

while participating in weapons training at the Naval Base and Reserve Training Center. The Office accepted his claim for a lumbosacral sprain. On August 23, 2002 it accepted additional conditions of a cervical strain, thoracic strain, bilateral knee sprain, bilateral shoulder sprain and a left hip strain.¹

On July 27 and September 24, 2002, respectively, Dr. Philip Wirganowicz and Dr. Thomas D. Schmitz, Board-certified orthopedic surgeons and Office referral physicians, examined appellant and opined that he had no residuals from his May 14, 2002 accepted conditions.

On September 3, 2002 Dr. Fred Blackwell, an attending Board-certified orthopedic surgeon, stated that appellant still had residuals from his May 14, 2002 employment injury.

The Office found a conflict in the medical opinion evidence between Dr. Blackwell and the Office referral physicians and referred appellant, together with a statement of accepted facts, a list of questions and the case file, to Dr. John W. Batcheller, a Board-certified orthopedic surgeon, in order to resolve the conflict in the medical opinion evidence.

On February 3, 2003 Dr. Batcheller reviewed the medical history and provided findings on physical examination. He stated that appellant had no residual disability or medical condition causally related to his May 14, 2002 employment-related medical conditions.

By decision dated March 17, 2003, the Office terminated appellant's compensation on the grounds that the report of Dr. Batcheller established that he no longer had any residuals from his May 14, 2002 employment injury. On December 1, 2003 an Office hearing representative vacated the March 17, 2003 decision, finding that Dr. Batcheller's report was not based on a complete and accurate background because the Office had not provided him with relevant medical reports regarding appellant's other orthopedic claims. He remanded the case for the Office to obtain a supplemental report from Dr. Batcheller after providing him with medical records pertaining to earlier treatment of appellant's orthopedic conditions.

On December 16, 2003 the Office notified appellant that an Office hearing representative had directed that Dr. Batcheller rereview his case in conjunction with related orthopedic claims. It indicated that the case was reopened for medical treatment until Dr. Batcheller had submitted a supplemental report. On March 18, 2004 the Office asked Dr. Batcheller to reexamine appellant's case in light of a revised statement of accepted facts, which included information regarding appellant's related orthopedic claims and copies of medical reports regarding these claims.

By letter dated March 18, 2004, the Office advised appellant that it was necessary for him to be reexamined by Dr. Batcheller in order to properly resolve the conflict in the medical evidence. It notified him of an appointment with Dr. Batcheller scheduled for May 17, 2004. The Office advised appellant that, if he failed to keep the appointment and did not provide an

¹ Subsequent to appellant filing his claim in 2002, his employing establishment changed from the Department of Justice, Immigration and Naturalization Service to the Department of Homeland Security, Immigration and Customs Enforcement.

acceptable reason for not attending, his benefits would be suspended pursuant to section 8123(d) of the Federal Employees' Compensation Act.

On June 24, 2004 the Office issued a final decision suspending appellant's compensation benefits on the grounds that he failed to attend a directed medical examination. By letter dated July 6, 2004, appellant advised that he was making funeral arrangements for a relative between May 14 and 21, 2004. Consequently, he could not attend the medical appointment scheduled for May 17, 2004 with Dr. Batcheller. On March 23, 2005 the Office rescinded the June 24, 2004 suspension of appellant's compensation benefits, finding that he had shown good cause for his failure to attend the May 17, 2004 medical examination.

By letter dated October 18, 2005, the Office again referred appellant to Dr. Batcheller for an evaluation as to whether he had any residual disability or medical condition causally related to his May 14, 2002 employment injury. The Office advised him that the examination was scheduled for November 14, 2005 at 12:30 p.m. It advised appellant that his compensation benefits would be suspended if he missed the appointment and did not provide an acceptable reason. On June 6, 2006 Dr. Batcheller's office staff advised the Office that appellant cancelled the appointment and never rescheduled. On October 4, 2006 the Office proposed to suspend appellant's compensation benefits pursuant to section 8123(d) of the Act for failure to attend the examination scheduled with Dr. Batcheller for November 14, 2005, as directed in the October 18, 2005 Office letter.

On October 18, 2006 appellant stated that he did not attend the appointment with Dr. Batcheller on November 14, 2005 because section 8123(a) of the Act provided that the physician selected to resolve a medical conflict must not have been previously involved in the case. He stated that Dr. Batcheller had previously rendered a "negative" opinion against him. Appellant stated that he advised Dr. Batcheller's office staff that he did not plan to attend the appointment and understood that his staff would so advise the Office.

By decision dated November 3, 2006, the Office finalized its suspension of appellant's compensation benefits.

On November 29, 2006 appellant requested an oral hearing.

In a February 20, 2007 notice, the Office advised appellant that a hearing would be held in his case on March 22, 2007 at 2:15 p.m. at the Federal Building located at 450 Golden Gate Avenue, Room 7-5290, in San Francisco, California. The notice was sent to his address of record. Appellant did not appear for the hearing.

By decision dated April 9, 2007, the Office found that appellant abandoned his request for a hearing. It found that a hearing had been scheduled for March 22, 2007. Appellant failed to appear although a notice of the hearing had been sent to him 30 days in advance of the hearing. The Office further found that appellant did not contact the Office before or after the scheduled hearing to explain his failure to appear.

LEGAL PRECEDENT -- ISSUE 1

Section 8123 of the Act authorizes the Office to require an employee, who claims disability as a result of federal employment, to undergo a physical examination as it deems necessary.² 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 the Office.³ The Office's federal regulation at section 10.320 provides that a claimant must submit to examination by a qualified physician as often and at such times and places as the Office considers reasonably necessary.⁴ Section 8123(d) of the Act and section 10.323 of the Office's 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.⁵ Office procedures provide that, before the Office may invoke these provisions, the employee is to be afforded a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.⁶ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of the Act.⁷

ANALYSIS -- ISSUE 1

By letter dated October 18, 2005, the Office referred appellant to Dr. Batcheller for a second examination and evaluation as to whether he had any residual disability or medical condition causally related to his May 14, 2002 employment injury. The Office advised him that the examination was scheduled for November 14, 2005 at 12:30 p.m. It advised appellant that his compensation benefits would be suspended if he missed the appointment and did not provide an acceptable reason for failing to attend. On June 6, 2006 Dr. Batcheller's office staff advised the Office that appellant cancelled the November 14, 2005 appointment and never rescheduled. On October 4, 2006 the Office advised appellant that it proposed to suspend his compensation benefits, pursuant to section 8123(d) of the Act, for failure to attend the examination scheduled with Dr. Batcheller for November 14, 2005, as directed by the Office in its October 18, 2005 letter.

On October 18, 2006 appellant stated that he did not attend the appointment with Dr. Batcheller on November 14, 2005 because section 8123(a) of the Act provided that the physician selected to resolve a medical conflict must not have been previously involved in the case. He stated that Dr. Batcheller had previously rendered a "negative" opinion against him. Appellant stated that he advised Dr. Batcheller's office staff that he did not plan to attend the

² 5 U.S.C. § 8123.

³ See *Lynn C. Huber*, 54 ECAB 281 (2002).

⁴ 20 C.F.R. § 10.320.

⁵ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; see *Alfred R. Anderson*, 54 ECAB 179 (2002).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

⁷ *Id.*

appointment and understood the staff would so advise the Office. Appellant's stated explanation for failing to attend the second scheduled examination with Dr. Batcheller is not valid as a matter of law. The language of section 8123 of the Act does not require that a physician selected to resolve a medical conflict must not have been previously involved in the case. There is a relevant provision in the Code of Federal Regulations. In section 10.321(b) of the Office's regulations is language which states, in relevant part, that "[the Office] will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case."⁸ However, this requirement applies to the initial selection of a physician performing an impartial examination, not subsequent, additional examinations by the same physician to resolve a conflict of medical opinion.

In addition to the statute and the regulations, the Office's procedure manual provides that if the impartial specialist's report is vague, speculative, incomplete or unrationalized, it is the responsibility of the Office to secure a supplemental report from that physician to correct the defect in the original report. Only if the impartial specialist is unable or unwilling to provide a supplemental report, or if the supplemental report is also defective, will the Office arrange for an examination by a new impartial specialist.⁹

In this case, an Office hearing representative found that Dr. Batcheller's initial report was incomplete because the doctor had not been provided with relevant information regarding appellant's previous orthopedic claims. Under the circumstances in this case described above, the Office properly found that it was reasonably necessary for appellant to undergo a second examination by Dr. Batcheller. For the reasons discussed, appellant did not show good cause for his failure to attend the November 14, 2005 examination with Dr. Batcheller.¹⁰ Because appellant failed to attend the directed medical examination and did not provide good cause for the failure within 14 days of the Office's October 4, 2006 notice of proposed suspension, the Office properly suspended his compensation benefits as of November 3, 2006.

LEGAL PRECEDENT -- ISSUE 2

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of the Office. Section 8124(b)(1) provides as follows: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary [of Labor] under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."

⁸ 20 C.F.R. § 10.321(b).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(c)(2) (April 1993).

¹⁰ The Board notes that appellant did not object to the first follow-up evaluation by Dr. Batcheller which had been scheduled for May 17, 2004. His stated reason for not attending the second examination with Dr. Batcheller at that time was that he was making funeral arrangements for a relative.

With respect to abandonment of hearing requests, Chapter 2.1601.6.e of the Office's procedure manual provides in relevant part:

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. Under these circumstances, [the Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [district Office].”¹¹

ANALYSIS -- ISSUE 2

By decision dated November 3, 2006, the Office suspended appellant's compensation benefits. Appellant timely requested an oral hearing. In a February 20, 2007 letter, the Office notified appellant that an oral hearing was to be held on March 22, 2007. Appellant did not attend.¹² As noted, he was required to provide an explanation for his failure to appear within 10 days of the March 22, 2007 hearing. However, there is no evidence of record that appellant explained his failure to appear at the March 22, 2007 hearing within 10 days of the hearing date.

The evidence establishes that appellant did not request a postponement of the hearing, failed to appear at the hearing and failed to provide adequate explanation for his failure to appear within 10 days of the hearing date. The Board therefore finds that he abandoned his request for a hearing.

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation benefits effective November 3, 2006 for failure to attend a directed medical examination. The Board further finds that the Office properly determined that appellant abandoned his request for a hearing.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999); *see also G.J.*, 58 ECAB ___ (Docket No. 07-1028, issued August 16, 2007).

¹² The Board notes that, on appeal, appellant asserted that he failed to attend the scheduled hearing or timely request a postponement because he was traveling between February 22 and March 14, 2007. In his appeal letter, appellant did not explain why he could not attend the March 22, 2007 hearing in light of the fact that the return date for his trip was March 14, 2007. However, upon his return from his trip on March 14, 2007, he did not request a postponement of the March 22, 2007 hearing. Whatever their merit, appellant's explanations contained in his appeal letter were not before the Office and are not part of the record below. Therefore, the Board cannot consider those statements on appeal.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 9, 2007 and November 3, 2006 are affirmed.

Issued: December 6, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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