United States Department of Labor
Employees' Compensation Appeals Board

SANDRA J. LITES, Appellant	)	
and	)	**Docket No. 06-590**
	)	**Issued: May 5, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Broadview, IL, Employer	)	

Appearances:
Sandra J. Lites, 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 January 20, 2006 appellant filed a timely appeal from the October 12, 2005 merit decision of the Office of Workers' Compensation Programs, which suspended her compensation for failing to report for a scheduled medical appointment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the suspension issue.

ISSUE

The issue is whether the Office properly suspended appellant's compensation under 5 U.S.C. § 8123(d) for failing to report for a scheduled medical appointment.

FACTUAL HISTORY

On May 14, 2002 appellant, then a 57-year-old clerk, filed a claim alleging that her trigger finger was a result of her federal employment. The Office accepted her claim for left thumb trigger finger and osteoarthritis and authorized a surgical release. She received compensation for intermittent periods of disability.

On February 17, 2004 the Office issued a schedule award for a one percent permanent impairment of appellant's left upper extremity. In a decision dated November 9, 2004, however, an Office hearing representative found that subsequently submitted medical evidence created a conflict warranting referral to an impartial medical specialist.[1] The hearing representative directed the Office to prepare a statement of accepted facts and to refer appellant to an impartial Board-certified orthopedist for an opinion and determination of the permanent impairment resulting from appellant's employment-related condition.

On April 22, 2005 the Office notified appellant that she was being referred to a "Second Opinion Specialist" to determine the permanent impairment of her work-related condition. The Office indicated that she would be receiving a separate letter advising where to report for the examination.

On April 27, 2005 the Office again notified appellant that a "SECOND OPINION EVALUATION" was necessary in her case. The Office notified appellant of the provisions of 5 U.S.C. § 8123(d) relating to suspension of compensation for refusing to submit to an examination.

On May 2, 2005 the Office's scheduling agent, The Ricwel Corporation, informed appellant that she had an appointment on May 17, 2005 with Dr. Edward S. Forman, who is Board-certified by the American Osteopathic Association.

On May 17, 2005 Ricwel informed the Office that appellant did not appear for her examination with Dr. Forman that day: "This is the '1st' NO SHOW for the employee."

On May 27, 2005 Ricwel informed appellant that her examination with Dr. Forman was now rescheduled for June 21, 2005. Appellant telephoned the Office on June 7, 2005 to explain that she had airplane tickets for June 21, 2005 and could not change them. She stated that she would return on July 21, 2005. The Office advised that appointments could not be made around the individual claimant's personal schedule and that her claim could be denied if she missed the appointment.

On June 21, 2005 Ricwel informed the Office that appellant did not appear for her examination with Dr. Forman that day: "This is the '2nd' NO SHOW for the employee."

In a decision dated September 1, 2005, the Office advised appellant that the proposed suspension of her compensation under 5 U.S.C. § 8123(d) was made final, effective August 12, 2005.[2] The Office noted that it had twice directed appellant to report for examination by Dr. Forman and had advised her of her obligation to attend and fully cooperate and of the consequences for not doing so. The Office found that appellant failed to keep these two appointments and failed to provide written evidence justifying her failure to attend or cooperate with the examinations.

[1] *See* 5 U.S.C. § 8123(a) (if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination).

[2] The record contains no proposed suspension.

Appellant telephoned the Office on October 11, 2005 to discuss the status of rescheduling the appointment. The Office returned her call and left a message advising that it would not be scheduling any additional second-opinion appointments because two were previously scheduled and neither one was kept.

In a decision dated October 12, 2005, the Office notified appellant that the proposed suspension of her compensation and medical benefits under 5 U.S.C. § 8123(d) was made final, effective October 12, 2005, on the same grounds provided in its September 1, 2005 decision.[3]

LEGAL PRECEDENT

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.[4] 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 only limitation on this authority is that of reasonableness.[5]

If an employee refuses to submit to or obstructs an examination, his or her right to compensation 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.[6]

To invoke this provision of the law, the Office must ensure that the claimant has been properly notified of his or her responsibilities with respect to the medical examination scheduled. Either the claims examiner or the medical management assistant may contact the physician directly and make an appointment for examination. The claimant and representative, if any, must be notified in writing of the name and address of the physician to whom he or she is being referred as well as the date and time of the appointment. The notification of the appointment must contain a warning that benefits may be suspended under 5 U.S.C. § 8123(d) for failure to report for examination. The claimant must have a chance to present any objections to the Office's choice of physician, or [explanation] for failure to appear for the examination, before the Office acts to suspend compensation. 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. Such agreement may be expressed in writing or by telephone (documented on Form CA-110).

[3] Again, the record contains no proposed suspension.

[4] 5 U.S.C. § 8123(a).

[5] *Joseph W. Bianco*, 19 ECAB 426 (1968).

[6] 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323 (1999).

When the claimant actually reports for examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made.[7]

ANALYSIS

The Office referred appellant to Dr. Forman for a second-opinion evaluation. Such referrals are within the province and discretion of the Office. However, the Office hearing representative had found a conflict of medical opinion between appellant's examining physician and the district medical director and remanded the case with instructions to refer appellant to an impartial specialist for resolution of the conflict. The hearing representative noted: "On remand, the [d]istrict Office is directed to prepare a statement of accepted facts and refer the claimant's case file along with such to an impartial Board-certified orthopedist for an opinion and determination with regard to the exact percentage of permanent partial impairment which the claimant experiences in the left upper extremity as a result of the accepted employment-related condition."

The Office did not follow these instructions, as appellant was referred for a second-opinion evaluation. Unlike selection of second-opinion examining physicians, selection of referee physicians, or impartial medical specialists, is made by a strict rotational system using appropriate medical directories.[8] As there is no evidence that the Office selected Dr. Forman according to this strict rotational system, he may not serve as an impartial medical specialist. The Office abused its discretion when, on remand with instructions to refer appellant to an impartial medical specialist to resolve a conflict in medical opinion, it referred appellant instead to Dr. Forman for a second-opinion evaluation. The referral was not reasonable under the circumstances and the Office may not suspend appellant's compensation for failing to report.

CONCLUSION

The Board finds that the Office improperly suspended appellant's compensation under 5 U.S.C. § 8123(d) for failing to report for a scheduled medical appointment. The Office failed to follow established procedures for invoking the penalty under that section.

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

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4.b (May 2003).

ORDER

IT IS HEREBY ORDERED THAT the October 12 and September 1, 2005 decisions of the Office of Workers' Compensation Programs are reversed. The case is remanded for further action consistent with the November 9, 2004 decision of the Office hearing representative.

Issued: May 5, 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