

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

E.S., Appellant

and

**DEPARTMENT OF THE ARMY,
Fort Shafter, HI, Employer**

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**Docket No. 07-1206
Issued: March 6, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 3, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 16, 2007 suspending his entitlement to compensation. 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 refused to allow appellant to participate in the selection of a referee physician under 5 U.S.C. § 8123(a); and (2) whether it properly suspended his right to compensation pursuant to 5 U.S.C. § 8123(d).

FACTUAL HISTORY

The case has been before the Board on prior appeals. In a merit decision dated May 17, 2000, the Board affirmed the Office's termination of compensation for wage loss and medical benefits as of September 20, 1992.¹ It found that the opinion of the second opinion referral

¹ Docket No. 98-1109 (issued May 17, 2000).

physician, Dr. Edward Gunderson, represented the weight of the medical evidence and established that the employment-related condition had resolved by September 20, 1992.² The Board noted that the evidence from Dr. Michael Lee, a podiatrist, was of diminished probative value because the opinion on causal relationship relied on an alleged fall at work in February 1997 that had not been factually established.

On November 26, 2002 the Board issued an order remanding the case on the grounds that the record was incomplete.³ In an order dismissing appeal dated June 29, 2004, the Board noted that the Office had issued a decision pursuant to an emotional condition claim, but had not issued an appropriate decision with respect to the foot injury as directed by the Board in its November 26, 2002 order. The Office was directed to issue an appropriate decision with regard to the foot claim.

By decision dated December 12, 2005, the Board found that a conflict in the medical evidence existed between Dr. Lee and Dr. Gunderson. The Office was directed to resolve the conflict by referral to a referee physician pursuant to 5 U.S.C. § 8123(a).

Appellant was referred to Dr. Jeffrey Tedder, a Board-certified orthopedic surgeon. In reports dated March 6 and 10, 2006, Dr. Tedder provided a history and results on examination. He opined that appellant had sustained a permanent injury “from the injuries [appellant] sustained as a Marine Corps soldier in 1979 and aggravated by the fall in 1987.” Dr. Tedder stated that appellant was disabled but could be retrained for a sedentary job.

In letters dated April 25 and June 15, 2006, the Office requested that Dr. Tedder provide a clarifying report discussing appellant’s job duties and disability for work after 1992. It contacted Dr. Tedder’s office several times, but did not receive a supplemental report. The Office advised appellant, by letter dated November 29, 2006, that he would be referred to another physician for a referee examination. In a letter dated November 30, 2006, it indicated that appellant had stated in a telephone call that he wanted a list of eligible referee physicians so he could choose one. The Office noted the provisions of the procedure manual regarding participation in the referee selection.

By letter dated December 1, 2006, the Office notified appellant that he was scheduled for an appointment with Dr. Michael Slomka on January 8, 2007 in order to resolve the conflict in the medical evidence. It advised appellant of the provisions of 5 U.S.C. § 8123(d). Appellant submitted a December 5, 2006 letter in response to the Office’s inquiry as to why he wanted to participate in the referee selection. He stated that he wanted a list of all physicians that are eligible to conduct referee examinations so that he could choose the physician. Appellant asserted that his prior representative had received such a list without providing any reasons.

In a December 11, 2006 letter, appellant discussed Dr. Tedder’s report and argued that a second referral was unnecessary. He requested that the Office cancel the scheduled appointment with Dr. Slomka and issue a final decision.

² The accepted condition was a temporary aggravation of bilateral pes planus and plantar fasciitis.

³ Docket No. 02-1171 (issued November 26, 2002).

The record indicates that appellant did not appear for the January 8, 2007 examination scheduled with Dr. Slomka. By letter dated January 18, 2007, the Office noted that appellant had failed to appear for the scheduled examination. It also noted that he had asked to participate in the selection of the referee physician, but did not provide a sufficient reason. Appellant was requested to submit reasons for failing to appear at the scheduled examination within 14 days and if the reasons are invalid, compensation would be suspended pursuant to 5 U.S.C. § 8123(d).

In a letter dated January 24, 2007, appellant stated that he had previously voiced his concerns over the need for referral to a second referee physician. He stated that he believed the regulations allowed him to choose the second referee if necessary.

By decision dated February 16, 2007, the Office finalized the suspension of entitlement to compensation effective that date. It stated that a referral to Dr. Slomka was necessary because Dr. Tedder did not resolve the medical issues and appellant did not provide valid reasons to participate in the selection of the referee physician.

LEGAL PRECEDENT -- ISSUE 1

According to the Office's procedures, a claimant who asks to participate in selecting the referee physician or who objects to the selected physician should be requested to provide his or her reason for doing so.⁴ The claims examiner is responsible for evaluating the explanation offered. If the reason is considered acceptable, the medical management assistant (MMA) will prepare a list of three specialists, including a candidate from a minority group if indicated, and ask the claimant to choose one. This is the extent of the intervention allowed by the claimant in the process of selection or examination. If the reason offered is not considered valid, a formal denial of the claimant's request, including appeal rights, may be issued if requested.⁵

ANALYSIS -- ISSUE 1

Appellant submitted a December 5, 2007 letter requesting to participate in the selection of a referee physician. The February 16, 2007 Office decision did make a finding that he was not entitled to participate in the selection process. As noted above, appellant must provide reasons to support his request to participate. He did not provide sufficient reasons in this case. Appellant discussed his belief that Dr. Tedder had resolved the issue, but this is not a reason to participate in the selection of a new referee. It is an argument for not requiring a referral to a second referee physician.

Since appellant did not provide any valid reasons for participating in the selection process, he was not entitled to a list of three specialists. Pursuant to its procedures, the Office properly denied the request in this case.

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(4) (May 2003). Examples of circumstances under which the claimant may participate in the selection are: documented bias or unprofessional conduct by the selected physician, a female claimant requesting a female physician to perform a gynecological examination and a claimant in a remote area with a medical documented inability to travel requesting a physician that may be reached expeditiously by air travel.

⁵ *Id.*

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. § 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.”⁶ 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.”

ANALYSIS -- ISSUE 2

The Office found that appellant’s entitlement to compensation should be suspended under 5 U.S.C. § 8123(d) because he failed to appear at the January 8, 2007 scheduled appointment with Dr. Slomka, the referee physician. The Board notes that, while appellant argued that the referral to Dr. Slomka was unnecessary, the record does not support his argument. The initial physician selected, Dr. Tedder, failed to address the medical issue presented. As the Board indicated in its prior appeal, the issue was whether appellant’s employment-related condition resulted in disability after September 20, 1992. Dr. Tedder did not provide a reasoned medical opinion and the Office made repeated attempts to secure a supplemental report.⁷ The Office reasonably made a determination that a second referral was warranted.

The issue remains whether appellant’s failure to appear at the scheduled examination with Dr. Slomka was sufficient to establish that he refused to submit to or obstructed an examination under 5 U.S.C. § 8123(d). As noted, appellant did submit a request to participate in the selection process. While he did not appear to request a formal decision, he did make the request over a month before the scheduled examination. He was entitled to a response from the Office in regard to his request. The Office did not respond until a January 18, 2007 letter, 10 days after the scheduled examination. At the time of the scheduled examination, appellant had a pending request for participation in the selection process as well as a request to cancel the appointment. He was entitled to a response prior to the scheduled appointment that would confirm the appointment and reiterate the provisions of 5 U.S.C. § 8123(d). The Office cannot apply 5 U.S.C. § 8123(d) in the absence of an appropriate response to the pending requests. The Board finds that the evidence does not establish that appellant’s failure to appear for the January 8, 2007 examination was a refusal to submit to or an obstruction of an examination under 5 U.S.C. § 8123(d).

⁶ 20 C.F.R. § 10.320.

⁷ The Office may not seek a second referee’s opinion before it has attempted to clarify the original referee’s report. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6 (December 1995).

CONCLUSION

The Office properly denied the request to participate in the referee selection process. The Office did not, however, provide a timely response prior to the scheduled examination and it cannot suspend compensation pursuant to 5 U.S.C. § 8123(d).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 16, 2007 is affirmed with respect to the denial of participation in the referee selection process and reversed with respect to suspension of compensation pursuant to 5 U.S.C. § 8123(d).

Issued: March 6, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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