

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

C.M., Appellant)

and)

DEPARTMENT OF THE INTERIOR,)
NATIONAL PARK SERVICE,)
GETTYSBURG NATIONAL MILITARY PARK,)
Gettysburg, PA, Employer)

Docket No. 09-940
Issued: December 24, 2009

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 25, 2009 appellant filed a timely appeal from the merit decision dated December 31, 2008 suspending his compensation benefits. His appeal is also timely filed from the January 26, 2009 decision denying reconsideration on the merits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether the Office properly suspended appellant's compensation benefits effective December 31, 2008; and (2) whether the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant contends that he gave the Office 48 hours' notice to cancel the appointment and that he could not attend the appointment because he needed to care for his wife and could not leave her for even one-half hour.

FACTUAL HISTORY

On May 17, 1994 appellant, then a 52-year-old laborer, filed a traumatic injury claim alleging that on May 16, 1994 he slipped and fell in a ditch while weeding and hurt his leg and lower back. The Office accepted appellant's claim for bursitis of the right knee, lumbosacral strain and right knee soft tissue fibrosis. On September 5, 1995 it issued a schedule award for a 35 percent impairment of the right lower extremity. The Office paid appropriate medical and compensation benefits.

On August 16, 2007 appellant's treating Board-certified orthopedic surgeon, Dr. Lawrence F. Honick, noted that his continuing impression for appellant was severe degenerative disease of the lower back with spondylosis as well as an internal derangement of the right knee. He opined that appellant was totally disabled with regard to any type of work activity.

In a report dated October 9, 2008, Dr. Robert Franklin Draper, Jr., the Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion, noted that appellant's only diagnosis that is causally connected to the job is a lumbosacral strain and contusion of the right knee. He opined that appellant was capable of performing modified-duty work and could perform a job that did not require him to lift more than 25 pounds. Dr. Draper indicated that appellant can work five to six days a week and 8 to 10 hours a day. He believed that these limitations were not causally related to the accident in 1994 but were related to preexisting pathological conditions.

By letter dated October 23, 2008, the Office referred appellant to Dr. S. Edward Said, a Board-certified orthopedic surgeon, to resolve the conflict between Drs. Honick and Draper with regard to the cause and extent of impairment due to appellant's work-related injury. It noted that the date of the examination was December 12, 2008 at 8:00 a.m. and provided appellant with Dr. Said's address and telephone number.

On December 10, 2008 appellant called the Office and indicated that he would not be able to attend the appointment on December 12, 2008 because his wife just got out of the hospital and will be going back on December 13, 2008 and that he needed to take care of her. On December 11, 2008 a representative from the Office returned appellant's telephone call and indicated that appellant must make every effort to attend the December 12, 2008 appointment and notified appellant that if he missed the appointment his benefits would be suspended from December 20, 2008 until he attends and fully cooperates with the examination. On December 12, 2008 an Office representative spoke with a person from Dr. Said's office who indicated that appellant failed to appear for the appointment.

By letter dated December 12, 2008, the Office gave appellant a notice of proposed suspension of compensation as he failed to attend and fully cooperate with a scheduled referee medical examination with Dr. Said on December 12, 2008. It notified appellant that, if he believed he had a valid reason for failing to submit or cooperate with the scheduled examination, he should submit his response, with supporting evidence, to the Office within 14 days from the date of the letter. The Office informed appellant that, if he did not show good reason for failing

to keep the appointment, his benefits would be suspended under 5 U.S.C. § 8123(d) until he attended and fully cooperated with the examination.

By letter dated December 12, 2008, Dr. Said confirmed that appellant did not show for his appointment on December 12, 2008. He also noted that appellant called him on December 10, 2008 and cancelled his appointment.

By letter to the Office dated December 24, 2008, appellant stated that his wife had a breathing attack and underwent a tracheotomy, and that he was therefore unable to attend the appointment. He attached a note from his wife's physician dated December 6, 2008 indicating that he needed to take care of his wife for two weeks.

By decision dated December 31, 2008, the Office finalized the proposed suspension of compensation, effective the date of the decision.

By letter dated January 7, 2009, appellant requested reconsideration. He indicated that he tried to get several people to take care of his wife in his absence but could not find anyone because he was the only one who knew how to take care of her. Appellant also noted that he notified both the Office and Dr. Said's office of his need to cancel the appointment. In further support thereof, he submitted an operative report indicating that his wife was admitted to the hospital on December 1, 2008 and had an open tracheotomy on December 3, 2008 due to respiratory failure, bilateral arytenoid fixation and stridor.

By decision dated January 26, 2009, the Office denied reconsideration without review of the merits.

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.¹

To invoke 5 U.S.C. § 8123(d), 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

¹ 20 C.F.R. § 10.320.

of physician or any reasons for failure to appear for the examination before the Office acts to suspend compensation.²

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.³

ANALYSIS -- ISSUE 1

The Office suspended appellant's compensation benefits effective December 31, 2008 under section 8123(d) of the Act on the grounds that he failed to attend a scheduled medical examination. The Board finds that the suspension of benefits was proper.

A conflict existed in medical opinion between appellant's attending physician, Dr. Honick, and the second opinion physician, Dr. Draper, as to the cause and extent of appellant's impairment due to his work-related injury. Dr. Honick opined that appellant had continued severe degenerative disease of the lower back with spondylosis as well as an internal derangement of the right knee and was totally disabled from any work activity. Dr. Draper indicated that appellant could work full time with his only limitation being a prohibition of lifting more than 25 pounds. He believed these limitations were necessary due to preexisting pathological conditions and not to his employment injury. An impartial medical examination was necessary to determine whether appellant had any continuing employment-related residuals. Under section 8123 of the Act and its implementing regulations, appellant was required to attend this examination.⁴

By letter dated October 23, 2008, the Office notified appellant that he was being referred to Dr. Said for an impartial medical evaluation to resolve the conflict in the medical opinion evidence. It informed him of his obligations to attend and cooperate. The notice clearly explained that appellant's compensation benefits would be suspended for failure to report to or an obstruction of the examination under section 8123(d) of the Act. The Office advised appellant that the examination was scheduled for 8:00 a.m. on December 12, 2008. Appellant was also provided with Dr. Said's address and telephone number.

Appellant indicated that he telephoned both the Office and Dr. Said on December 10, 2008 and stated that he would be unable to attend the appointment because his wife just had surgery and that he needed to take care of her. The Office called appellant back on December 11, 2008 and notified appellant that if he missed his appointment his benefits would be suspended. Appellant did not show for the appointment. Based on Dr. Said's confirmation of appellant's missed appointment, the record reveals that appellant cancelled the appointment on

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

³ *Id.*

⁴ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

December 10, 2008, prior to speaking with an Office representative on December 11, 2008. The Office considered appellant's excuse that he had to take care of his wife who recently had surgery. However, it found that the medical evidence submitted indicating that he had to miss the appointment to take care of his wife was not compelling. Although appellant indicated that he had to take care of his wife who was recovering from a tracheotomy necessitated by a breathing attack, there was no medical condition mentioned in the physician's brief note nor does it state that he could not attend the appointment with Dr. Said. There is no indication that he could not arrange for someone else to take care of his wife while he went to the appointment. The law requires appellant to submit to an Office-directed examination as directed.⁵ Appellant cannot make the decision himself not to attend the appointment, nor are his assertions that he could not attend the appointment, without adequate support, a sufficient reason to not attend.

The Office, in its October 23, 2008 letter, appropriately directed appellant to report for an impartial medical examination on December 12, 2008. Appellant failed to appear for the examination on the scheduled date and failed to show good cause for not complying with the Office's directive. The Board finds that the Office properly suspended appellant's compensation benefits effective December 31, 2008.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁶ the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁷ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁸ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁹

ANALYSIS -- ISSUE 2

Appellant does not allege in the request for reconsideration that the Office erroneously applied or interpreted a point for law; nor, did he advance a legal argument not previously considered by the Office. He did submit new evidence, specifically an operative report indicating that his wife was admitted to the hospital on December 1, 2008 for respiratory failure and had an open tracheotomy on December 3, 2008. Although this evidence does establish the

⁵ *E.B.*, 59 ECAB __ (Docket No. 07-1618 issued January 8, 2008).

⁶ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ *Id.* at 10.607(a).

⁹ *Id.* at 10.608(b).

reason for appellant's wife's medical condition, it is not relevant and pertinent evidence as it still does not provide evidence as to why he needed to miss his appointment. The note indicates that the surgery was on December 3, 2008 and appellant's appointment was on December 12, 2008, nine days after the surgery. There is still no indication from appellant's wife's physician that appellant could not leave his wife for several hours while he attended the appointment. The Board also notes that appellant did not call to cancel the appointment until 48 hours prior to the appointment even though his wife's surgery was nine days earlier. Accordingly, as this evidence does not provide a reason that appellant could not attend the appointment with Dr. Said, it is not relevant and pertinent, and is insufficient to require merit review.

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation benefits effective December 31, 2008. The Board further finds that the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 26, 2009 and December 31, 2008 are affirmed.

Issued: December 24, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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