

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFFREY S. GREEN and U.S. POSTAL SERVICE,
POST OFFICE, Seattle, WA

*Docket No. 00-2208; Submitted on the Record;
Issued October 12, 2001*

DECISION and ORDER

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

The issue is whether appellant's left foot condition is causally related to factors of his federal employment.

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

On appeal, appellant's authorized representative argues, as he had before the Office of Workers' Compensation Programs, that the Office's failure to provide sufficient time between the date of the referral letter and the date of the second opinion evaluation deprived appellant of the statutory right to have a physician designated and paid by him present to participate in the examination, and that this denial precludes the Office from relying on the report of the second opinion physician to deny benefits. The representative further argues that the Office failed to notify him, the attorney of record, of the second opinion evaluation in a timely manner and, thus, also deprived appellant of his statutory right. For the reasons stated below, the Board agrees.

Section 8123(a) of the Federal Employees' Compensation Act¹ states, in pertinent part:

“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. The employee may have a physician designated and paid by him present to participate in the examination.”

In the case of *Esther Velasquez*,² the Board found that by misinforming the claimant of the purpose of the medical referral the Office effectively denied her the right granted by statute to have “a physician designated and paid by him present to participate in the examination.” The

¹ 5 U.S.C. § 8123(a).

² *Esther Velasquez*, 45 ECAB 249, 254 (1993).

Board also found that the Office was precluded from relying on the resulting medical report “before affording appellant the opportunity to exercise this statutory right.” Thus the existence of the statutory right and the remedy when the Office effectively denies it are clearly established.

In the instant case, appellant was first notified of his statutory right in a letter of October 5, 1998. The Office then issued two letters of October 13 and 20, 1998 to notify appellant of the time, date and location of his second opinion examination. Each notice was for a different physician. Appellant attended the October 23, 1998 examination with Dr. Birkeland, which the notice of October 20, 1998 had arranged. The Office hearing representative acknowledged in her July 14, 1999 decision that the amount of time between the mailing of the first notice of October 13, 1998 and an examination scheduled for October 17, 1998 and the mailing of the second notice of October 20, 1998 and an examination scheduled for October 23, 1998 was not adequate time for appellant to arrange for his physician to be present at the examination. The Office hearing representative effectively found this error to be harmless as the weight of the evidence and the denial of appellant’s claim rested with Dr. Birkeland, the Office referral physician.

The Office hearing representative, in the decision of July 14, 1999, recognized that the Office did not provide sufficient time by allowing three or four days between the date the notice was mailed to appellant and the date of the examination appointment. The Board finds that the deprivation of a right under section 8123 of the Act cannot be characterized as harmless error. As the notification of the second opinion referral provided insufficient time for appellant to exercise his statutory right, the Office is therefore precluded from relying on the opinion of the second opinion physician. The case will be remanded to the Office for another second opinion examination for the purpose of affording appellant the opportunity to have his physician participate in the examination. The Office should then further develop the evidence as it deems necessary and issue an appropriate decision.

The decision of the Office of Workers’ Compensation Programs dated July 14, 1999 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
October 12, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member