

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT M. McCALLEN and U.S. POSTAL SERVICE,
POST OFFICE, Columbus, OH

*Docket No. 99-2085; Submitted on the Record;
Issued November 29, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits for refusing to submit to a medical examination that he was directed to undergo.

On March 22, 1996 appellant, then a 42-year-old letter carrier, injured his right knee when he slipped on ice. Appellant worked intermittently after the injury under light-duty restrictions. Medical evidence indicated that knee surgery was recommended.

On September 6, 1996 the Office authorized the performance of arthroscopic surgery with debridement, meniscectomy, chondroplasty and ACL reconstruction. On October 21, 1996 Dr. Timothy P. Duffey, an osteopath, performed arthroscopically assisted ACL reconstruction of the right knee and chondroplasty and debridement. The postoperative diagnosis was ACL tear and right torn medial meniscus.

Thereafter, appellant submitted several CA-8 forms dating from October 26, 1996 through April 20, 1997 along with various medical records documenting appellant's recovery from surgery and the development of chronic patellar tendonitis.

On July 26, 1997 appellant submitted a claim for a schedule award. The Office referred appellant to Dr. Ronald Vargo, an osteopath, for an evaluation of the extent of any permanent impairment arising from his accepted employment injury in accordance with the American Medical Association, (A.M.A., *Guides to the Evaluation of Permanent Impairment*, (fourth edition 1993)). The Office did not process appellant's claim because appellant was not at maximum medical improvement at this time. Dr. Duffey continued submitting status reports.

In a letter dated June 30, 1998, the Office informed appellant that at this time he may be entitled to a schedule award or permanent impairment of the right knee due to the work-related injury. The Office requested that appellant submit a comprehensive medical narrative from his

attending physician, including the date of maximum medical improvement as well as objective physical findings. Appellant did not respond to this request.

In a letter dated August 12, 1998, the Office referred appellant for a second opinion evaluation with Dr. John W. McGrail, a Board-certified orthopedic surgeon. The Office scheduled the appointment for August 25, 1998 at 9:45 a.m. and informed appellant of the penalty for refusing to submit to the examination. The letter was sent to appellant's address of record.

On August 28, 1998 the Office was advised by Dr. McGrail's office that appellant failed to keep the scheduled appointment.

By letter dated September 4, 1998, the Office provided appellant with the opportunity to present his reasons in writing for failing to keep the scheduled appointment. Appellant was informed that if no response and/or valid reason was received within 15 days from the date of this letter, his right to any future compensation would be suspended and his claim denied until the refusal and/or obstruction ceased. The Office received no response from appellant.

By decision dated October 1, 1998, the Office suspended appellant's entitlement to compensation under 5 U.S.C. § 8123(d) based on his failure to attend the scheduled appointment with Dr. McGrail.

The Board finds that appellant's failure to keep the scheduled appointment constituted a refusal to submit, without good cause, to a medical examination that was reasonably required.¹

Section 8123(a) of the Federal Employees' Compensation Act authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examinations as it deems necessary.² The determination of the need for an examination, the type of examination, the choice of the locale and the choice of medical examiners are matters within the discretion of the Office. The only limitation on this authority is that of reasonableness.³ Section 8123(d) of the Act provides: "[I]f an employee refuses to submit to or obstructs an examination, his right to compensation is suspended until the refusal or obstruction stops."⁴ If an employee fails to appear for an examination, the Office must request the employee to provide in writing an explanation for the failure within 14 days of the scheduled examination.⁵

The Board has held that 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

¹ *Larry B. Guillory*, 45 ECAB 522 (1994).

² 5 U.S.C. § 8123(a).

³ *See Eva M. Morgan*, 47 ECAB 400 (1996); *Dorine Jenkins*, 32 ECAB 1502 (1981).

⁴ 5 U.S.C. § 8123(d).

⁵ *Donald E. Ewals*, 51 ECAB __ (Docket No. 98-2180, issued April 3, 2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing, Evaluating Medical Evidence*, Chapter 2.810.14(d) (November 1998).

employee failed to submit to or obstructed a medical examination.⁶ In the present case, the Office properly scheduled appellant for an examination with Dr. McGrail to evaluate his permanent impairment. The date and time for the second opinion evaluation with Dr. McGrail was set, as it was reasonable for the Office to refer appellant to Dr. McGrail under these circumstances and appellant was duly advised of the scheduled appointment and failed to appear for medical evaluation. Consistent with its procedures,⁷ the Office, on September 4, 1998 requested that appellant explain within 15 days the reason why he failed to appear for the scheduled examination. The only remaining issue is whether appellant presented an acceptable excuse or reason for his failure to appear.

The Office advised appellant 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. The Office did not receive any response from appellant. Consequently, appellant has not shown good cause for his failure to appear and the Office properly suspended appellant's compensation benefits. Suspension shall continue until appellant makes himself available for an evaluation as directed by the Office, with regard to his claim for a schedule award.⁸

⁶ *Margaret M. Gilmore*, 47 ECAB 718 (1996).

⁷ The Office's Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (11-98) provides:

"Failure to Appear. If the claimant does not report 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."

⁸ On appeal, appellant stated that he never received the Office's August 12, 1998 letter referring him to Dr. McGrail. The record supports that the Office's August 12, 1998 referral letter was sent to appellant at the address of record and does not indicate that it was returned as undeliverable. Under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. *A.C. Clyburn*, 47 ECAB 153 (1995).

The October 1, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 29, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member