

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANNE M. McGUINNESS and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Jamaica, NY

*Docket No. 98-299; Submitted on the Record;
Issued May 26, 2000*

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 under section 8123(d) of the Federal Employees' Compensation Act, effective June 5, 1997 on the grounds that she refused to submit to or obstructed testing for vascular thoracic outlet syndrome.

Appellant filed a claim for disability commencing August 4, 1994, which the Office has accepted for cervical radiculitis, a herniated disc at L5-S1, rotator cuff strain and thoracic outlet syndrome as a result of her August 4, 1994 employment injury.¹ By letter dated May 30, 1996, the Office placed appellant on the periodic rolls for temporary disability. On August 20, 1996 the Office issued a proposed notice of termination.²

¹ The Office combined appellant's seven prior claims under the claim number A02-0699141. By letter dated November 29, 1995, the Office accepted that appellant had sustained cervical radiculitis, herniated disc at L5-S1, thoracic outlet syndrome and bilateral rotator cuff strain beginning May 24, 1995 based on her six occupational disease claims filed on June 13, 1995 and the Office noted that appellant stopped work on August 4, 1995. The Office accepted that appellant sustained cervical strain with radiculitis due to a September 15, 1992 employment injury in claim number A02-0654935, but denied her recurrence claims by decision dated March 6, 1995, which was affirmed by a hearing representative decision on May 10, 1996. In claim number A02-658314, the Office accepted that appellant sustained shingles and temporary aggravation of cervical radiculitis due to a January 28, 1993 employment injury. Appellant had filed a claim on August 1, 1995 alleging that she developed carpal tunnel syndrome, fibromyalgia and radiculopathy due to her employment duties and the Office assigned this claim number A02-702949. The Office denied this claim on January 12, 1996 on the basis that fact of injury had not been established. On November 7, 1996 the Office hearing representative set aside the decision and remanded the case to the Office for referral to a Board-certified specialist. The hearing representative also instructed this claim to be combined with appellant's other claims on remand. On September 6, 1996 appellant filed an occupational disease claim alleging that her intervertebral disc disorder was employment related. On September 26, 1996 appellant filed an occupational disease claim alleging that her ganglion cysts were due to her employment.

² Appellant was accepted for disability retirement by the Office of Personnel Management on March 1, 1996.

By letters dated September 23 and October 3, 1996, the Office referred appellant to Dr. Sue de Lanerolle, an impartial Board-certified neurologist, due to the conflict in the medical opinion evidence between Drs. Emil F. Pascarelli, an attending physician, specializing in family practice, and Rafael E. de la Hoz, a treating physician, Board-certified in internal medicine, occupational medicine and pulmonary disease, and Drs. Stephen Zolan, a second opinion Board-certified orthopedic surgeon, and William H. Bloom, a second opinion Board-certified neurological surgeon, on the issue of causal relationship, continuing disability and the need for physical therapy arising from the August 4, 1994 employment injury. By letter dated November 14, 1995, to Dr. de Lanerolle, the Office noted that appellant had been scheduled by the physician's office to undergo electromyogram (EMG) testing on October 31, 1996, that appellant was unable to keep this appointment and the appointment was rescheduled for December 2, 1996. By letter dated December 2, 1996, the Office rescheduled appellant's EMG testing for December 16, 1996 after noting and rejecting appellant's objections to the testing and referral to an impartial medical specialist.

On April 16, 1997 the Office referred appellant to Dr. Sultan Mohiuddin, a Board-certified surgeon and thoracic surgeon, for testing to ascertain nature and extent of her claimed thoracic outlet syndrome pursuant to Dr. de Lanerolle's recommendation for a vascular evaluation in her December 5, 1996 and February 26, 1997 reports. In a report dated April 30, 1997, Dr. Mohiuddin recommended that a "[Pulse Volume Recording] PVR study with Duplex scan of the subclavian arteries" was required to determine whether appellant had thoracic outlet syndrome.

By letter dated May 1, 1997, the Office advised appellant that it had scheduled an appointment for the PVR study for June 4, 1997.

In a letter dated May 15, 1997, written in response to appellant's concern, Lori N. Kessler, a registered nurse, informed appellant that the tests ordered by Dr. Mohiuddin were noninvasive and there were no "precautions, needles, or drugs associated with the administration of these examinations." Ms. Kessler explained that blood pressure cuffs were used, PVRs repeated and ultrascan performed to evaluate the subclavian arteries.

By letter dated May 23, 1997, appellant disputed the need for the arterial thoracic outlet syndrome test as she had made no claim for this and submitted a May 15, 1997 report from Dr. Pascarelli and an article by Dr. David Roos on vascular outlet syndrome in support of her argument. By letter dated May 26, 1997 and faxed on May 27, 1997, appellant again disagreed with the need for the arterial thoracic syndrome test and submitted a May 15, 1997 report from Dr. Pascarelli and an article by Dr. Roos on vascular outlet syndrome in support of her contention. In the May 15, 1997 report, Dr. Pascarelli noted that he was treating appellant for cervical radiculopathy, cubital tunnel, neurogenic thoracic outlet syndrome, postural misalignment, musculoskeletal pain, shoulder impingement, tendinitis, lateral epicondylitis and medical epicondylitis. He contended that sending appellant for additional testing and examinations prevents her from getting the necessary physical therapy.

By letter dated May 29, 1997, the Office advised appellant that Dr. Mohiuddin had determined that the vascular outlet syndrome test was necessary for him to render his opinion. The Office advised appellant that pursuant to section 8123 of the Act, if an employee refused to

submit to, or obstructed an examination, compensation would be suspended until the obstruction stopped.

In a letter faxed on June 4, 1997, appellant stated that she had called Dr. de Lanerolle's office and was informed that she suggested, but did not order, a vascular outlet syndrome test be performed and that the Office ordered the test according to Dr. Mohiuddin's secretary. She then stated she went for the testing, was cooperative, but that the nurse was angry and refused to test her.

By letter dated June 4, 1997, the Office notified appellant of the proposal to suspend compensation benefits on the basis of her failure to attend the June 4, 1997 examination and afforded her 14 days to provide an explanation for refusing to submit to the test. The Office advised appellant that, if she failed to provide good cause or failed to respond, her benefits would be suspended.

In notes from Dr. Mohiuddin's office, Eva Sattler, Dr. Mohiuddin's secretary, noted a call from appellant on June 3, 1997 in which appellant was reluctant to keep the appointment and "refused to comprehend repeated explanations as to the necessity of the test." Ms. Sattler also noted that appellant indicated that she would "be there, but we will see about the test." In notes dated June 4, 1997, Ms. Sattler noted that appellant refused to undergo the ordered testing.

In a letter dated June 4, 1997, Glenda Skolnik, an ultrasound student employed by Dr. Mohiuddin, verified that appellant arrived for her appointment for testing. Ms. Skolnik stated that appellant became extremely agitated, demanded to see her medical chart and demanded to know the qualifications of Ms. Kessler who explained her qualifications. Ms. Kessler refused to give appellant a written letter of her credentials, but then stated that she would be happy to do the test. Ms. Kessler stated that, despite her statement indicating that she would perform the test, appellant refused to have the tests performed and walked out the door.

In a letter dated June 4, 1997, Ms. Sattler confirmed that appellant arrived for her testing, became extremely agitated, demanded to read her chart and demanded to know the qualifications of Ms. Kessler, a nurse/technologist. Appellant demanded that Ms. Kessler put her qualifications in writing for her, which Ms. Kessler declined to do and appellant became very angry and refused to take the test.

By fax transmittal dated June 11, 1997, Dr. Mohiuddin requested the Office to issue a letter releasing him from treating appellant.

In a letter dated June 13, 1997, appellant argued that she did not fail to show up for her appointment or obstruct the testing. Appellant stated that the doctor was not present for the test, that the tests were going to be performed by a student and that when she asked for the credentials of one of the women, she was informed that the woman had a registered nurse degree. Appellant then stated that the woman became irate and refused to do the tests. In addition, appellant attached the licensing law for New York state and stated she had contacted a New York official who stated that a nursing license did not "justify the taking of these tests." Appellant also provided a tape recording of the event in which the nurse stated she would not perform the test.

By letter dated June 17, 1997, appellant's representative indicated that appellant arrived in good faith for the June 4, 1997 test even though neither he nor appellant had "received an explanation as to the reasonableness of vascular thoracic [sic] outlet syndrome testing." Mr. Kirchner stated that the nurse became upset when appellant asked for her credentials and that the nurse stated that she refused to perform the test, which upset appellant such that both she and her husband left the office.

By letter dated June 19, 1997, the Office requested Dr. Mohiuddin to confirm their June 18, 1997 telephone conversation in which he stated that he overheard appellant's questioning Ms. Kessler, the accusatory tone of voice used by appellant and that this behavior was intended to annoy Ms. Kessler and that Ms. Kessler "was working under the auspices of Dr. Mohiuddin (sic) rather than in her capacity as a registered nurse and that your office is an accredited ICVAL testing laboratory." The Office also noted that Dr. Mohiuddin noted that appellant "must have shut off her tape recorder after Nurse Kessler stated she would not perform the test because you heard Nurse Kessler inform [appellant] that she would perform the test if [appellant] would submit to it as [appellant] was walking out." Dr. Mohiuddin was requested to submit a statement by Ms. Kessler regarding her willingness to perform the test after stating she would not perform the test and appellant's behavior during this time.

In a letter dated June 24, 1997, Ms. Kessler noted appellant's request to have her husband present during the examination and her explanation that there was not any room for him to be present due to the smallness of the room, but that he stood in a corner at appellant's request. Ms. Kessler stated that appellant began questioning her regarding the testing, to which she advised appellant that the May 15, 1997 letter should have explained everything. She noted that appellant replied in a "nasty tone" that she asked for a letter from the doctor, not Ms. Kessler. Ms. Kessler related that, next appellant requested to read her chart, which she was given, that appellant disputed some of the findings and that appellant began questioning Ms. Kessler about her credentials and requested to see a copy of her license. Ms. Kessler noted that, when she could not locate her license, appellant requested a letter of her credentials. Ms. Kessler stated that she refused to give her a letter of her credentials and when appellant continued arguing, Ms. Kessler told her that, "I [a]m not doing this," after which, she advised appellant that she would do the test to which appellant said "no, you are refusing." Ms. Kessler stated that she repeated twice more that she would do the test and that appellant with her husband left the office. Ms. Kessler stated that she believed the "entire episode was premeditated by [appellant]. Her prior behavior and interactions in this office leading up to these events demonstrate that she did not want this testing." Appellant's behavior was belligerent and difficult throughout according to Ms. Kessler. Lastly, Ms. Kessler noted that ICAVL stands for Intersocietal Commission for the Accreditation of Vascular Laboratories and that Dr. Mohiuddin's office is one of a handful accredited in his locality.

In a July 7, 1997 decision,³ the Office suspended appellant's compensation effective June 4, 1997, due to her obstructing testing for vascular thoracic outlet syndrome as ordered by

³ The Board notes that the Office also issued a notice of preliminary determination that an overpayment had occurred. As no final overpayment decision was issued it is not an issue before the Board in this appeal; *see* 20 C.F.R. § 501.2(c).

Dr. Mohiuddin. By letter dated July 8, 1997, the Office advised appellant that the effective date would be June 5, 1997 and that the remainder of the decision remained unchanged.⁴

The Board finds that the Office properly suspended appellant's compensation benefits under section 8123(d) of the Act, effective June 5, 1997 on the grounds that she refused to submit to or obstructed testing for vascular thoracic outlet syndrome.

Section 8123(a) of the Act⁵ 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 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.⁶ Section 8123(d) of the Act provides that, "[i]f an employee refuses to submit to or obstructs an examination, his right to compensation ... is suspended until the refusal or obstruction stops."⁷ 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.⁸

Section 8123(a) of the Act also 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..."⁹

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."¹⁰

⁴ The record indicates that subsequent to the Office's suspension decision, appellant underwent the direct testing on October 6, 1997.

⁵ 5 U.S.C. § 8123(a).

⁶ See *Dorine Jenkins*, 32 ECAB 1502, 1505 (1981).

⁷ 5 U.S.C. § 8123(d).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (November 1998).

⁹ 5 U.S.C. § 8123(a).

¹⁰ *Id.* at § 8123(d).

In the present case, the Office accepted appellant's claim for cervical radiculitis, herniated disc at L5-S1 and thoracic outlet syndrome due to her accepted August 4, 1994 employment injury. As part of the Office's effort to resolve a medical conflict, Dr. de Lanerolle directed appellant to undergo diagnostic testing by Dr. Mohiuddin. While appellant contends that she did not obstruct the performance of the test, the evidence of record fails to support this contention. Prior to appearing for the test, the Office received two letters dated May 23 and May 26, 1997 from appellant in which she argued that the test was unnecessary and submitted a report from Dr. Pascarelli, her treating physician, and an article by Dr. Roos in support of her contention that the test was unnecessary. On June 3, 1997 appellant contacted Dr. Mohiuddin's office regarding information about the test even though Ms. Kessler, Dr. Mohiuddin's nurse, had sent her a letter dated May 15, 1997 providing information concerning the test, explaining that the procedure was noninvasive. In addition, Ms. Sattler, Dr. Mohiuddin's secretary, submitted a statement as well as notes taken regarding the June 3, 1997 telephone conversation, which further negate appellant's contention that she was willing to take the test as her comment to Ms. Sattler, on June 3, 1997 was that she would be present, but would see about taking the test. Ms. Sattler noted that appellant again questioned the necessity for the test as well as what the test entailed. Contrary to appellant's contention that she did not obstruct testing as the nurse refused to perform the test, the evidence of record indicates her unwillingness to undergo the test and her conduct in Dr. Mohiuddin's office constitutes an obstruction of the diagnostic test. Dr. Mohiuddin, Ms. Sattler, Ms. Skolnik and Ms. Kessler all noted appellant's hostile behavior toward Ms. Kessler including her demanding attitude regarding her medical chart and Ms. Kessler's qualifications. Dr. Mohiuddin supports Ms. Kessler's statement that she did offer to perform the test after stating she would not and that appellant did not tape that part of the conversation. Furthermore, while the tape recording contains Ms. Kessler's refusal to do the test, appellant appears to have stopped the tape after Ms. Kessler's refusal to perform the test so that the tape contains no recording of Ms. Kessler subsequently indicating her willingness to perform the test or appellant's refusal of Ms. Kessler's offer to perform the test. The totality of the circumstances establish that appellant refused to undergo diagnostic testing and that her behavior on June 4, 1997 was directed towards provoking Ms. Kessler into refusing to perform the test. Appellant's actions indicate that she did not want to undergo the required test as evidenced by her letters dated May 23 and May 27, 1997 and her response to Ms. Sattler on June 3, 1997 stating that her belief that the test was unnecessary, that she would keep the appointment, "but we would see about the test" as well as her behavior at Dr. Mohiuddin's office support the Office's conclusion that appellant obstructed the performance of the required test. The totality of the circumstances support the Office's conclusion that she obstructed the testing on June 4, 1997. The Office thus properly suspended compensation benefits on the determination that appellant had obstructed her testing on June 4, 1997.

Moreover, the Office satisfied its regulations by notifying appellant on several occasions of the penalty for refusing to submit or obstructing an examination required by the Office.¹¹ The Office provided appellant with an opportunity to explain her refusal to submit to the vascular outlet syndrome test by Dr. Mohiuddin even though it was not required by its procedures to do

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 required by the Office).

so. Office procedure requires only that an employee be asked to give reasons for failure to appear for a scheduled examination; there is no requirement that an employee be asked to give reasons for obstructing an examination where as in the present case, she fails to cooperate in having a test performed once she appears at the physician's office.¹²

The decision of the Office of Workers' Compensation Programs dated July 7, 1997 is hereby affirmed.¹³

Dated, Washington, D.C.
May 26, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹² See *Ida L. Thomson*, 45 ECAB 750 (1994).

¹³ The Board notes that subsequent to appellant's appeal to the Board on October 26, 1997, the Office issued a decision terminating her benefits on December 22, 1997 on the basis that there is no continuing disability in claim number A2-069941. As this decision was issued subsequent to appellant's appeal, the Board does not have jurisdiction to review that decision.