U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY ROMERO and DEPARTMENT OF THE TREASURY, TUCSON AVIATION BRANCH, Tucson, AZ

Docket No. 00-2057; Submitted on the Record;
Issued June 5, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits effective March 22, 2000 based on his obstruction of a medical examination.

On October 27, 1998 appellant, then a 43-year-old customs officer, filed a notice of traumatic injury and claimed "while pursuing fugitives at night, I stepped into two separate holes with my right leg and jammed my lower right hip and back." He first received treatment from Dr. Joseph Guyton, a chiropractor, on March 5, 1999. Dr. Guyton performed chiropractic manipulation of appellant's spine and assessed that appellant had "lumbar neuralgia, lumbar disc disorder, lumbar strain/sprain and paraventebral muscle spasm." Appellant submitted treatment reports from Dr. Guyton dated from March 5 through October 1, 1999.

By letter dated August 18, 1999, the Office informed appellant that under section 8101(2) of the Federal Employees' Compensation Act, chiropractors are deemed physicians "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist." The Office stated that since appellant's chiropractor did not submit a diagnosis of subluxation of the spine, he is not a "physician" under Act. The Office indicated that appellant should submit evidence from a medical doctor.

Appellant submitted a report from Dr. James H. Shorten[1] dated March 5, 1999 and a letter from Dr. Guyton dated August 27, 1999. Dr. Shorten performed a radiographic evaluation of appellant's lumbar spine and found: "discogenic spondylosis as well as suggestion of osteoarthrosis involving the apophyseal joints." He expressed his disagreement with the Office's view of the medical evidence in the case, stating that he personally exposed radiographs of

[1] The Board was unable to determine whether he is Board-certified.

appellant and beyond a shadow of a doubt subluxations existed as a direct result of the industrial injury appellant suffered.

By letter dated September 3, 1999, the Office referred appellant to Dr. Borislav Stojic, a Board certified orthopedic surgeon, for a second opinion examination. In an attachment to the letter, the Office advised appellant that if he failed to provide an acceptable reason for not appearing for the examination or if he obstructed the examination, his benefits would be suspended in accordance with section 8123(d) of the Act. Appellant's appointment with Dr. Stojic was scheduled for October 15, 1999.

By letter dated September 16, 1999, appellant responded to the Office's letter, stating that the Office's September 3, 1999 letter was "arrogant and condescending." He stated: "making a physician's appointment without consulting me to coordinate my Chicago-based flying schedule is simply the methodology of an incompetent."[2] Appellant continued:

> "Your consequential context and discouragement regarding the unavoidable rescheduling of an appointment for a father and husband like myself, has prompted me to send a copy of your letter to my Congressman requesting a thorough investigation into your office concerning any dealings with the taxpayer."

Appellant did not keep the scheduled appointment on October 15, 1999 with Dr. Stojic, and the Board notes there is no evidence of record that appellant attempted to reschedule his appointment.

By letter dated November 3, 1999, the Office issued a notice of proposed suspension of compensation since appellant did not attend his second opinion medical examination. The Office again reminded appellant of the consequences of refusing to submit to a medical examination and provided appellant 14 days to submit a written explanation demonstrating good cause of why he refused to submit to an examination by Dr. Stojic. No response was received.

By decision dated March 22, 2000, the Office suspended appellant's entitlement to compensation effective March 22, 2000.

The Board finds that the Office properly suspended appellant's compensation benefits, effective March 22, 2000, based on his refusal to submit to a medical examination.

Section 8123(a) of the 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…."[3]

[2] Appellant apparently left the U.S. Customs Service to work for American Airlines.

[3] 5 U.S.C. § 8123(a).

Section 8123(d) of the Act authorizes the Office to require an employee who claims disability as a result of federal employment to undergo a physical examination as it deems necessary.[4] This section provides:

> "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.[5] Compensation is not payable while a refusal or obstruction continues and the period of refusal or obstruction is deducted from the period for which compensation is payable to the employee."[6]

In this case, the Office, by letter dated September 3, 1999, properly notified appellant of the time and place of the examination and of the penalty for refusing to submit to the directed examination.[7] The Office also advised appellant of the procedure for rescheduling the appointment. The Board notes that the Office's letter was sent out over one month before appellant's scheduled appointment, thus allowing appellant ample time to make arrangements or reschedule the appointment. However, appellant did not attend the examination on the grounds that he was upset with the Office for scheduling an appointment without consulting him first. The Board finds that this contention is without merit. The Office acted reasonably in scheduling the second opinion examination and in notifying appellant of the examination.

Appellant also contends that the Office's September 3, 1999 letter was arrogant and condescending. The Board also finds that this argument is without merit. The Office's letter was a standard letter commonly used for second opinion medical examination referrals. The letter appellant received did not differ in any way from other similar letters written by the Office. Accordingly, appellant was properly notified that failure to attend the examination, as scheduled, could constitute an obstruction of the examination, resulting in the suspension of his compensation benefits.

The Office also properly asked appellant to provide in writing his reasons for failing to appear at the examination. This request was properly made following appellant's failure to appear, but before suspension of benefits. Appellant did not respond to this request.

The Office therefore acted properly to suspend appellant's compensation. As the only time limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error.[8] There is no evidence that the Office abused its discretion in this case.

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[4] 5 U.S.C. § 8123(d).

[5] *Id*.

[6] *Id*. *See also* 20 C.F.R. § 10.323.

[7] The Federal (FECA) Procedure Manual requires that appellant be advised of the existence of a conflict, the name and address of the physician, any requests to forward x-rays, copies of certain forms and a warming that benefits may be suspended. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3-500.4(c) (October 1990).

[8] *Daniel J. Perea*, 42 ECAB 214 (1990).

The March 22, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 5, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member