

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS E. ARMSTRONG and DEPARTMENT OF THE ARMY,
U.S. ARMY MATERIEL COMMAND, Chambersburg, PA

*Docket No. 00-833; Submitted on the Record;
Issued January 5, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's entitlement to compensation in accordance with 5 U.S.C. § 8123(d) of the Federal Employees' Compensation Act.

On June 16, 1999 appellant filed an occupational disease claim alleging that he had been exposed to asbestos since June 1975 due to factors of his federal employment. Appellant did not stop work as a result of the claimed condition.

By letter dated June 24, 1999, the Office requested additional information from appellant regarding his CA-2 claim and appellant thereafter submitted factual and medical evidence.

By letter dated September 1, 1999, the Office referred appellant for a medical evaluation with Frederick ME Pulmonary Associates scheduled for September 15, 1999, in order to clarify the cause and extent of his injury-related impairment. In a second letter of the same date, the Office advised appellant that, if he either failed to appear for the scheduled examination or otherwise refused to submit thereto, his right to compensation would be suspended, pursuant to 5 U.S.C. § 8123(d), until the refusal or obstruction ceased.

In a September 7, 1999 letter received by the Office on September 15, 1999, appellant advised that he would not be able to keep the September 15, 1999 appointment and requested that it be rescheduled. In a letter faxed to the Office on September 16, 1999, the Office was notified by the medical facility that appellant failed to keep his appointment the day prior.

By letter dated September 22, 1999, the Office informed appellant that it had rescheduled his appointment with Frederick ME Pulmonary Associates for October 14, 1999. In a letter faxed to the Office on October 14, 1999, the Office was notified by the medical facility that appellant failed to keep the rescheduled appointment that day "for second time."

By decision dated November 5, 1999, the Office suspended appellant's claim for compensation in accordance with 5 U.S.C. § 8123(d) of the Act. The Office explained that appellant did not establish good cause for refusing to submit to or obstructing the examination as required by the Office.

The Board finds that the Office improperly suspended appellant's eligibility to compensation in accordance with 5 U.S.C. § 8123(d).

Section 8123(a) 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...."¹

Section 8123(d) 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. 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

Additionally, 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 date on which the claimant agrees to attend the examination."³

The Office's September 1, 1999 letter referring appellant for a medical evaluation scheduled for September 15, 1999 advised him that, pursuant to 5 U.S.C. § 8123(d), if he refused to submit to or obstructed the examination, his right to compensation would be suspended until the refusal or obstruction stopped. As previously noted, appellant notified the Office by a September 7, 1999 letter received September 15, 1999 that he was unable to keep the September 15, 1999 appointment and asked that it be rescheduled. Appellant failed to appear for the appointment rescheduled with Frederick ME Pulmonary Associates for October 14, 1999, and as a result, the Office issued a November 5, 1999 decision suspending his claim for compensation benefits.

¹ 5 U.S.C. § 8123(a).

² 5 U.S.C. § 8123(d).

³ Federal (FECA) Procedure Manual, Part 2 -- *Claims, Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (November 1998).

The Office suspended appellant's entitlement to compensation based on his failure to keep the scheduled appointments arranged with Frederick ME Pulmonary Associates. Although the record reflects that appellant advised the Office in a letter received September 15, 1999 that he was unable to keep the September 15, 1999 appointment, and requested that the appointment be rescheduled, the Office's November 5, 1999 decision makes no mention of appellant's letter. Notwithstanding, the Board notes that appellant did fail to keep the rescheduled appointment of October 14, 1999, however, the Office did not allow appellant to set forth his reasons for failing to appear. The record does not contain a notice from the Office advising appellant that he had 14 days within which to provide an explanation for failing to keep the October 14, 1999 appointment. As stated above, section 8123(d) of the Act provides 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. However, before the Office may invoke this provision, the employee is provided a period of 14 days within which to present, in writing, his or her reasons for the refusal or obstruction. Accordingly, the Office erred in suspending appellant's compensation, without providing appellant the opportunity to set forth reasons for failing to keep the October 14, 1999 appointment.

The November 5, 1999 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
January 5, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Valerie D. Evans-Harrell
Alternate Member