

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HELEN DUENO and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

*Docket No. 97-2797; Oral Argument Held June 8, 2000;
Issued August 29, 2000*

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

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by suspending appellant's compensation benefits for obstruction of a medical examination; and (2) whether the Office properly denied appellant's request for a review of the written record as untimely.

The Board has duly reviewed the case on appeal and finds that this case is not in posture for a decision.

In the present case, the Office accepted that on July 15, 1993 appellant, then a 32-year-old letter carrier, sustained employment-related tears of the medial and lateral meniscus of the left knee. The Office further accepted that appellant sustained recurrences of disability on November 15, 1993 and January 31, 1996. Appellant stopped work on November 15, 1993. On October 3, 1996, acting within its discretion, the Office referred appellant for an independent medical examination to be conducted on October 17, 1996 by Dr. Bruce Goldberg, a Board-certified orthopedic surgeon, for the purpose of resolving a conflict in medical opinion between appellant's treating physician, Drs. Ronald M. Krinick and Nate V. Bondi, an Office second opinion physician. Appellant was properly advised that, pursuant to 5 U.S.C. § 8123(d), if she refused or obstructed the examination, her right to compensation would be suspended until the refusal or obstruction stopped. Appellant did not appear for the scheduled examination.

By letter dated November 22, 1996, the Office advised appellant that she had 14 days to submit a written explanation showing good cause as to why she refused to appear at the examination. The Office again advised appellant of the penalties for continued obstruction of a medical examination under section 8123 of the Federal Employees' Compensation Act.

By decision dated January 30, 1997, the Office suspended appellant's compensation benefits. The Office specifically noted that appellant had not submitted a response to the Office's November 22, 1996 letter.

Section 8123(a) of the Act authorizes the Office to require an employee who claims disability as a result of federal employment, to undergo a physical examination as it deems necessary.¹ 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.² The regulations governing the Office provide that an injured employee "shall be required to submit to examination by a U.S. Medical Officer or by a qualified private physician approved by the Office as frequently and at such times and places as in the opinion of the Office may be reasonably necessary."³ The only limitation on this authority is that of reasonableness.⁴ The Act provides that "[i]f 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."⁵ The Office procedures provide for a period of 14 days within which to present, in writing, his or her reasons for the refusal or obstruction.⁶

There is no dispute that appellant did not attend the scheduled medical examination. The Office suspended benefits, however, largely on the grounds that appellant failed to submit a written explanation showing good cause as to why she failed to appear at the examination. The Board notes, however, that the record does contain a response from appellant dated December 16, 1996. However, it appears that the December 16, 1996 letter was not associated with the record until after the Office issued its suspension decision on January 30, 1997 and, therefore, was not considered by the Office in making its determination. In this letter, appellant provided an explanation why she could not keep the appointment. Appellant stated that she had unsuccessfully attempted to reschedule the appointment. Appellant expressed a willingness to attend any medical examinations set by the Office and renewed her request that the appointment with Dr. Goldberg be rescheduled.

¹ 5 U.S.C. § 8123(a).

² *Corlisa L. Sims (Smith)*, 46 ECAB 172, 180 (1994); *James C. Talbert*, 42 ECAB 974, 976 (1991).

³ 20 C.F.R. § 10.407(a).

⁴ *See William G. Saviolidis*, 35 ECAB 283, 286 (1983); *Joseph W. Bianco*, 19 ECAB 426, 428 (1968).

⁵ 5 U.S.C. § 8123(d).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (April 1993).

In *William A. Couch*,⁷ the Board remanded the case because the Office, in issuing a decision dated July 17, 1989, failed to consider new evidence that it received on July 13, 1989. The Board stated:

“The Act provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim. Since the Board’s jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision, it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision. As the Board’s decisions are final as to the subject matter appealed, it is critical that all evidence relevant to that subject matter which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.”

In the present case, the Office received appellant’s December 16, 1996 letter on January 10, 1997 as established by the Office’s date stamp on the document. As the Office had appellant’s letter, in which she explained her failure to attend the scheduled medical examination and expressed a willingness to comply with the Office’s requirements, before it issued its January 30, 1997 decision denying benefits on the grounds that appellant had not appeared at the examination and had not proffered any explanation for her absence, it was necessary for the Office to consider the contents of this letter. The case will be remanded to the Office for its consideration of appellant’s December 16, 1996 letter, to be followed by an appropriate decision. In light of this decision, the Board finds that the additional issue of whether the Office properly denied appellant’s request for a review of the written record as untimely, is moot and need not be addressed.

⁷ 41 ECAB 548 (1990).

The decision of the Office of Workers' Compensation Programs dated January 30, 1997 is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, D.C.
August 29, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member