# United States Department of Labor
# Employees' Compensation Appeals Board

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| **E.L., Appellant** | ) | |
| **and** | ) | |
| **DEPARTMENT OF TRANSPORTATION, TRANSPORTATION SECURITY ADMINISRTRATION, Albuquerque, NM, Employer** | ) | **Docket No. 08-459**<br>**Issued: August 13, 2008** |

*Appearances:*
*James Chakeres, Esq.,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On November 28, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated December 1, 2006, regarding the suspension of compensation. The record also contains decisions dated July 9 and October 9, 2007, denying merit review of the claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUES***

The issues are: (1) whether the Office properly suspended appellant's compensation effective October 2, 2005 pursuant to 5 U.S.C. § 8123(d); and (2) whether the Office properly determined appellant's applications for reconsideration were insufficient to warrant merit review of the claim pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

## ***FACTUAL HISTORY***

The Office accepted that appellant sustained a lumbar sprain, aggravation of lumbosacral spondylosis and aggravation of lumbar spinal stenosis in the performance of duty on January 12, 2003. Appellant stopped working on May 16, 2003 and began receiving compensation for wage loss. He was referred for vocational rehabilitation services. On March 8, 2005 appellant underwent a functional capacity evaluation.

By letter dated August 17, 2005, the Office advised appellant that he was being referred to an orthopedic surgeon for a second opinion examination. Appellant was advised of the provisions of 5 U.S.C. § 8123(d) regarding refusal to submit to or obstruction of an examination. In a letter dated August 19, 2005, he was advised of a scheduled examination on September 1, 2005 with Dr. William K. Jones, an orthopedic surgeon located in Santa Fe, New Mexico. Appellant failed to appear for the scheduled examination.

In a letter dated September 8, 2005, the Office issued a notice of proposed suspension of compensation for failure to appear for the scheduled examination. Appellant was directed to respond within 14 days. By letter dated September 2, 2005, received by the Office on September 12, 2005, appellant's representative argued that Dr. Jones "has a contract with Baybrook Medical Services that compromises his independent judgment and erodes his credibility."

The Office responded by letter dated September 14, 2005, noting that the referral to Dr. Jones was as a second opinion examination, not a referee to resolve a conflict. According to the Office scheduling of second opinion examinations was handled by private contractor, Baybrook Medical Services, and Dr. Jones was one of two orthopedic surgeons used in the Albuquerque/Santa Fe area. It was explained that the other orthopedic surgeon, Dr. Richard Castillo, had a previous involvement in the case and therefore Dr. Jones was selected as the second opinion examiner.[1] The Office found the reasons offered by appellant were not valid and his continued refusal to undergo the examination would result in suspension. In a letter dated September 13, 2005, received by the Office on September 19, 2005, appellant again argued that Dr. Jones was not acceptable and would not provide an impartial opinion.

By decision dated September 23, 2005, the Office suspended appellant's compensation pursuant to 5 U.S.C. § 8123(d) effective October 2, 2005. It found that he did not attend the scheduled examination with Dr. Jones and failed to provide justification.

[1] Appellant was treated by Dr. Castillo on February 20, 2003 as an attending physician.

In a letter dated October 25, 2005, appellant argued that the Office failed to locate an orthopedic surgeon in the Albuquerque area, rather than Santa Fe, as required by the Board in *Billie J. Gardner*.[2] By letter dated December 31, 2005, he requested reconsideration of his claim.

In a decision dated February 8, 2006, the Office denied the request without merit review of the claim. Appellant again requested reconsideration by letter dated February 15, 2006. He argued that all referral physicians must be impartial and Dr. Jones was a biased physician under contract with Baybrook Medical Services. Appellant cited the case of *Maura D. Fuller (Judson H. Fuller).*[3]

By decision dated April 13, 2006, the Office declined to review the case on its merits. In an April 17, 2006 letter, appellant again requested reconsideration. He referred to another file number alleging that in that case the reports of Dr. Jones were disallowed because Dr. Jones claimed he reviewed x-rays, when he had not done so.

In a decision dated December 1, 2006, the Office reviewed the case on its merits and denied modification. It stated that, in the case referred to by appellant, Dr. Jones had been on one side of a conflict that was resolved by a referee physician, with no indication his reports were disallowed.

The record indicates that appellant agreed to attend a second opinion examination by letter dated December 18, 2006 and his compensation for wage loss was reinstated. By letter dated June 20, 2007, he requested reconsideration. Appellant stated that Dr. Jones had been used in five cases over a short period by the Office and Dr. Jones was biased and unprofessional.

By decision dated July 9, 2007, the Office denied the request for reconsideration without merit review of the claim. Appellant again requested reconsideration by letter dated August 14, 2007. In a decision dated October 9, 2007, the Office denied the request for reconsideration without merit review of the claim.

## ***LEGAL PRECEDENT -- ISSUE 1***

Section § 8123(a) provides that "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." The regulations governing the administration of the Federal Employees' Compensation Act also provide that "the employee must submit to an examination by a qualified physician as often and at such times and places as [the Office] considers reasonably necessary."[4]

[2] 53 ECAB 356 (2002). In that case the claimant was referred for a second opinion examination in Oklahoma, City, Oklahoma, although the claimant lived in Batesville, Arkansas. The Board noted that appellant lived near a major metropolitan area in Little Rock, Arkansas and the referral was unreasonable as the Office did not document any attempt to locate an appropriate specialist in the claimant's area.

[3] 54 ECAB 386 (2003).

[4] 20 C.F.R. § 10.320.

Section 8123(d) of the Act provides that, "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." According to the Office's procedures, 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 and if good cause is not established, compensation should be suspended in accordance with 5 U.S.C. § 8123(d).[5]

## ***ANALYSIS -- ISSUE 1***

The Office referred appellant for a second opinion examination by Dr. Jones for an opinion as to his current condition and employment-related disability. There is no evidence that the referral for a second opinion was unreasonable, as appellant was receiving compensation for wage loss and the Office was attempting to determine the degree of continuing employment-related disability.

Appellant was advised of the scheduled appointment with Dr. Jones on September 1, 2005 and failed to appear for the scheduled examination. The Office provided appellant with an opportunity to provide good cause for not appearing at the examination. Prior to the September 23, 2005 final decision, appellant argued that Dr. Jones was not impartial as he was under contract by the private contractor used by the Office to schedule second opinion examinations. Dr. Jones was not, however, selected for a "referee examination" to resolve a conflict under 5 U.S.C. § 8123(a).[6] Asecond opinion physician is a physician "making the examination for the United States" under 5 U.S.C. § 8123(a) and the examination is typically scheduled through medical second opinion service contractors, as in this case.[7] The argument that Dr. Jones was under contract with the private contractor used by the Office provides no justification for a failure to appear for a scheduled second opinion examination.

In his February 15, 2006 application for reconsideration, appellant appeared to allege that second opinion physicians must be "impartial" as a referee examiner, citing the *Fuller* case.[8] In *Fuller* the Board affirmed a finding that the Office properly suspended appellant's compensation for failure to appear at a scheduled referee examination. The reasons provided by the claimant, such as his belief that there was no conflict or that the referee physician was not properly selected as he had performed second opinion examinations, did not constitute good cause for failure to appear. The *Fuller* case does not support an argument that Dr. Jones was unqualified or not properly selected as a second opinion physician.

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

[6] 5 U.S.C. § 8123(a) provides that, if there is a disagreement between a physician making the examination for the Untied States and the employee's physician, a third physician shall be appointed. This is called a referee examination. 20 C.F.R. § 10.321(b).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(a) (June 2002).

[8] *Supra* note 3.

Following the September 23, 2005 decision, appellant raised the argument that the referral to Dr. Jones was unreasonable as he lived in Albuquerque and Dr. Jones was located in Santa Fe, citing *Gardner*[9] in support of his argument. The *Gardner* case is not applicable to the circumstances of the present case. Unlike *Gardner*, appellant did not raise the argument until after the scheduled appointment and after the final decision suspending compensation. Moreover, in *Gardner* the scheduled appointment was over 400 miles from the claimant's residence, while in this case Santa Fe is approximately 60 miles from Albuquerque. The Office had explained to appellant in its September 14, 2005 letter, that Dr. Jones was the only orthopedic surgeon in the Santa Fe/Albuquerque area for the second opinion examination as Dr. Castillo had a prior involvement in the case. The Board finds that appellant did not provide good cause for failing to appear at the September 1, 2005 scheduled examination in Santa Fe, New Mexico based on the travel requirement.

With respect to the evidence before the Office at the time of the December 1, 2006 merit decision, there is no evidence to establish that appellant had good cause for failing to appear at the scheduled examination by Dr. Jones. It complied with established procedures and provided appellant an opportunity to provide supporting evidence prior to suspension of compensation. The Board accordingly finds that appellant refused to submit to an examination and the Office properly suspended appellant's compensation pursuant to 5 U.S.C. § 8123(d).

## ***LEGAL PRECEDENT -- ISSUE 2***

The Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.[10] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[11]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent evidence not previously considered by the Office.[12]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the

[9] *Supra* note 2.

[10] 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.605 (1999).

[12] *Id*. at § 10.606(b)(2).

request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[13]

## ***ANALYSIS -- ISSUE 2***

In an application for reconsideration dated June 20, 2007, appellant asserted that there were three cases that had not been considered with respect to suspension of compensation. He cited *Alfred R. Anderson*,[14] *Lynn C. Huber*,[15] and *Brenda C. McQuisition.*[16] These cases do not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. The *Anderson* and *Huber* cases involve suspension of compensation for failure to appear for a referee examination and provide no relevant legal argument or evidence to the present case. The *McQuiston* case involved a termination of benefits based on a referee report and provides no relevant evidence or argument to the issue presented. Where the legal argument presented has no reasonable color of validity, the Office is not required to reopen the case for merit review.[17]

The August 14, 2007 application for reconsideration provided no additional evidence or argument. The Board finds that appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent evidence not previously considered by the Office. Since appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2), the Office properly denied the applications without merit review of the claim.

## ***CONCLUSION***

The Office properly suspended appellant's compensation under 5 U.S.C. § 8123(d) because he failed to appear for a scheduled second opinion examination and did not provide good cause for such failure. The applications for reconsideration did not meet the requirements of 20 C.F.R.§ 10.606(b)(2) and the Office properly declined to reopen the case for merit review.

[13] *Id*. at § 10.608.

[14] 54 ECAB 179 (2002).

[15] 54 ECAB 281 (2002).

[16] 54 ECAB 816 (2003).

[17] *See Norman W. Hanson*, 40 ECAB 1160 (1989).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 9 and July 9, 2007 and December 1, 2006 are affirmed.

Issued: August 13, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board