

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD BURTON LEE and GENERAL SERVICES ADMINISTRATION,
FEDERAL PROTECTIVE SERVICE, Washington, DC

*Docket No. 00-1498; Oral Argument Held September 13, 2001;
Issued October 24, 2001*

Appearances: *Edward Burton Lee, pro se; Thomas G. Giblin, Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation for obstruction of a medical examination.

The case has been on appeal three times previously.¹ On January 16, 1976 appellant slipped and fell on steps at the employing establishment, landing on his right hip. The Office accepted appellant's claim for a contusion of the right gluteal area, including the sciatic nerve, causing radiculopathy. In a December 5, 1977 decision, the Office found that appellant could perform the duties of a general clerk and, therefore, had a 56 percent loss of wage-earning capacity.

In a March 12, 1980 order, the Board remanded the case on the grounds that new medical evidence had been submitted which should have been reviewed by the Office. In a May 31, 1984 decision, the Board affirmed the Office's decision that appellant had a 56 percent loss of wage-earning capacity. In an August 18, 1985 decision, the Board found that the Office had properly denied appellant's request for reconsideration.

In an October 16, 1998 letter, the Office requested Dr. Benjamin S. Pecson, a general practitioner and appellant's treating physician, to submit an updated report on appellant's condition. In an October 23, 1998 letter, appellant contended that the Office had not provided continuing medical care for his condition and, therefore, was not entitled to continuing medical reports.

¹ Docket No. 85-982 (issued August 18, 1985); Docket No. 83-2039 (issued May 31, 1984); Docket No. 79-1338 (Order Remanding Case issued March 12, 1980).

In a March 11, 1999 letter, the Office referred appellant, a statement of accepted facts and the case record to Dr. Edward Alexander, a Board-certified orthopedic surgeon, for an examination and second opinion on appellant's current condition. The examination was scheduled for March 31, 1999.

On March 31, 1999 appellant appeared at Dr. Alexander's office for the examination but refused to fill out and sign a medical form prior to the examination. Appellant was informed that the examination would not occur unless he completed the form. Appellant refused to complete the form, even after a telephone conversation with an official from the Office. Appellant then left Dr. Alexander's office without undergoing the scheduled examination.

In an April 8, 1999 letter, the Office warned appellant that his compensation would be suspended for obstruction of a medical examination because he had refused to fill out a medical form at Dr. Alexander's office and, as a result, the examination had not occurred. Appellant was allotted 14 days to give his reasons for obstructing the medical examination. The Office stated that if good cause were not established for appellant's refusal to undergo the examination, his compensation would be suspended until he reported for the examination.

In an April 12, 1999 letter, appellant stated that he had refused to complete a form that had not been approved under government regulations. He argued that his refusal was lawful and that the failure to complete the examination rested with Dr. Alexander who refused to conduct the examination once appellant refused to fill out the form. He also contended that because the examination was to take place in Virginia, he was denied the right to have his personal physician participate in the examination. His physician, licensed in Maryland, was not licensed to practice medicine in Virginia. Appellant additionally claimed that, since his case record was lost at some point, there was no guarantee that the case record forwarded to Dr. Alexander was sufficiently complete for a full and accurate examination.

In an April 28, 1999 decision, the Office suspended appellant's compensation for obstruction of a medical examination.

Appellant requested an oral hearing, which was held on November 2, 1999. At the hearing, appellant stated that the form at Dr. Alexander's office was a credit application which stated that he would be responsible for payment of the cost of the medical examination. He indicated that, since the Office had ordered the examination, it bore the responsibility to pay for it. He also repeated his argument that he was deprived of his right to have his personal physician present at the examination.

In a February 10, 2000 decision, the Office hearing representative found that appellant had obstructed the examination of Dr. Alexander. He, therefore, affirmed the suspension of appellant's compensation.

The Board finds that the Office properly suspended appellant's compensation for obstruction of a medical examination.

Section 8123(a)² of the Federal Employees' Compensation 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. Section 8123(d) states:

“If an employee refuses to submit to or obstructs an examination, his right to compensation under [the Act] 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.”³

The Office's October 1998 request for an updated report on appellant's condition was within its discretion under section 8123. Appellant, however, refused to provide any current medical evidence on his condition. The Office, therefore, properly referred appellant to Dr. Alexander.

Appellant refused to complete a form requesting basic information prior to the scheduled examination by Dr. Alexander. The form requested appellant's name, address and telephone number and his employer's address, all of which is basic information that Dr. Alexander would be entitled to have for his records. The form requested appellant's social security number, which appellant would be justified in leaving blank if he had concerns about personal security. The form asked for the date of the injury, the part of the body injured and the current medications appellant was taking, which would provide a quick reference for the physician conducting the examination. The form asked whether appellant was allergic to any medications, which is a standard question meant to ensure the safety of any patient should medication be prescribed. The form asked whether appellant had ever had hepatitis, HIV, or tuberculosis or had ever had a blood transfusion. These questions are pertinent to an examination so that a physician can take precautions to avoid the infection of himself or members of his staff. The form requested insurance information, which is a standard question in any examination.

The form required appellant's signature to ensure that the cost of the examination be paid. The Office had informed appellant that it would pay the cost of the examination. Therefore, even if appellant were to be billed for the examination, the Office was required to bear the cost of the examination, either to pay the physician directly or reimburse appellant if he were required to pay the cost of the examination. While appellant may have had objections to some of the questions on the form and the requirement to guarantee payment for the examination be paid, his refusal to complete any part of the form, including his name and address, was not appropriate or reasonable. The physician conducting the examination was entitled to that basic information. Appellant's refusal to provide such basic information constituted an obstruction of the medical examination.

Appellant contended that the Office, by referring him to a physician in Virginia instead of Maryland, deprived him of the right to have a physician present at the examination. The Board notes that appellant lived in Virginia at the time the Office referred him to Dr. Alexander. The

² 5 U.S.C. § 8123(a).

³ 5 U.S.C. § 8123(d).

Office, therefore, acted appropriately in referring appellant to a physician that was in close geographical proximity.

Appellant's contention that his personal physician could not participate in the examination because the physician was not licensed to practice in Virginia is irrelevant. The provision permitting a claimant's personal physician to be present at a second opinion examination places the personal physician in the role of an observer or expert witness who can later provide a statement on whether the examination was conducted properly. Such an observer role would not constitute the practice of medicine and, therefore, would not bar a personal physician from being present.

Appellant contended that he received inadequate notice of the examination. The notice of examination was dated March 11, 1999 and indicated that the examination would occur on March 31, 1999. While appellant received only 20 days notice, he did present himself at the specified date and time for the examination. If appellant had not appeared for the examination, he may have had a valid objection to inadequate notice. However, since appellant did appear, his objection to the notice is irrelevant.

Appellant contended that his case record was incomplete because it was lost at one point. He also raised claims regarding inaccurate medical information from the first physician to examine him after the employment injury in 1976. These issues have been considered previously by the Office and the Board and have been found insufficient to change the decisions of either the Office or the Board. On this appeal, these contentions are irrelevant as the issue is whether appellant obstructed an examination that sought to determine his current medical condition and disability status. Based on the facts in this case, appellant's prior medical history would have no significant relevance to the issue of whether he remained disabled as a result of the employment injury.

Appellant also argued that Dr. Alexander had a tenuous associate relationship with a prior physician in his case which would taint Dr. Alexander's report. However, it is not required in a second opinion examination that a physician not be an associate of any physician who has previously examined the claimant.⁴ Appellant can object to a physician conducting a second opinion examination if he has reason to believe that the selected physician would be biased. However, appellant must submit evidence to support his claim of bias. In this case, appellant has presented no such evidence.

Appellant has offered to undergo a medical examination at another location. However, the choice of a physician to conduct an examination under the provisions of section 8123 rests with the Office, not the claimant. The Office has discretion, within reason, to choose any physician who has the qualifications to conduct a second opinion examination. As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.⁵ There is no

⁴ *Harold Burkes*, 42 ECAB 199 (1990).

⁵ *Daniel J. Perea*, 42 ECAB 214 (1990).

evidence that the Office abused its discretion in this case in suspending appellant's compensation for obstruction of a medical examination.

The February 10, 2000, decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 24, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member