

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALD S. LEPRE and DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, Otisville, N.Y.

*Docket No. 96-2622; Submitted on the Record;
Issued September 22, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits for obstruction of a medical examination.

The Board has duly reviewed the case record and concludes that the Office properly suspended appellant's compensation benefits.

Section 8123(a) of the Federal Employees' Compensation 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...."¹

Section 8123(d) provides:

"If an employee refuses to submit to or obstructs an examination, [her] right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee."²

In the present case, the Office has accepted that appellant sustained a lumbosacral strain as a result of a November 17, 1993 employment injury. By letter dated June 30, 1995, in order to clarify the nature and extent of appellant's injury-related disability the Office referred

¹ 5 U.S.C. § 8123(a).

² *Id.* § 8123(d).

appellant for an examination by Dr. Matthew Berger, scheduled to take place on August 3, 1995. Appellant was properly advised that pursuant to 5 U.S.C. § 8123(d) if he refused or obstructed the examination his right to compensation would be suspended until the refusal or obstruction stopped. The notification was sent to appellant's address of record, to which all prior correspondence to date had been sent. Appellant did not report for the examination.

By letter dated August 14, 1995, the Office again advised appellant that pursuant to section 8123 of the Act, if an employee refused to submit to, or obstructed an examination, compensation would be suspended until the obstruction stopped. Appellant was requested to provide an explanation within 14 days as to why he did not keep his August 3, 1995 appointment to see Dr. Berger, and to indicate whether he was now willing to comply with the Office's request that he submit to a medical examination. No response was received from appellant.

In a decision dated September 18, 1995, the Office suspended appellant's compensation benefits for failure to comply pursuant to section 8123.

By letter dated September 27, 1995, appellant requested reconsideration of the Office's September 18, 1995 decision. Appellant submitted an attending physician's report, Form CA-20a, dated January 19, 1995, a Form CA-8 request for continuing compensation, several copies of correspondence from his congressman, and a return receipt for an item of mail signed for by appellant on March 30, 1995. Appellant indicated that he had not been properly notified by the Office of the scheduled medical evaluation and asked that all future correspondence be sent to him at a different address.

In a decision dated September 29, 1995, the Office found the arguments presented and the additional evidence submitted insufficient to warrant modification of the September 18, 1995 decision.

Subsequent to the Office's September 29, 1995 decision, appellant simultaneously requested reconsideration before the Office and filed an appeal with the Board, asserting in both instances that the Office did not have proper jurisdictional authority to suspend his compensation benefits. As the Board and the Office cannot have concurrent jurisdiction, the Office forwarded the record file to the Board without issuing a decision on appellant's request for reconsideration.³

Upon receiving information that appellant had failed to keep his scheduled appointment with Dr. Berger, the Office properly provided appellant the opportunity to present, within 14 days, his reasons in writing for failing to keep the scheduled appointment.⁴ Appellant did not respond to the Office's request. In his request for reconsideration following the Office's suspension of benefits, appellant asserted that he had not received notice of the scheduled evaluation. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.⁵ This presumption

³ *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings* 41 ECAB 880 (1990).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (April 1993).

⁵ *Clara T. Norga*, 46 ECAB____ (Docket No. 93-853, issued January 31, 1995); *Mike C. Geffre*, 44 ECAB

arises when it appears from the record that the notice was properly addressed and duly mailed. The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee. While in his request for reconsideration, appellant requested that all mail be sent to another address, prior to that time, the address of record was correctly used by the Office. As appellant has not provided any evidence to the contrary, it is presumed that he was duly notified of the scheduled appointment.

With respect to appellant's contention that the federal statutes applied by the Office are inapplicable to him as a citizen of the state of Pennsylvania, the Board has long recognized that it is not the proper forum to challenge the constitutionality of an act of Congress.⁶ Adjudication of the constitutionality of congressional enactments is beyond the jurisdiction of administrative agencies.⁷ Administrative agencies are entrusted to administer statutes and thus perform quasi-judicial duties by ascertaining facts and interpreting the law in carrying out the will of the legislature.⁸ It is a "judicial function," however, within the constraints of separation of powers, for the courts to exercise power to determine the constitutional legality of congressional enactments. The exercise of jurisdiction by the federal courts regarding constitutional issues is calculated to directly uphold and preserve the principle of separation of powers.

The Supreme Court has held that constitutional questions are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.⁹ The Supreme Court has noted that judging the constitutionality of an act of Congress is considered the gravest and most delicate duty that the federal court is called upon to perform.¹⁰ When constitutional questions are in issue, the availability of judicial review is presumed.¹¹

Congressional enactments are administered under a presumption of constitutionality, and the Board accepts the presumption of constitutionality of the suspension provisions found at 5 U.S.C. § 8123.

As appellant did not offer sufficient reasons for his refusal to cooperate with the second opinion examination, the Board finds that there is no justification in the record for his refusal to submit to the medical examination scheduled by the Office. The Board further finds that the Office was in compliance with its established procedures when it invoked the provision of

942 (1993).

⁶ *Christino Rodriguez*, 8 ECAB 428 (1955).

⁷ See *Johnson v. Robinson*, 415 U.S. 361 (1974) and cases cited therein.

⁸ See *Robinson v. United States*, 718 F.2d 336 (10th Cir. 1983).

⁹ *Califano v. Sanders*, 430 U.S. 99 (1977).

¹⁰ See *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985).

¹¹ *Supra* note 8.

5 U.S.C. § 8123(d), in suspending appellant's entitlement to compensation due to his refusal to cooperate with the medical evaluation as directed by the Office, and it did not abuse its discretion in this matter.

The decisions of the Office of Workers' Compensation Programs dated September 29 and September 18, 1995 are hereby affirmed.

Dated, Washington, D.C.
September 22, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member