

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOYCE M. MITCHELL and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Dallas, TX

*Docket No. 99-2565; Submitted on the Record;  
Issued March 27, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits effective July 17, 1999 for obstruction of a medical examination.

On July 9, 1997 appellant, then a 47-year-old data transcriber, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that on July 2, 1997 she sustained injuries to her back and feet while in the performance of duty. She explained that her injuries occurred when the back of her office chair broke and she began to fall backwards causing her to pull a muscle in her back. As appellant attempted to regain her balance and sit upright, she struck both of her feet and legs against the chair. She ceased work on July 3, 1997. Appellant returned to her duties intermittently following her injury, however, on July 23, 1997 she ceased work again. On September 30, 1997 the Office accepted appellant's claim for lumbar strain and bilateral ankle and foot contusions. She received continuation of pay and appropriate wage-loss compensation. On July 2, 1998 appellant returned to work in a limited-duty, part-time basis for four hours per day and the Office compensated appellant for the remaining four hours of each workday.

By letter dated March 26, 1999, the Office referred appellant for a second opinion evaluation with Dr. Allen Kent scheduled for April 29, 1999. She arrived late for the examination and, therefore, the examination did not proceed as scheduled. On May 11, 1999 the Office issued a notice of proposed suspension of compensation. Appellant was advised that she had 14 days within which to provide an explanation for "refusing to submit to [the] examination." In a letter dated May 17, 1999, appellant provided an explanation for her late arrival to the scheduled appointment on April 29, 1999 and she indicated that she was waiting to be seen by Dr. Kent. By decision dated July 13, 1999, the Office suspended appellant's compensation effective July 17, 1999 for obstruction of a medical examination.

The Board finds that the Office improperly suspended appellant's compensation benefits effective July 17, 1999.

Section 8123(a) of the Federal Employees' Compensation Act provides:

"An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required...."<sup>1</sup>

Section 8123(d) provides:

"If an employee refuses to submit to or obstructs an examination, [her] right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee."<sup>2</sup>

Additionally, the Office's Federal (FECA) Procedure Manual provides:

*"Failure to Appear.* If the claimant does not report for a scheduled appointment, he or she should be asked in writing to provide an explanation within 14 days. If good cause is not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d) until the date on which the claimant agrees to attend the examination."<sup>3</sup>

The Office's March 26, 1999 letter referring appellant for a second opinion evaluation scheduled for April 29, 1999 advised her that, pursuant to 5 U.S.C. § 8123(d), if she refused to submit to or obstructed the examination her right to compensation would be suspended until the refusal or obstruction stopped. As previously noted, the record indicates that appellant arrived late for her appointment with Dr. Kent on April 29, 1999 and consequently, the examination was not performed as scheduled. In her May 17, 1999 letter in response to the Office's May 11, 1999 notice of proposed suspension of compensation, appellant stated she arrived approximately 17 minutes late for her appointment, whereas Dr. Kent's office indicated she arrived one hour late. She explained that she left her home approximately one hour prior to her scheduled 9:00 a.m. appointment, but she nonetheless arrived late due, in part, to unanticipated traffic congestion resulting from highway construction. Appellant further explained that Dr. Kent's office was located in a building complex with twin towers and that she spent approximately 14 minutes in the wrong building because of misinformation provided concerning the physician's office location. She indicated that, upon her arrival, she signed in and filled out some paperwork and

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<sup>1</sup> 5 U.S.C. § 8123(a).

<sup>2</sup> 5 U.S.C. § 8123(d).

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

was then advised by Dr. Kent's secretary that he was unable to see her because he had another appointment elsewhere. A May 11, 1999 Form CA-110 (report of telephone or office call) corroborates appellant's statement that Dr. Kent was unable to see her as a result of her late arrival on April 29, 1999. The Form CA-110 also indicates that Dr. Kent's office offered to reschedule appellant's appointment but she refused, stating that "she did n[o]t want to be there anyway!" She, however, provided a different account of this incident in her May 17, 1999 letter to the Office. While appellant acknowledged that she did not reschedule her appointment with Dr. Kent while at his office on April 29, 1999, she explained that her reason for not rescheduling at that time was because the doctor's office advised her that it had to speak with the Department of Labor before they could let her know what date and time to return.

In its July 13, 1999 decision suspending appellant's compensation, the Office noted that Dr. Kent's office indicated that appellant arrived one hour later for her April 29, 1999 appointment, at which time Dr. Kent could no longer see her. The Office further noted that Dr. Kent's staff offered to reschedule the appointment, but appellant refused. Regarding appellant's May 17, 1999 letter, the Office characterized appellant's explanation as follows: "traffic and road construction made you late and ... the doctor's office refused to let you reschedule the appointment." The Office also noted that as of the date of the decision "[appellant had] not rescheduled the appointment with Dr. Kent. The Office concluded that appellant's compensation was suspended for "obstruction of a medical examination."

The Office suspended appellant's compensation based on her failure to reschedule an appointment with Dr. Kent.<sup>4</sup> The Board finds this evidence of record does not support the Office's conclusion in this case. It is noted that the Office neither instructed appellant to reschedule her appointment nor did it attempt to reschedule an appointment for her.<sup>5</sup> The Office placed the onus on appellant to reschedule an appointment with Dr. Kent and her failure to do so was apparently interpreted as a refusal to submit to an examination. It is not at all clear from the record that appellant was unwilling to reschedule an appointment. As previously noted, appellant advised that she was awaiting word from Dr. Kent's office about when she could return. On the other hand, his office advised that appellant refused to reschedule the appointment. The Office's decision makes no attempt at clarifying this discrepancy. The Office's procedure manual states that "refusal to schedule an examination at the direction of the Office is ... insufficient to invoke section 8123(d)."<sup>6</sup> An examination must be scheduled and appellant must fail to appear, without an acceptable excuse or reason, before the Office can suspend compensation pursuant to section 8123(d) of the Act.<sup>7</sup> Under the circumstances, the

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<sup>4</sup> While the Office did not specifically comment on appellant's explanation for her late arrival on April 29, 1999, the Board finds that appellant provided an acceptable excuse for her tardiness. Furthermore, the Board notes that there is no evidence to indicate that appellant was unwilling to proceed with the scheduled examination upon her late arrival on April 29, 1999. In fact, the record indicates that the examination did not proceed due to Dr. Kent's unavailability.

<sup>5</sup> The record indicates that when appellant previously missed a scheduled appointment in May 1998 due to her medical condition, the Office rescheduled the appointment on appellant's behalf and advised her accordingly.

<sup>6</sup> Federal (FECA) Procedure Manual, *supra* note 3.

<sup>7</sup> See *Herbert L. Dazey*, 41 ECAB 271, 275 (1989).

mere fact that appellant had yet to reschedule her appointment by the time the Office issued its decision on July 13, 1999 is not sufficient to establish that appellant either refused to submit to or obstructed an examination. Furthermore, appellant indicated in her May 17, 1999 response that she was “waiting to be seen.” Accordingly, the Office erred in suspending appellant’s compensation effective July 17, 1999.

The July 13, 1999 decision of the Office of Workers’ Compensation Programs is hereby reversed.

Dated, Washington, D.C.  
March 27, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

## CHECK LIST FOR LEGAL STAFF

Check/Answer all that apply

- Does Board have jurisdiction over the appeal? yes
- If appellant is represented on appeal, is the attorney/representative's authorization present? n/a
- Is there an outstanding oral argument request? no
- What are the issues on appeal? List them. (*E.g.*, Termination; Fact of Injury, Emotional Conditions.) obstruction of med. exam./suspension of benefits.
- Are the issues addressed in the text of your decision included in the issue statement?  
yes
- Does the Board have jurisdiction over all the issues addressed? yes
- What are the dates of the pertinent reconsideration requests and Office decisions ?  
List them. 7/13/99 (3/5 and 11/17/98)
- Have all decisions over which the Board has jurisdiction been disposed of? *I.e.*, by affirmance, remand, reversal, *etc.* no (denial of compensation for temp. total not challenged on appeal/appropriate action by Office--3/5 and 11/17/98 decisions).
- Has the draft been proofed for typos, grammatical errors and proper citation form?  
yes
- Was the Office hearing rep's decision adoptable? If so, is a memorandum explaining why adoption was preferred attached? n/a
- Is the hearing rep's decision attached with references to case record? n/a