

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GILBERT ORTEGA and DEPARTMENT OF AGRICULTURE,
CARSON NATIONAL FOREST, Taos, NM

*Docket No. 98-642; Submitted on the Record;
Issued December 29, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits under 5 U.S.C. § 8123(d).

In the present case, the Office accepted that appellant sustained a lumbar strain in the performance of duty on August 28, 1992. Appellant did not return to work. By decision dated January 8, 1996, the Office determined that appellant had failed to participate in vocational rehabilitation efforts and his compensation was reduced to zero. The record indicates that appellant agreed to participate in a work tolerance program with the employing establishment in February 1996 and he continued to receive compensation for temporary total disability. In a decision dated July 17, 1996, the Office suspended appellant's compensation for failure to attend a scheduled appointment with a second opinion referral physician, Dr. William K. Jones, an orthopedic surgeon. Compensation was restored as appellant appeared for examination by Dr. Jones on July 23, 1996.

By decision dated September 25, 1996, the Office suspended appellant's compensation, effective October 13, 1996, on the grounds that he had obstructed an examination under 5 U.S.C. § 8123(d). In a decision dated August 28, 1997, an Office hearing representative affirmed the suspension of compensation benefits.

The Board has reviewed the record and finds that the Office properly suspended appellant's compensation under section 8123(d).

Section 8123(d) of the Federal Employees' Compensation Act provides: "If an employee refuses to submit to or obstructs an examination, his right compensation under this subchapter is suspended until the refusal or obstruction stops."¹

¹ 5 U.S.C. § 8123(d).

In this case, appellant did appear for examination by the referral physician, Dr. Jones, on July 23, 1996. In his report of that date, Dr. Jones recommended a functional capacity evaluation to properly determine appellant's employment capabilities. A functional skills assessment was scheduled for July 30, 1996 with a physical therapist and appellant did attend. The functional capacity report, however, clearly indicates that appellant's work capacity could not be accurately determined because appellant refused to cooperate and provide maximum effort during the examination. The report stated that appellant demonstrated "multiple inconsistencies throughout" the evaluation, exhibited symptom magnification and the overall assessment "is not an accurate representation of his functional capacities. This determination is made through correlation of consistency of efforts, final outcomes, changes in pulse rates upon exertion, ratings of perceived exertion, pain reports, pain behaviors and general movement patterns." The Board has held that a failure to properly cooperate in a functional capacity evaluation constitutes an obstruction of an examination under section 8123(d).² In the present case, the functional capacity report establishes that appellant failed to properly cooperate with the evaluation.

Prior to suspending appellant's compensation, the Office issued a letter dated August 30, 1996 that notified appellant of the provisions of section 8123(d), and allowed appellant 20 days to provide a written explanation for the inconsistencies found in the functional capacity evaluation. Appellant thus had notice and an opportunity to respond prior to suspension of benefits.³ There is no indication that appellant provided an explanation prior to the September 25, 1996 decision. In a letter dated September 30, 1996, appellant's representative asserted that it is not uncommon for an injured person to guard against pain by resisting instructions that would inflict pain. The functional capacity report, however, clearly indicated that appellant exhibited symptom magnification and failed to provide sufficient effort so that his functional capacity could accurately be determined. Accordingly, the Board finds that the Office properly suspended appellant's compensation effective October 13, 1996.

² See *Gloria D. Livingston*, Docket No. 94-2573 (issued October 22, 1996).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (November 1998).

The decision of the Office of Workers' Compensation Programs dated August 28, 1997 is affirmed.

Dated, Washington, D.C.
December 29, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member