

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DALE HERNANDEZ and DEPARTMENT OF THE AIR FORCE,
KELLY AIR FORCE BASE, San Antonio, TX

*Docket No. 00-210; Submitted on the Record;
Issued April 24, 2001*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's right to compensation beginning April 21, 1997 on the grounds that he refused to submit to a medical examination.

The Office accepted that appellant sustained a lumbar strain on October 18, 1994 while turning over an aircraft part. Appellant received continuation of pay from October 19 to December 2, 1994, after which the Office began paying him compensation for temporary total disability. By decision dated November 2, 1994, the Office terminated appellant's compensation on the basis that he no longer had residuals of his employment injury. Appellant requested a hearing, and an Office hearing representative, by decision dated December 20, 1996, found that the Office improperly terminated appellant's compensation, as there was an unresolved conflict of medical opinion between appellant's attending physician and the Office's referral physician.

By letter dated February 19, 1997, the Office referred appellant, the case record and a statement of accepted facts to Dr. Jay Hassell, an orthopedic surgeon, to resolve the conflict of medical opinion. Appellant did not appear for the appointment scheduled for March 14, 1997. By letter dated March 21, 1997, the Office rescheduled appellant's appointment with Dr. Hassell for April 18, 1997. The Office advised appellant, as it had in its February 19, 1997 letter, of the provision of the Federal Employees' Compensation Act that the compensation of an employee who refuses to submit to a medical examination is suspended. The Office also allowed appellant 15 days to explain in writing his reasons for failing to keep his appointment. Appellant did not appear for the appointment scheduled for April 18, 1997.

By decision dated April 21, 1997, the Office suspended appellant's compensation on that date for refusal, without good cause, to submit to a medical examination. Appellant requested a hearing, which was held before an Office hearing representative on June 17, 1998. Appellant testified that he did not receive the Office's February 19 or March 21, 1997 letters referring him to Dr. Hassell. By decision dated August 20, 1998, an Office hearing representative found that

the Office properly suspended appellant's compensation for refusing to submit to a medical examination.

Section 8123 of the Act authorizes the Office to require an employee who claims disability as a result of his employment or who is already in receipt of compensation for disability to undergo physical examination as it deems necessary.¹ Subsection (d) of section 8123 states: "If 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. 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." 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 authority of the Office. The only limitation on this authority is that of reasonableness.²

The Board finds that the Office properly suspended appellant's right to compensation beginning April 21, 1997 on the grounds that he refused to submit to a medical examination.

The Office properly found that there was a conflict of medical opinion between appellant's attending physician and an Office referral physician regarding appellant's diagnosis and his ability to work. To resolve this conflict, the Office, pursuant to section 8123(a) of the Act,³ referred appellant to Dr. Hassell. Appellant did not appear for the appointment scheduled for March 14, 1997, and the Office rescheduled an appointment for April 18, 1997. Appellant did not appear for this appointment.

At a hearing held before an Office hearing representative on June 17, 1998 appellant testified that he did not receive the Office's letters referring him to Dr. Hassell. The record shows that these referral letters were addressed to appellant's correct address, and the copies in the case record show that the letters were sent by the Office in the ordinary course of its business. Under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.⁴ Given the application of this rule and appellant's failure to appear at two scheduled appointments, the Office properly suspended appellant's compensation effective April 21, 1997.

At the hearing held on June 17, 1998 appellant testified that he would go to any appointment scheduled by the Office. As the period of suspension ends when refusal or

¹ 5 U.S.C. § 8123.

² *Cynthia G. Tharp*, 43 ECAB 297 (1991).

³ 5 U.S.C. § 8123(a) states 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."

⁴ *A.C. Clyburn*, 47 ECAB 153 (1995).

obstruction stops,⁵ the Office should, upon return of the case record, determine whether and, if so, when appellant's obstruction ended.

The decision of the Office of Workers' Compensation Programs dated September 11, 1998 is affirmed.

Dated, Washington, DC
April 24, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ See *William G. Saviolidis*, 37 ECAB 174 (1985).