

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RENEE WRIGHT and DEPARTMENT OF VETERANS AFFAIRS,
LONG BEACH MEDICAL CENTER, Long Beach, CA

*Docket No. 98-1401; Oral Argument Held September 9, 1999;
Issued November 29, 1999*

Appearances: *Renee Wright, pro se; Catherine P. Carter, Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's entitlement to compensation on the grounds that she failed to attend a physical examination pursuant to 5 U.S.C. § 8123(d).

On August 23, 1994 appellant, then a 44-year-old medical photographer, filed an occupational disease claim, alleging that she suffered employment-related stress and situational anxiety.¹ Following a complex procedural history, in a September 19, 1997 decision, an Office hearing representative remanded the case to the Office for preparation of an amended statement of accepted facts, to be followed by referral to an impartial medical evaluation for the purpose of resolving the conflict in medical opinion evidence on the issue of whether appellant had an employment-related emotional condition. The facts of this case as set forth in the hearing representative's decision are hereby incorporated by reference.

Subsequent to the September 19, 1997 decision, the Office scheduled an appointment on December 2, 1997 for appellant with Dr. Eric Lifshitz, a psychiatrist. By letter dated October 3, 1997, the Office informed appellant that the appointment had been made "to determine the relationship between her condition and factors of employment." The letter did not characterize the appointment as an impartial medical evaluation. By letters dated November 25 and December 4, 1997, appellant objected to the necessity for attending the examination and the record indicates that she did not attend the scheduled examination. By letter dated December 11,

¹ The record indicates that the instant claim was adjudicated by the Office under file number A13-1058942. Appellant has a separate claim for a back injury that was adjudicated by the Office under file number A13-0151399 and was accepted for lumbosacral radiculitis. She filed two appeals with the Board regarding the latter file number that were assigned docket numbers 98-1913 and 98-2117 and will be adjudicated separately.

1997, the Office informed appellant that it proposed to suspend her entitlement to compensation pursuant to 5 U.S.C. § 8123(d) because she failed to submit to examination. In a December 22, 1997 letter, appellant responded that she had fully explained her “good cause” reasons for not attending the scheduled examinations in her letters dated November 25 and December 4, 1997. By decision dated December 30, 1997, the Office suspended appellant’s entitlement to compensation. The instant appeal follows.

The Board finds that the Office improperly suspended appellant’s compensation.

The Office did not follow the procedures outlined in its procedural manual in notifying appellant that she was being referred to an impartial referee physician pursuant to section 8123(a) of the Federal Employees’ Compensation Act to resolve a conflict.² Nor did the Office inform appellant of the nature of conflict. The Office did not select the impartial physician under section 8123(a) of the Act using the rotational system as provided for in its procedural manual. Appellant was deprived of the information that she was being referred for impartial examination to resolve a conflict in the medical evidence as well as the nature of the conflicting evidence. In addition, appellant was denied an opportunity to raise an objection to the selected physician under this section of the Act.

The Board held in *Dorine Jenkins*, 32 ECAB 1502 (1981) that under section 8123(a) of the Act, the Office has authority to require an employee who claims for compensation to submit to such physical examination as it deems necessary. 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.

Considering all of the acknowledged errors committed by the Office in this case, in not selecting an impartial physician and in not using the Office’s rotational system as mandated by the Office hearing representative, in referring appellant for a mandatory examination, the Board finds that appellant was deprived of necessary information as well as denied her procedural rights to raise an objection to the physician selected. The Board, therefore, finds that the suspension of appellant’s benefits, under the circumstances for refusing to attend an examination with a physician who could not have resolved the conflict in medical opinion and would have required a second referral to a properly selected impartial physician, was unreasonable and constituted an abuse of discretion.

² Federal (FECA) Procedure Manual, Part 3 -- Medical Examination, *Referee Examinations*, Chapter 3.500.4(d)(1) (May 1994).

The case shall, therefore, be remanded for referral of appellant to an appropriate Board-certified specialist,³ accompanied by a statement of accepted facts and the complete case record. After such further development deemed necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated December 30, 1997 is hereby set aside and the case is remanded for further proceedings.

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

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

³ The Board notes that Dr. Lifshitz is not Board-certified and notes further that in a Motion to Remand filed by the Director in this case, it was recommended, *inter alia*, that the case files for Office file numbers A13-1058942, the instant claim, and A13-0151399 be consolidated as appellant alleges that a cause of her emotional condition is the employment-related back condition; *see supra* note 1.