

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ATANACIO G. SAMBRANO and DEPARTMENT OF THE NAVY,
NAVY PUBLIC WORKS CENTER, Great Lakes, IL

*Docket No. 98-2071; Submitted on the Record;
Issued June 23, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by suspending appellant's compensation benefits effective March 25, 1998, for obstruction of a medical examination.

In the present case, the Office accepted that on February 25, 1997 appellant, then a 53-year-old civil engineer, sustained an employment-related acute lumbosacral strain. Appellant stopped work on the date of injury and returned to limited duty, four hours a day, on July 8, 1997.¹ Appellant began working six hours a day on August 11, 1997. On October 2, 1997 the Office referred appellant for a second opinion examination to be conducted on October 16, 1997 by Dr. Avi J. Bernstein, a Board-certified orthopedic surgeon. Appellant was properly advised that, pursuant to 5 U.S.C. § 8123(d), if he refused or obstructed the medical examination, his right to compensation would be suspended until the refusal or obstruction stopped. Appellant attended the examination as scheduled.

On January 28, 1998 the Office determined that, at the time of his examination, Dr. Bernstein did not have a copy of the statement of accepted facts, or copies of all of the relevant medical evidence of record. The Office forwarded all of the relevant material to Dr. Bernstein and, by letter dated January 29, 1998, referred appellant for a follow-up second opinion examination with the physician, to be conducted on February 13, 1998. Appellant did not appear for the scheduled examination.

By letter dated February 7, 1998 and received by the Office on February 19, 1998, appellant listed his objections to the follow-up examination. Appellant stated that he did not refuse to see Dr. Bernstein, but that he felt there was a conflict of interest, that Dr. Bernstein was biased and that the physician had abused, humiliated and intimidated him with rough and rude behavior. Appellant added that he objected to the Office's scheduling of the appointment

¹ Appellant first returned to work for 1.5 hours a day from April 7 to 11, 1997, when he stopped work until his return to limited duty on July 8, 1997.

without first checking to see if he was available. He concluded that the Office's instructions directing him to attend a follow-up second opinion examination were not within the policies, rules, regulations and the law.

By letter dated February 23, 1998, entitled notice of proposed suspension of compensation, the Office advised appellant that his letter dated February 7, 1998 had been received and that, upon review, the reasons set forth by appellant had been found insufficient to establish good cause for his failure to appear for the scheduled examination. The Office advised appellant that he had 14 days to submit an additional written explanation showing good cause as to why he refused to appear for the examination. Alternatively, the Office advised appellant that he could submit a written statement explaining that he was now willing 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 letter dated February 24, 1998, the Office informed appellant that the follow-up second-opinion examination with Dr. Bernstein had been rescheduled for March 20, 1998. Appellant did not appear for the rescheduled examination and did not submit a response to the Office's February 23, 1998 notice of proposed suspension of compensation.

By decision dated March 25, 1998, the Office suspended appellant's compensation benefits.

The Board finds that the Office properly suspended appellant's compensation benefits, effective March 25, 1998 on the grounds that he obstructed a medical examination.

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.² 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.³ 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."⁴ The only limitation on this authority is that of reasonableness.⁵ 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."⁶ 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.⁷

² 5 U.S.C. § 8123(a).

³ *Corlisa L. Sims (Smith)*, 46 ECAB 172, 180 (1994); *James C. Talbert*, 42 ECAB 974, 976 (1991).

⁴ 20 C.F.R. § 10.407(a).

⁵ See *William G. Saviolidis*, 35 ECAB 283, 286 (1983); *Joseph W. Bianco*, 19 ECAB 426, 428 (1968).

⁶ 5 U.S.C. § 8123(d).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (April 1993).

In the present case, the Board finds that appellant presented insufficient reasons for forgoing the medical examination scheduled by the Office. Contrary to appellant's arguments, the Act specifically provides the Office with the authority to require appellant to submit to an examination by a physician approved by the Office "*as frequently and at such times and places as in the opinion of the Office may be reasonably necessary.*"⁸ (Emphasis in the original.) In addition, as the Office procedures mandate that a statement of accepted facts be sent to the second opinion physician for his review,⁹ it was reasonable for the Office to schedule a follow-up appointment with Dr. Bernstein after learning that a statement of accepted facts had not been provided to the physician at the time of his initial examination. Moreover, appellant provided no explanation for his statement that seeing Dr. Bernstein involved a conflict of interest and provided no support for his assertion that Dr. Bernstein was biased or behaved in an unprofessional manner. Finally, the Office was in compliance with its established procedures when it invoked the provision of section 8123(d) in suspending appellant's entitlement to compensation due to his refusal to undergo the medical examination as directed by the Office. Therefore, the Office properly suspended appellant's compensation benefits.

The March 25, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
June 23, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ 20 C.F.R. § 10.407(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(a) (April 1993).