

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARNICE ROGERS and DEPARTMENT OF THE ARMY,
PINE BLUFF ARSENAL, Pine Bluff, AR

*Docket No. 99-1694; Submitted on the Record;
Issued January 22, 2001*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly suspended appellant's compensation effective September 13, 1998 on the grounds that he failed to attend a scheduled medical examination; (2) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124; and (3) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On March 3, 1986 appellant, then a 29-year-old protective and safety equipment repairer, sustained contusions to his left arm, right knee and back and a bulging disc at L5-S1 in the performance of duty.

By decision dated August 22, 1995, the Office terminated appellant's compensation on the grounds that he had no further condition or disability causally related to his March 30, 1986 employment injury. In a decision dated August 16, 1996, a hearing representative set aside the Office's August 22, 1995 termination and remanded the case for resolution of a conflict in medical opinion. The hearing representative also instructed the Office to further develop the issue of whether appellant sustained a shoulder condition causally related to his employment injury.

Following further development of the evidence, by decision dated September 23, 1997, the Office terminated appellant's compensation effective October 12, 1997 on the grounds that he had no continuing disability causally related to his March 1986 employment injury.

On October 22, 1997 the Office referred appellant to Dr. Thomas Rooney, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding whether he had an employment-related shoulder condition and, if so, whether he required surgery on his shoulder.

In a letter dated October 10, 1997, appellant, through his representative, requested a hearing before an Office hearing representative. Appellant's representative questioned why the

second opinion evaluation had been scheduled following the termination of benefits. Appellant did not attend the scheduled appointment.

By decision dated March 5, 1998, a hearing representative reversed the Office's September 23, 1997 termination after finding the continued existence of a conflict in medical opinion. The hearing representative found that, prior to referring appellant for an impartial medical examination, the Office should refer him for a second opinion evaluation regarding the cause of his shoulder condition and the necessity of surgery.

On April 2, 1998 the Office referred appellant to Dr. Rooney for a second opinion evaluation regarding his shoulder condition. The Office scheduled the appointment for April 15, 1998. By letter dated April 16, 1998, the Office noted that appellant had not kept his appointment with Dr. Rooney and provided him 14 days within which to provide an acceptable reason for not keeping the appointment. In a letter received by the Office on May 7, 1998, appellant related that he had been unable to attend the appointment due to the death of his wife's father. The Office rescheduled appellant's appointment for May 20, 1998. Appellant attended the May 20, 1998 evaluation by Dr. Rooney.

By letter dated June 23, 1998, the Office referred appellant to Dr. Joe Schooler, an orthopedic surgeon, for an impartial medical examination on July 9, 1998. In a report of a telephone call dated July 9, 1998, an employee with Dr. Schooler's office informed the Office that appellant had not attended his scheduled appointment and provided as a reason that he did not have transportation. The employee informed the Office that appellant had been rescheduled for August 3, 1998 but had not definitely indicated that he would attend the appointment.

By letter dated July 9, 1998, the Office provided appellant with the opportunity to present his reasons in writing for failing to keep the scheduled appointment with Dr. Schooler on July 9, 1998. The Office informed appellant that, if no response or valid reason was received within 15 days from the date of this letter, his right to any future compensation would be suspended until his refusal or obstruction ceased. The Office further noted that Dr. Schooler had rescheduled an appointment for appellant on August 3, 1998 and that "[f]ailure to keep this appointment without acceptable reasons will result in suspension of compensation."

The Office received no response from appellant and appellant did not keep the August 3, 1998 appointment with Dr. Schooler. By decision dated September 1, 1998, the Office suspended appellant's entitlement to compensation until his refusal or obstruction stopped.

Appellant sent a letter dated September 25, 1998, postmarked October 5, 1998, to the Branch of Hearings and Review contending that his compensation should not have been suspended. By decision dated December 14, 1998, the Office denied appellant's request for a hearing as untimely. In a letter dated January 5, 1999, appellant requested reconsideration. By decision dated February 2, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was immaterial and thus insufficient to warrant review of the prior merit decision.

The Board finds that the Office properly suspended appellant's compensation effective September 13, 1998 on the grounds that he failed to attend a scheduled medical examination.

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

The Board has held that a time must be set for medical examinations 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 employee failed to submit to or obstructed a medical examination.² In this case, the Office set the time for the impartial medical evaluation with Dr. Schooler and duly advised appellant of the scheduled appointment. Appellant, however, failed to appear for medical evaluation. Dr. Schooler's office rescheduled the appointment with appellant; however, he again failed to show up for the appointment. The only remaining issue is whether appellant presented an acceptable excuse or reason for his failure to appear. In this regard, the Office's Federal (FECA) Procedure Manual provides:

“*Failure to Appear.* If the claimant does not report [for the] scheduled appointment, he or she should be ask in writing to provide an explanation within 14 days. If good causes not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d) until the claimant reports for examination.”³

Following notice that appellant failed to appear for examination by Dr. Schooler, the Office, in a July 9, 1998 letter, allowed him 14 days to explain why he failed to keep the July 9, 1998 appointment, and advised him that he did not respond or his reasons were found unacceptable, or if he did not keep his rescheduled appointment on August 3, 1998, 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. The Office considered appellant's statement to Dr. Schooler's office that he did not have transportation to the appointment but properly found that this argument was not acceptable as appellant had been informed that the Office would pay for any reasonably necessary expenses. The Board therefore 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.⁴

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

¹ 5 U.S.C. § 8123(a).

² *Margaret M. Gilmore*, 47 ECAB 718 (1996).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (April 1993).

⁴ *Larry B. Guillory*, 45 ECAB 522 (1994).

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁵ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁶

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,⁷ when the request is made after the 30-day period established for requesting a hearing,⁸ or when the request is for a second hearing on the same issue.⁹ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.¹⁰

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated September 1, 1998 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter dated September 25, 1998 and postmarked October 5, 1996. Hence, the Office was correct in stating in its December 14, 1998 decision that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's September 1, 1998 decision as determined by the date of the postmark of the request.¹¹

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its December 14, 1998 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by appellant requesting reconsideration and submitting additional evidence to establish that he was entitled to further compensation payments. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown

⁵ 5 U.S.C. § 8124(b)(1).

⁶ *Frederick D. Richardson*, 45 ECAB 454 (1994).

⁷ *Rudolph Bermann*, 26 ECAB 354 (1975).

⁸ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁹ *Johnny S. Henderson*, 34 ECAB 216 (1982).

¹⁰ *Sandra F. Powell*, 45 ECAB 877 (1994).

¹¹ *William E. Seare*, 47 ECAB 663 (1996).

through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.¹² In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The Board further finds that the Office abused its discretion in denying appellant's request for reconsideration under section 8128.

Section 10.606 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹³ Section 10.608 provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without review of the merits of the claim.¹⁴

Appellant argued that he did not have the financial means or transportation to attend the appointment with Dr. Schooler. As the Office previously considered this argument, it is repetitive in nature and therefore not sufficient to warrant a merit review of the case.

Appellant also contended that Dr. Rooney's report should have been sufficient for the Office to resolve the conflict in medical opinion. Appellant further argued that it was inappropriate for the Office to arrange an appointment for him with a physician in Fort Worth, Texas when he lived in Pine Bluff, Arkansas. The Office has not previously considered appellant's contentions, which are relevant to the issue of whether he has an acceptable reason for failing to keep his appointment with Dr. Schooler. The Board has held that the requirement for reopening a claim for merit review does not include the necessity to submit all evidence which may be necessary to discharge an appellant's burden of proof. Instead, the requirement pertaining to the submission of evidence or new legal argument in support of reconsideration only specifies that the evidence or new legal argument be relevant and pertinent and not previously considered by the Office.¹⁵ If the Office should determine that the new evidence or legal argument lacks probative value, it may deny modification of the prior decision.¹⁶

In view of the foregoing, the case shall be remanded to the Office to conduct any further development as it deems necessary and to issue a *de novo* decision on the merits of the case.

¹² *Daniel J. Perea*, 42 ECAB 214 (1990).

¹³ 20 C.F.R. § 10.606(b)(2).

¹⁴ 20 C.F.R. § 10.608(b).

¹⁵ *Amrit P. Kaur*, 40 ECAB 848 (1989).

¹⁶ *Dennis J. Lasanen*, 41 ECAB 933 (1990).

The decision of the Office of Workers' Compensation Programs dated February 2, 1999 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board. The decisions of the Office dated December 14 and September 1, 1998 are hereby affirmed.

Dated, Washington, DC
January 22, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member