account of the events of August 22, 2006.

[4] The Board notes that it appears that appellant's entitlement to compensation was reinstated effective October 24, 2006 after she attended an October 24, 2006 examination by Dr. Dittmer.

[5] 5 U.S.C. § 8123(a).

[6] *See Dorine Jenkins*, 32 ECAB 1502, 1505 (1981).

[7] 5 U.S.C. § 8123(d). *See* 20 C.F.R. § 10.323.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (April 1993).

ANALYSIS -- ISSUE 1

The Board has reviewed the evidence of record and notes that the record contains sufficient evidence to establish that appellant obstructed a medical examination on August 22, 2006 within the meaning of 5 U.S.C. § 8123(d). The Office properly advised appellant of the time and place of an appointment it had made for her to be examined by Dr. Dittmer, a Board-certified psychiatrist. Appellant appeared at Dr. Dittmer's office on August 22, 2006 but left before his examination could be performed.

Appellant, through her attorney, contends that her failure to stay for the appointment was justified. She asserted that she arrived on time but was forced to wait 45 minutes while Dr. Dittmer reviewed her medical records. While she was waiting, she was advised that the appointment would last over two hours. Appellant claimed that she was not made aware of the length of the examination before the appointment and indicated that the "appointment was cancelled" because her husband had driven her to Dr. Dittmer's office and had his own appointment to attend at 4:30 p.m.

The Board finds that the Office properly determined that appellant did not provide good cause for obstructing the August 22, 2006 examination with Dr. Dittmer. While it appears that the examination by Dr. Dittmer was to last about two hours, it would be reasonable for a person to anticipate that a medical examination might last for such a period. Given appellant's failure to make arrangements which would have allowed her to stay for the August 22, 2006 examination, it cannot be found that she presented good cause for obstructing the examination by leaving Dr. Dittmer's office before the examination was completed. Therefore, the Office properly suspended appellant's compensation under 5 U.S.C. § 8123(d).

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[9] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[10] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[11] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[12]

[9] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.606(b)(2).

[11] 20 C.F.R. § 10.607(a).

[12] 20 C.F.R. § 10.608(b).

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.[13]

ANALYSIS -- ISSUE 2

In support of her reconsideration claim, appellant submitted statements in which she explained why she did not stay for the August 22, 2006 examination. She asserted that she arrived on time but had to wait 45 minutes while Dr. Dittmer reviewed her case and that the receptionist advised her that the examination would take two hours. Appellant stated that she was not previously advised that the examination would take two hours and indicated that she had to leave because her husband, who drove her to the appointment, had his own appointment to attend at 4:30 p.m. In letters dated October 12 and 28, 2006, counsel provided a similar, albeit briefer, account of appellant's reasons for not staying for the examination.

The Board finds that the submission of this argument would not require reopening of appellant's claim because appellant previously submitted and the Office previously rejected a similar argument.[14] This similar argument was contained in a previously submitted August 30, 2006 letter of Mr. Baron.

Appellant has not established that the Office improperly denied her request for further review of the merits of its September 13, 2006 decision under section 8128(a) of the Act, because the evidence and argument she submitted did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that the Office properly suspended appellant's entitlement to compensation effective September 3, 2006 for obstruction of a scheduled medical examination. The Board further finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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

[14] *See supra* note 14 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 8 and September 13, 2006 decisions are affirmed.

Issued: December 19, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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