

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH COURTO and U.S. POSTAL SERVICE,
POST OFFICE, Utica, NY

*Docket No. 00-1392; Submitted on the Record;
Issued December 18, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits for refusing to submit to a medical examination; and (2) whether the Office abused its discretion by refusing to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

On May 10, 1973 appellant, then a 40-year-old letter carrier, stepped into a hole in the road and twisted his left leg. His claim was accepted for a sprain of the left thigh. Later appellant was referred to a psychiatrist and the claim was also accepted for "post-traumatic anxiety state." Appellant received compensation benefits as a result of the psychiatric condition from August 15, 1973 to May 5, 1974. He stopped work on the date of the injury and returned to work on August 14, 1973.

Appellant suffered a recurrence of disability on April 25, 1975. Eventually an additional condition of "internal derangement of the left knee" was accepted on December 24, 1975.

On May 20, 1986 appellant was referred to Dr. Eliot M. Friedman by his employing establishment and was found by Dr. Friedman to be fit for light duty. His primary care physician has been Dr. Daniel C. Goodman, a Board-certified internist, since September 1996.

By letter dated August 11, 1999, the Office referred appellant to Dr. Robert Wilson for a second opinion examination. The Office requested that Dr. Wilson provide a diagnosis and opine whether appellant's accepted condition had been resolved and whether his current disability is due to the work-related injury or its residuals.

By letter dated August 16, 1999, appellant informed the Office that he was unable to get to the location of the second opinion examination because of a broken right hip. He stated that he underwent hip surgery but that the surgery was unsuccessful. Appellant indicated that he also submitted an April 30, 1999 report from his attending physician, Dr. Goodman. He requested that the Office reschedule the second opinion examination with a physician in his area.

By letter dated October 14, 1999, the Office informed appellant that he failed to keep his second opinion examination with Dr. Wilson scheduled for August 25, 1999. The Office noted that it received appellant's August 16, 1999 letter but they did not receive any medical evidence.¹ The Office also stated that appellant had 14 days to provide an explanation as to why he failed to keep his appointment.

By letter dated October 20, 1999, appellant stated that he mistakenly could have sent the medical evidence to the incorrect address. He resent Dr. Goodman's April 30, 1999 report and again explained that he could not travel any considerable distance and requested that the Office reschedule his examination with a physician in his area.

By decision dated November 4, 1999, appellant's benefits were suspended for his obstruction to the medical examination ordered by the Office.

By letter dated December 1, 1999, appellant requested reconsideration. In support of his request, he submitted a second report from Dr. Goodman dated December 1, 1999. In his report, Dr. Goodman stated that appellant was not capable of working and that he has a history of severe arthritis with a previous fracture of the right hip. He indicated that appellant suffers from gout and osteoarthritis, and that his right leg is 1½ inches shorter than his left leg which impairs his gait. Dr. Goodman also stated that appellant "is not capable of doing any substantial amount of walking, standing, reaching, twisting, driving, pushing or pulling."

By decision dated February 7, 2000, the Office denied appellant's request for review, finding that the medical evidence submitted by appellant was repetitious and immaterial in nature.

The Board finds that the Office properly suspended appellant's compensation benefits for refusing to submit to a medical examination that he was directed to undergo by the Office.

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...."²

The Board has held that a time must be set for a medical examination and the employee must fail to appear for the appointment, without an acceptable excuse or reason, before the Office can suspend or deny the employee's entitlement to compensation on the grounds that the employee failed to submit to or obstructed a medical examination.³ In the present case, the time for the second opinion evaluation with Dr. Wilson was set, appellant was duly advised of the

¹ The Board notes that Dr. Goodman's April 30, 1999 letter was received on August 23, 1999. The report is date stamped August 23, 1999.

² 5 U.S.C. § 8123(a).

³ *Margaret M. Gilmore*, 47 ECAB 718 (1996).

scheduled appointment and failed to appear for medical evaluation. The only remaining issue is whether appellant presented an acceptable excuse or reason for his failure to appear. In this regard, the Office's Federal (FECA) Procedure Manual provides:

"Failure to Appear. If the claimant does not report for a scheduled appointment, he 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 claimant reports for examination."⁴

Following notice that appellant failed to appear for examination by Dr. Wilson, the Office, in an October 14, 1999 letter, allowed him 15 days to explain why he failed to keep the August 25, 1999 appointment, and advised him that if he did not respond or if his reasons were found unacceptable, his entitlement to compensation would be suspended until he agreed to submit to examination as directed.

In a response dated October 20, 1999, appellant stated that he could not attend the appointment because he could not travel any considerable distances. He resubmitted the April 30, 1999 report from Dr. Wilson noting that "as far as he could tell," appellant had not returned to his preinjury status and was not making any progressive improvement that would lead one to believe that return to preinjury status was anticipated.

The Board finds that the Office properly found in its November 4, 1999 decision that Dr. Goodman's April 30, 1999 report did not show good cause for appellant's failure to attend the scheduled appointment.

Dr. Goodman's report only indicated that he was treating appellant for polyarticular gout and osteoarthritis but did not indicate the nature and extent of his disability and did not give any specific limitations or restrictions. Therefore, the Office properly found that since appellant did not provide medical documentation indicating his travel limitations, he did not present an acceptable excuse for his failure to appear.

The Board also finds that the Office acted within its discretion in refusing to reopen appellant's case for further reconsideration of the merits.

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁵

In this case, appellant submitted a December 1, 1999 report from Dr. Goodman in support of his request for reconsideration. Dr. Goodman opined that appellant is not capable of working and suffers from several types of conditions which limit him from performing normal

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.180.14(d) (April 1993).

⁵ 20 C.F.R. § 10.606(b)(2).

daily activities. He also stated that appellant “is not capable of doing any substantial amount of walking, standing, reaching, twisting, driving, pushing or pulling.” Appellant contends that Dr. Goodman’s report evidences that he was not able to attend his August 25, 1999 appointment since he was not able to drive and that this report should be considered new and relevant evidence.

The Board finds, however, that Dr. Goodman only addresses driving in passing, by concluding that appellant is not capable of doing several types of activities. The Board does not consider this general statement sufficiently relevant to appellant’s ability to attend the August 25, 1999 examination, for which he could have taken public transportation, be driven by someone, or even drive himself. Dr. Goodman does not actually restrict appellant from driving, but only vaguely refers to a “substantial amount” of driving with regard to working five days a week in his job as a letter carrier.

As appellant’s December 1, 1999 request for reconsideration does not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office did not abuse its discretion in denying that request.

The February 7, 2000 and November 4, 1999 decisions of the Office of Workers’ Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 18, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member