United States Department of Labor
Employees' Compensation Appeals Board

DANA D. HUDSON, Appellant	)	
and	)	**Docket No. 05-300**
	)	**Issued: January 9, 2006**
U.S. POSTAL SERVICE, POST OFFICE, San Francisco, CA, Employer	)	

Appearances:
Dana D. Hudson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 15, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 17, 2004, affirming an Office decision suspending her right to compensation for obstructing a medical examination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether the Office properly suspended appellant's compensation benefits effective November 4, 2003 based on her obstruction of a medical examination.

FACTUAL HISTORY

On August 12, 1988 appellant, then a 30-year-old letter carrier, filed a traumatic injury claim alleging that on August 5, 1988 she was lifting flats of mail and strained her right knee.[1] Appellant's claim was accepted for right knee sprain and low back strain. The Office authorized a right knee arthroscopy, synovectomy, patella and a femoral chondral replacement. Appellant worked intermittently until January 2001 and then stopped.

Appellant came under the treatment of Dr. David Wren, Jr., a Board-certified orthopedic surgeon. On June 12, 1991 he performed a right knee arthrotomy with patellofemoral condylar groove implant arthroplasty, synovectomy and realignment. He diagnosed severe right knee patellofemoral arthritis and synovitis and malalignment of the patella.

On April 16, 1993 appellant was offered and accepted a position as a modified letter carrier for four hours per day effective May 3, 1993. In a decision dated August 3, 1993, the Office determined that appellant had been reemployed as a modified carrier with actual wages of $493.89 per week effective May 3, 1993. The Office advised that appellant had been employed over 60 days and determined that her actual earnings fairly and reasonably represented her wage-earning capacity.

Appellant filed a claim for a schedule award for her right knee and, on November 26, 1993, the Office granted an award for 46 percent permanent impairment of the right lower extremity. On November 16, 1999 appellant filed a claim for schedule award for her left knee. On September 13, 2000 the Office granted appellant an award of 20 percent permanent impairment of the left lower extremity.

On January 29, 2001 Dr. Wren noted that he performed a right knee arthroscopy with arthroscopic partial medial meniscectomy, synovectomy, femoral chondroplasty, right knee arthroscopy with completion of the synovectomy and revision and replacement of the patellofemoral implants. He diagnosed loosening of the patellofemoral implants, extensive reactive synovitis, Grade 2 chondromalacia of the medial and lateral femoral condyles and torn medial meniscus. He determined that appellant was totally disabled and appellant stopped work. Dr. Wren noted that appellant's symptoms and pain in the right knee worsened and he recommended a total right knee replacement. In an operative report dated May 15, 2002, Dr. Wren noted removing the patellofemoral implants and converting the right total knee using a posterior stabilized cemented femoral component. He diagnosed failed right knee patellofemoral arthroplasty and severe knee arthritis and tenosynovitis. Dr. Wren noted postoperative symptoms of right knee fibrous ankylosis and flexion contractures and on October 9, 2002 performed a closed manipulation and percutaneous quadriceps tenotomy to help lyse the adhesions. In reports dated October 24 to December 30, 2002, Dr. Wren advised that both knees were symptomatic with limited range of motion and extension. He recommended a total knee

[1] On September 15, 1983 appellant filed a claim for a traumatic injury to her left knee, which occurred on September 9, 1993, claim number A13-717265. The claim was accepted for contusion of the left knee. On November 14, 1993 appellant filed an occupational disease claim for an aggravation of her left knee condition, claim number A13-1029454. The claim was accepted for aggravation degenerative medial meniscus of the left knee. These claims were consolidated with the current claim before the Board.

revision. On May 7, 2003 the physician performed a right knee arthrotomy, excision of extensive scar fibrosis, removal and replacement of the femoral and tibial implants. Dr. Wren diagnosed failed right total knee, extensive scar fibrosis from fibrous ankylosis of the right knee.

In a letter dated August 20, 2003, appellant advised the Office that she was dissatisfied with the treatment offered by Dr. Wren and requested a change in physicians. She alleged that there were inaccuracies in his reports and that he violated her right to privacy. In a letter of the same date, appellant also expressed dissatisfaction with her assigned medical case manager, nurse Nina Balassone and requested that she be removed from her case.

In a letter dated September 17, 2003, the Office advised appellant that Ms. Balassone had been removed from her case. The Office also notified appellant that she would receive a letter referring her for a second opinion examination.

On September 23, 2003 the Office referred appellant, together with a statement of accepted facts and the case record, for a second opinion evaluation to obtain an assessment of her work-related condition. The Office advised appellant that the appointment was scheduled for October 16, 2003 with Dr. Thomas Schmitz, a Board-certified orthopedic surgeon. The Office informed appellant of her responsibility to attend the appointment and that if she failed to do so without an acceptable reason, her compensation benefits could be suspended in accordance with section 8123(d) of the Federal Employees' Compensation Act.[2]

In a letter dated October 17, 2003, Dr. Schmitz noted that appellant presented for the examination on October 16, 2003 accompanied by a person with a video recorder and advised that she would be recording the entire session. He indicated that appellant shouted and complained that she would not put up with any "underhanded stuff" and stated: "I am not refusing treatment, but I think in view of the adversarial nature of being videotaped and getting a tape recording just to examine a patient to see whether there is anything we can do to help her, that life is too short for that." Dr. Schmitz did not perform the examination.

By letter dated October 20, 2003, mailed to appellant's address of record, the Office proposed to suspend her compensation benefits on the grounds that she refused to cooperate with the medical examination scheduled for October 16, 2003. The Office allowed appellant 14 days to provide good cause for her failure to submit or cooperate with the second opinion examination and informed her of the penalty provision of section 8123(d) of the Act.

On October 24, 2003 the Office referred appellant to another second opinion evaluation to obtain an assessment of her work-related condition. The Office advised appellant that the appointment was scheduled for November 17, 2003, with Dr. John R. Chu, a Board-certified orthopedic surgeon. The Office informed appellant of her responsibility to attend the appointment and that if she failed to do so without an acceptable reason, her compensation benefits could be suspended in accordance with section 8123(d) of the Act.[3]

[2] 5 U.S.C. § 8123(d).

[3] *Id*.

By letter dated October 17, 2003 and received on November 4, 2003, appellant responded to the Office advising that Dr. Schmitz did not ask her to provide photograph identification or forms pertaining to patient consent, notice of privacy practice or patient rights. She indicated that Dr. Schmitz refused to perform the evaluation because of the presence of an impartial witness to document the care. Appellant indicated that she requested a witness during the examination to protect her rights as she felt that she was the victim of incidents of "unprofessional conduct, incompetent care, coercion and false reports."

By decision dated November 10, 2003, the Office suspended appellant's compensation, finding that she failed to attend and fully cooperate in the medical examination scheduled for October 16, 2003 and did not establish good cause for refusing to submit to the examination. The suspension was effective November 4, 2003.[4]

By facsimile dated December 1, 2003, appellant requested that the second opinion examination be rescheduled and indicated that her attorney would accompany her to the appointment. In a facsimile dated December 2, 2003, appellant noted that she received a telephone call from Dr. Schmitz' office attempting to reschedule the second opinion examination for December 3, 2003. Appellant advised that she could not confirm the appointment because she had a conflicting medical appointment on that date. On December 4, 2003 appellant requested an oral hearing before an Office hearing representative.

In a letter dated December 12, 2003, the Office advised appellant that the Act allows the presence of a treating physician as an observer during a second opinion examination with the prior agreement of the second opinion examiner and any fee charged by the treating physician would be her responsibility. However, an observing physician could not speak or interfere in any way with the second opinion examiner. The Office advised that appellant could be accompanied to the examination by her attorney; however, the attorney could not be present in the examination room and could not speak, converse or interfere in any way with the second opinion examiner. The Office noted that it was unclear whether appellant wanted the Office to reschedule the second opinion examination due to the conflicting letters of December 1 and 2, 2003. Appellant could either reschedule the appointment herself or advise the Office to reschedule it for her.

In a letter dated December 16, 2003, appellant requested that the Office reschedule the second opinion examination and advised that her attorney would accompany her to the appointment due to the "conflict of interest." Appellant advised that she did not want the appointment rescheduled with either Dr. Schmitz or Dr. Chu. On December 31, 2003 appellant withdrew her consent for authorization and release of information to the nurse intervention program. On March 10, 2004 appellant requested the rescheduling of the examination and advised that her attorney would accompany her to the examination and she did not want the appointment scheduled with either Dr. Schmitz or Dr. Chu because of a conflict of interest.

[4] On November 19, 2003 Dr. Chu telephoned the Office and indicated that appellant showed up for her 8:40 a.m. appointment at 11:00 a.m. and was angry and uncooperative. He further advised that appellant wanted to videotape the session. Appellant informed Dr. Chu that she was not comfortable having the examination and left the office. In a report dated November 20, 2003, Dr. Chu advised that appellant did not keep the scheduled appointment on November 17, 2003.

An oral hearing was held on July 4, 2004. At the hearing appellant testified that she sustained several work-related injuries to her knees and alleged that physicians had provided false reports relating to her condition. She contended that she had been denied her right to freedom of speech and that her right to privacy had been violated. Appellant refused to submit to the examination with Dr. Schmitz because of false claims regarding her left knee, that she felt as though she was coerced by Dr. Wren's assistant and was insulted that he recommended she seek treatment from a psychologist.

Appellant submitted various duplicative medical records and operative reports from 2001 to 2003. Appellant also submitted revised nurse closure reports from May to June 2003. A revised report was also submitted from Dr. Schmitz in which certain language in his October 17, 2003 report was revised.

By a decision dated September 17, 2004, the hearing representative affirmed the November 10, 2003 decision.

LEGAL PRECEDENT

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.[5] 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.[6] 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 time and places as the Office considers reasonably necessary.[7] Section 8123(d) of the Act and section 10.323 of the Office's regulation provide that, if an employee refuses to submit to or obstructs a directed medical examination, his or her compensation is suspended until the refusal or obstruction ceases.[8] However, before the Office may invoke these provisions, the employee is provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.[9] 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.[10]

[5] 5 U.S.C. § 8123(a).

[6] *James C. Talbert*, 42 ECAB 974, 976 (1991).

[7] 20 C.F.R. § 10.320.

[8] 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

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

[10] *Id.*; *see Scott R. Walsh*, 56 ECAB ___ (Docket No. 04-1962, issued February 18, 2005); *Raymond C. Dickinson*, 48 ECAB 646 (1997).

ANALYSIS

The Board has reviewed the evidence of record and finds that the record establishes that appellant obstructed the October 16, 2003 second opinion examination with Dr. Schmitz within the meaning of section 8123 of the Act.[11]

The Office directed appellant to attend a second opinion evaluation with Dr. Schmitz, a Board-certified orthopedic surgeon. The Office properly determined that it required an assessment of appellant's work-related condition, in light of her stated dissatisfaction with her treating physician, Dr. Wren, and her request that the Office allow her to change physicians. On September 23, 2003 the Office referred her to Dr. Schmitz for a second opinion evaluation. The Office advised appellant that the examination was scheduled for October 16, 2003 at 10:20 a.m. and instructed her to attend the examination. The Office further advised appellant that her compensation could be suspended if she refused or obstructed the examination. The Office was notified by Dr. Schmitz, in an October 17, 2003 letter, that appellant presented for her examination with a friend who had a video recorder and advised that she would be recording the examination. He indicated that appellant shouted and complained that she would not put up with any "underhanded stuff." Dr. Schmitz declined to examine appellant.

In a letter dated October 20, 2003, the Office afforded appellant 14 days to provide a good cause for her failure to cooperate with the second opinion examination. In a letter dated October 17, 2003, appellant advised that Dr. Schmitz did not ask her to provide photograph identification or forms pertaining to patient consent, notice of privacy practice or patient rights, rather she was given a patient questionnaire. She indicated that Dr. Schmitz refused to perform the evaluation because of the presence of two impartial witnesses and a person to document the care.[12]

The Board has recognized the Office's responsibility in developing claims.[13] Section 8123 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. 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. The Office clearly acted within his discretion in referring appellant for a second opinion examination to assess appellant's work-related injury and appellant's stated reasons for not cooperating with the examination do not establish good cause.

Under section 8123(a) appellant has the right to have another physician present during a second opinion examination directed by the Office.[14] As noted above, section 10.320 of the regulations state that a claimant is not entitled to have anyone present during the examination

[11] 5 U.S.C. § 8123(a).

[12] The Board notes that correspondence from Dr. Schmitz dated October 17, 2003 noted that appellant presented for the examination on October 16, 2003 with one person with a video recorder.

[13] *See Scott R. Walsh, supra* note 10.

[14] 5 U.S.C. § 8123(a).

other than a qualified physician unless the Office decides exceptional circumstances exist.[15] Appellant did not make any showing that exceptional circumstances existed requiring an unidentified witness. Appellant's associate had no right to be present during Dr. Schmitz' examination and her failure to cooperate with an examination by Dr. Schmitz constitutes an obstruction of the examination. With regard to Dr. Schmitz failing to provide appellant with patient consent, notice of privacy practice or patient rights, the Board notes that there is no basis under the Act,[16] or the Office's regulations for refusing to submit to an examination because a physician does not provide this information. Appellant has not provided a valid reason for refusing to cooperate in the second opinion evaluation by Dr. Schmitz.

After the Office's November 10, 2003 decision suspending her compensation, appellant asserted that she refused to submit to the examination with Dr. Schmitz because there were false claims and inaccuracies in the medical records regarding her left knee. The Board has reviewed the evidence and finds that these assertions are without merit. Appellant did not submit any probative evidence establishing any irregularities in the record or otherwise show how these allegations, even if accepted as true, would rise to the level of good cause for refusing to cooperate in the second opinion evaluation by Dr. Schmitz.

Appellant further advised that she would submit to a second opinion examination as long as it was not with Dr. Schmitz or Dr. Chu. However, as noted above, 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.[17] The only limitation on this authority is that of reasonableness.[18] The referral to an appropriate specialist in appellant's area at the Office's expense was not unreasonable. Other than her unsupported assertions, there is no evidence establishing that the Office's referral in this case was unreasonable. Appellant failed to provide sufficient justification for her refusal to cooperate with the second opinion examination. The Board concludes that appellant has not shown good cause for her refusal to cooperate with the second opinion examination. The Office properly determined that appellant refused to submit to a properly scheduled medical examination and suspended her right to compensation benefits.

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation benefits effective November 4, 2003, based on her obstruction of the medical examination scheduled for October 16, 2003.

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[15] *See* 20 C.F.R. § 10.320; *see also Ida L. Townsen*, 45 ECAB 750 (1994) (where the Board found that under section 5 U.S.C. § 8123(a) a claimant has the right to have another physician present during a second opinion examination directed by the Office; however, a claimant does not have the right to have a family member or her representative participate in the second opinion examination).

[16] 5 U.S.C. § 8123(a) and (d).

[17] *Donald E. Ewals*, 51 ECAB 428 (2000); *see also Scott R. Walsh, supra* note 10 (where the Board found that the choice of medical examiners is within the province and discretion of the Office).

[18] *See id.*

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 9, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board