

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NORA E. McKENZIE-CARTER and U.S. POSTAL SERVICE,
POST OFFICE, Inglewood, CA

*Docket No. 98-717; Oral Argument Held February 15, 2000;
Issued March 29, 2000*

Appearances: *Elliot McKenzie*, for appellant; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation because she refused to undergo an Office-directed medical examination as required under 5 U.S.C. § 8123(d).

The Board finds that the Office properly suspended appellant's compensation because she refused to undergo an Office-directed medical examination as required under 5 U.S.C. § 8123(d).

On July 24, 1986 appellant sustained an employment-related left ankle injury. The Office accepted her claim for left ankle sprain, generalized anxiety disorder, conversion disorder and reflex sympathetic disorder and paid compensation for periods of disability. By decision dated July 5, 1996, the Office suspended appellant's compensation because she refused to undergo an Office-directed medical examination as required under 5 U.S.C. § 8123(d). By decision dated December 4, 1996 and finalized December 7, 1996 and a decision dated September 30, 1997, the Office denied modification of its July 5, 1996 decision.

Section 8123(a) of the Federal Employees' Compensation Act¹ authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examinations as it deems necessary. The determination of the need for an examination, the type of examination, the choice of local 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.² Section 8123(d) of the Act provides that, "[i]f an employee refuses to submit to

¹ 5 U.S.C. § 8123(a).

² See *Dorine Jenkins*, 32 ECAB 1502, 1505 (1981).

or obstructs an examination, his right to compensation is suspended until refusal or obstruction stops.”³ If an employee fails to appear for an examination, the Office must ask the employee to provide in writing an explanation for the failure within 14 days of the scheduled examination.⁴

By letter dated May 21, 1996, appellant was advised that she was being referred to Dr. Richard Marafioti, a Board-certified orthopedic surgeon, for an impartial medical examination to be held on June 18, 1996. The Office advised appellant that an employee who refused to submit to or obstructs an examination would have her compensation suspended until the refusal or obstruction stopped. The Office indicated that the referral was necessary to resolve a conflict in the medical evidence between Dr. Allen I. Salick, an attending physician specializing in rheumatology and Dr. Richard Chamber, a Board-certified orthopedic surgeon, who served as an Office referral physician, regarding the extent of appellant’s continuing employment-related disability. The Office noted that, although she had previously been referred to Dr. Fredrick J. Lieb, a Board-certified orthopedic surgeon and Dr. David Hubbel, a Board-certified neurologist, for resolution of the conflict in the medical evidence, the opinions of these physicians did not resolve the conflict in that they disagreed with each other and, therefore, referral to another impartial medical examiner was necessary.⁵

In several letters to the Office dated in June 1996, appellant voiced various objections to her referral to Dr. Marafioti. The Office responded to these letters and advised appellant that her objections to the referral to Dr. Marafioti were not considered valid; the Office again advised her of the consequences of refusing to submit to or obstruct an examination. Appellant did not appear for the June 18, 1996 appointment with him and the Office wrote appellant and advised her that she had 14 days from June 19, 1996 to submit her reasons for not attending the June 18, 1996 appointment and to fully cooperate in the referral.⁶ She did not attend the June 24, 1996 appointment with Dr. Marafioti.⁷

The Board has examined appellant’s reasons for not attending the impartial medical examinations to be held on June 16 and 24, 1996 with Dr. Marafioti and finds that the Office properly determined that these reasons were unacceptable. Therefore, the Office properly

³ 5 U.S.C. § 8123(d).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (April 1993).

⁵ Section 8123(a) of the Act provides in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.” 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989).

⁶ The record reveals that appellant canceled the appointment for June 18, 1996 due to a claimed illness and rescheduled the appointment for June 24, 1996.

⁷ By letter to the Office dated June 28, 1996, appellant indicated that she had canceled the June 24, 1996 appointment and noted that she continued to dispute the referral to Dr. Marafioti. The record contains a July 31, 1996 report in which Dr. Marafioti reviewed the medical records; this constitutes a preliminary report and does not represent an impartial medical evaluation.

determined that appellant refused to undergo an Office-directed medical examination as required under 5 U.S.C. § 8123(d) and suspended her compensation. Appellant argued that there was no conflict in the medical evidence at the time of the referral to Dr. Marafioti and that the referral to another impartial medical specialist constituted “doctor shopping.” The Board has reviewed the medical evidence and notes that there was a conflict in the medical evidence regarding the extent of appellant’s continuing employment-related disability, that the opinions of the prior impartial medical examiners were not sufficient to resolve the continuing conflict and that the referral to Dr. Marafioti was necessary to resolve the conflict. Appellant claimed that Dr. Marafioti was not competent to evaluate her condition, but the Board notes that he is Board-certified in the appropriate specialty for such purposes. She alleged that she was denied access to certain medical documents, but the Office advised her that the documents were with Dr. Marafioti at the time of her request.

Appellant also claimed that she should have been allowed to participate in the selection of the impartial medical examiner in order to avoid the selection of a biased physician. Office procedure provides examples of circumstances under which a claimant may participate in the selection of an impartial medical examiner. These examples include, but are not limited to, the following: documented bias by the selected physician; documented unprofessional conduct by the selected physician; a female claimant who requests a female physician when a gynecological examination is required; and certain circumstances when the claimant has a medically documented inability to travel to the office of the selected physician. If the reason is considered acceptable, the Office will prepare a list of three specialists, including a candidate from a minority group if indicated and ask the claimant to choose one.⁸

The Board notes that the Office properly indicated that appellant was not entitled to participate in the selection of the impartial medical examiner. The Office properly noted that appellant did not present an acceptable reason for participating in the selection process because she did not submit any evidence to show that Dr. Marafioti was biased against her or otherwise unable to perform a proper impartial medical examination.⁹ A claimant does not have an absolute right to participate in the selection of the impartial medical examiner and the Office was not required in this case to allow appellant to participate in the process.¹⁰ Therefore, appellant’s unsubstantiated allegations of bias do not provide an acceptable reason for not attending the appointment with Dr. Marafioti.

Moreover, the Office satisfied its regulations by notifying appellant on a number of occasions prior to the medical referral of the penalty for refusing or obstructing an examination

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (March 1994).

⁹ Dr. Marafioti was selected on a rotational basis in accordance with the appropriate Office procedures.

¹⁰ See *Larry B. Guillory*, 45 ECAB 522, 529 (1994). In support of her argument, appellant cited Chapter 3.400.3(a) of the Federal (FECA) Procedure Manual, a subsection which she believed entitled her to select an impartial medical examiner from a list prepared by the Office at her request. The Board notes, however, that this procedure was no longer in effect at the time of appellant’s claim in that it was superseded by Chapter 3.500.4(b)(4); see *supra* note 8 and accompanying text.

required by the Office.¹¹ For the above-noted reasons, the Office properly suspended appellant's compensation because she refused to undergo an Office-directed medical examination as required under 5 U.S.C. § 8123(d).

The decision of the Office of Workers' Compensation Programs dated September 30, 1997 is affirmed.

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

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

¹¹ See 20 C.F.R. § 10.407(b) (providing that the Office shall inform an employee of the penalty for refusing or obstructing an examination required by the Office when giving notification of such an examination). The Office also provided appellant an opportunity to explain her reasons for not attending the appointment with Dr. Marafioti after her nonappearance.