

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LULA JONES and DEPARTMENT OF THE ARMY,  
HEALTH SERVICES COMMAND, Fort Gordon, GA

*Docket No. 00-1472; Submitted on the Record;  
Issued March 27, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration, received by the Office on December 6, 1999, was untimely filed under 5 U.S.C. § 8128(a).

The Office accepted that appellant, then a 55-year-old dental assistant, developed right DeQuervain's tenosynovitis (inflammation of the tendon of the thumb) during the course of her federal employment. She stopped working in February 1998 and was eventually placed on the periodic rolls.

By letter dated June 22, 1998, the Office informed appellant that it proposed to terminate her compensation payments on the basis that she had been medically released to resume regular work. By letter dated July 23, 1998, the Office determined that appellant's compensation would not be terminated at that time based on medical evidence submitted which established partial disability.

By letter dated July 24, 1998, the Office advised appellant that she had 30 days to accept a position offered by the employing establishment, as a modified dental assistant or compensation would be terminated. She responded that the position had not been offered in writing and therefore had not accepted the position. The Office then informed the employing establishment that the position should be offered in writing and that the Office should review its suitability. The Office thereafter provided appellant with a written modified job offer on August 4, 1998. She accepted the modified position on or about August 12, 1998.<sup>1</sup>

By letter dated August 25, 1998, the Office advised appellant that it had scheduled her for a functional capacity evaluation for September 8, 1998 to determine the extent and degree of

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<sup>1</sup> Appellant later resigned her position on November 4, 1998. There is no indication in the record that the modified-duty position would not have continued to be able to appellant had she not terminated her employment.

remaining disability. The Office informed her that, pursuant to section 8123(d),<sup>2</sup> if she refused to submit to or obstructed the examination, her right to compensation would be suspended until the refusal or obstruction stopped and that compensation was not payable during the period of refusal or obstruction. By letter dated August 29, 1998, appellant declined to submit to the functional capacity evaluation.

By letter dated September 9, 1998, the Office informed appellant that she had 14 days in which to furnish reasons for failing to attend the arranged medical examination. The Office advised that it would review her reasons submitted and if determined invalid, appellant would be found in obstruction of a medical examination and compensation would be suspended. Appellant responded in a letter dated September 19, 1998 that due to elevated pain resulting from her accepted condition, she wished to decline or postpone the functional capacity evaluation.

By decision dated September 24, 1998, the Office suspended appellant's compensation on the grounds that she obstructed a medical examination.

By letter dated September 8, 1999, appellant through counsel requested reconsideration of the September 24, 1998 decision. She submitted a previous functional capacity evaluation and medical report and stated that regarding the evaluation she failed to attend, she did not understand the significance of refusing to be tested. Appellant also stated that she would comply with further requests and asked that her benefits be reinstated as soon as possible.

In a memorandum to the file, a senior claims examiner indicated that, although the word reconsideration was used in appellant's September 8, 1999 letter, appellant had actually indicated her willingness to cooperate and requested reinstatement. The claims examiner determined therefore that a new medical evaluation should be scheduled and the case should not be assigned as a "reconsideration."

By letter dated October 4, 1999, the Office advised appellant that it had scheduled her for another functional capacity evaluation on October 25, 1999 and advised of the consequences of failing to cooperate or refusing to submit to the evaluation.

Appellant appeared for the functional capacity evaluation on October 25, 1999. The rehabilitation counselor indicated in the report that appellant had completed a functional capacity evaluation on October 14, 1999 and was cooperative throughout the entire test. The rehabilitation counselor also indicated that, during the evaluation conducted on October 25, 1999, appellant's scores taken from pain questionnaires were compared to observed behavior and movement patterns during evaluation tasks and it was determined that her perception of pain and disability was disproportionate to impairment. It was also determined that appellant exhibited signs of exaggeration and that the test results were invalid, which indicated that appellant gave a submaximal effort throughout the entire evaluation.

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<sup>2</sup> 5 U.S.C. § 8123(d).

By letter dated November 18, 1999, the Office advised appellant that the September 24, 1999 decision suspending compensation remained in effect, since appellant did not fully cooperate with the October 25, 1999 evaluation. By letter dated December 2, 1999, she requested reconsideration and indicated that she was appealing the Office decision dated November 18, 1999.

By decision dated December 23, 1999, the Office denied the request for reconsideration on the basis that it was untimely. The Office explained that it did not issue a decision on November 18, 1999 but advised her by letter on that date that the September 24, 1998 remained in effect. The Office stated that appellant's right to reconsideration expired one year from the September 24, 1998 decision and therefore her request for reconsideration was untimely.

The Board finds that the case is not in posture for decision.

The record indicates that the Office's September 24, 1998 decision properly suspended appellant's compensation, effective July 24, 1994, as she had refused to appear at a medical examination ordered pursuant to section 8123. The Board finds, however, that in its December 23, 1999 decision, the Office improperly determined the matter of her compensation through the appeal process of a reconsideration and not on the issue regarding her suspension of compensation.

Appellant indicated in her September 8, 1999 request letter that she was willing to cooperate with future requests and asked that her benefits be reinstated as soon as possible. Pursuant to 20 C.F.R. § 10.323, there is no time limit on a claimant expressing a willingness to comply. Following an October 25, 1999 evaluation which indicated that she failed to fully cooperate with testing, the Office notified her that its prior decision dated September 24, 1998 remained in effect and did not issue a separate suspension decision that would afford appellant new appeal rights. In its December 23, 1999 decision, the Office did not determine whether appellant's compensation should be reinstated but that appellant's December 2, 1999 reconsideration request was untimely with respect to the September 24, 1998 decision. The Board therefore vacates the Office's December 23, 1999 decision and remands the case for the Office to properly address the issue of whether appellant's compensation should be reinstated pursuant to her September 8, 1999 request, pursuant to 20 C.F.R. § 10.323.

The December 23, 1999 decision of the Office of Workers' Compensation Programs is hereby vacated and remanded to the Office for a determination on the issue of reinstatement of appellant's compensation.

Dated, Washington, DC  
March 27, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member