

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANDREW STURZIONE, SR. and GENERAL SERVICES
ADMINISTRATION, FEDERAL SUPPLY SERVICE, BELLE MEAD
DEPOT, Belle Mead, NJ

*Docket No. 01-836; Submitted on the Record;
Issued August 13, 2002*

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 under 5 U.S.C. § 8123(d) on the grounds that he failed to attend a scheduled medical examination.

The Office accepted that on January 16, 1987, appellant, then a 50-year-old forklift operator, sustained an acute lumbosacral sprain when he pulled open a file cabinet drawer.¹ Appellant stopped work on January 16, 1987 and did not return.² He submitted periodic reports

¹ The claim for the January 16, 1987 injury was assigned Claim No. A02-0570861. Appellant had a previous claim accepted for a July 16, 1984 lumbosacral strain and a right knee sprain, assigned Claim No. A2533832. On May 1, 1987 appellant underwent right knee surgery to remove hardware from previous surgery on the patella.

² Appellant received vocational rehabilitation services from December 1989 to June 1991. Concurrent with its vocational rehabilitation efforts, the Office obtained two second opinion reports. Dr. Richard Sacks, a Board-certified orthopedic surgeon, submitted a February 16, 1989 report diagnosing a chronic lumbosacral sprain, mild osteoarthritis of the right knee and morbid obesity. Dr. Sacks opined that appellant was capable of light-duty work if no "more significant orthopedic pathology" were found. Dr. Cary Glastein, a Board-certified orthopedic surgeon, submitted a December 5, 1990 report finding morbid obesity, "nonorganic physical signs" of the lumbar spine, negative straight leg raising tests and significant functional overlay "not based on any anatomic pathology. Dr. Glastein opined that appellant could work four to six hours a day, light duty. On October 20, 1999 appellant's file was referred to a nurse intervention specialist, who closed the report in September 2000 as Dr. Steven Berkowitz, an attending Board-certified orthopedic surgeon, would not respond.

from Dr. Berkowitz, from January 1987 to February 10, 2000, finding appellant disabled for work due to lumbar and right knee pain, deconditioning and morbid obesity.³

In a May 28, 1999 report, Dr. Berkowitz found severe low back pain radiating into both legs, osteoarthritis of the right knee and found appellant permanently disabled for all work. Dr. Berkowitz reiterated these findings in a February 10, 2000 report.

By July 12, 2000 letter, the Office referred appellant to Dr. Andrew Weiss, a Board-certified orthopedic surgeon, for a second opinion examination. The appointment was scheduled for Wednesday, August 23, 2000 at 10:10 a.m. The Office advised appellant that failure to attend the appointment would be interpreted as obstruction and result in the suspension of his compensation benefits. The appointment was confirmed by National Health Resources (NHR), a medical management company providing support services to the Office.

In an undated letter received by the Office on August 3, 2000, appellant noted calling the Office in late July stating that he could not attend the scheduled appointment with Dr. Weiss due to a previously scheduled appointment with his diabetologist. He requested that the appointment with Dr. Weiss be rescheduled.⁴

In a September 21, 2000 letter, the Office advised appellant that the second opinion appointment with Dr. Weiss had been rescheduled to Wednesday, October 4, 2000 at 11:10 a.m. Appellant was again advised of the penalty for failing to keep this appointment.

In an October 3, 2000 letter, appellant stated that Dr. Weiss' office had unilaterally "changed the assigned appointment" without approval from the Office. Appellant noted receiving an October 2, 2000 letter from Dr. Weiss' office, changing the appointment time from 11:10 a.m. to 1:30 p.m. on October 4, 2000. Appellant asserted that he called Dr. Weiss' office days before the appointment to explain that it was "impossible to be at his office at this new time." He requested that the receptionist telephone the Office to get approval to change the appointment time and reschedule the appointment. Appellant explained that he could not attend the appointment at 1:30 p.m. as he had a final tuxedo fitting for his daughter's October 7, 2000 wedding.

The record contains an October 9, 2000 memorandum stating that appellant "did not show for a second opinion on October 4, 2000 [at] 1:30 p.m. with Dr. Andrew Weiss."

In an October 11, 2000 letter, the Office advised appellant that his failure to keep his appointment with Dr. Weiss on October 4, 2000 would be considered obstruction. Appellant was given 14 days to explain why he failed to keep the appointment. He was advised that if his explanation failed to "provide a good cause for [his] failure to keep the appointment or should

³ The record contains a January 26, 1998 decision suspending appellant's compensation benefits for failure to return 1996 and 1997 Forms EN-1032 statements of earnings and income. The record indicates that appellant returned the requested information to the Office on February 18, 1998 and that his benefits were reinstated retroactively.

⁴ In a September 5, 2000 note, the Office indicated that the second opinion appointment would be rescheduled.

[he] fail to respond, [he] will be found to have obstructed the examination within the meaning of section 8123 and [his] entitlement to benefits” would be suspended.

In an October 16, 2000 letter, appellant again noted receiving an October 2, 2000 letter from Dr. Weiss’ office, changing the time of the scheduled second opinion examination from 11:10 a.m. to 1:30 p.m. Appellant stated that when he called Dr. Weiss’ office to determine if the Office had approved this change in time, the receptionist was rude and “slammed the telephone in [his] ear.” He then wrote the October 3, 2000 letter to the Office, explaining that Dr. Weiss’ office had rescheduled the appointment as the doctor had to be in court at 11:10 a.m. Appellant asserted that it was unfair to blame him for missing an appointment that the doctor’s office had rescheduled without authorization from the Office.

By decision dated December 12, 2000, the Office suspended appellant’s compensation beginning November 5, 2000 on the grounds that appellant refused to submit as ordered for a medical examination by Dr. Weiss. The Office noted that the October 4, 2000 appointment “was a rescheduled appointment from August 23, 2000. The reason given for not attending the initial appointment was that [appellant] had another doctor’s appointment on that day. This Office accepted this although you did not submit proof of the other doctor’s appointment. The latest reason being that you had a tuxedo fitting for your daughter’s wedding does not establish good cause for [appellant’s] failure to attend the” October 4, 2000 examination by Dr. Weiss.⁵

The Board finds that the Office improperly suspended appellant’s compensation benefits.

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.⁶ The Act provides as follows:

“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. 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.”⁷

The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office.⁸ The only limitation on this authority is that of reasonableness.⁹ The Office’s regulation, 20 C.F.R. § 10.320, provides that an injured employee “must submit to examination by a

⁵ The record indicates that appellant’s compensation benefits were reinstated effective December 26, 2000, with reinstatement to the periodic roll effective January 28, 2001.

⁶ 5 U.S.C. § 8123(d).

⁷ *Id.*; see also 20 C.F.R. § 10.407(b).

⁸ *James C. Talbert*, 42 ECAB 974 (1991).

⁹ *Raymond J. Hubenak*, 44 ECAB 395 (1993).

qualified physician as often and at such times and places as [the Office] considers reasonably necessary.”

As the only limitation on the Office’s authority is reasonableness, abuse of discretion is generally shown through proof of manifest error.¹⁰ The Board finds that there is sufficient evidence that the Office abused its discretion in finding that appellant failed to present good cause for failure to attend the scheduled examination.

In the present case, the record establishes that appellant stopped work on January 16, 1987 due to a work-related lumbar injury and had received total disability compensation since approximately March 1987. To determine the extent and degree of appellant’s impairment, the Office referred him to Dr. Weiss, a Board-certified orthopedic surgeon, on July 12, 2000 for a second opinion examination. The Office scheduled an appropriate medical examination and notified appellant of the applicable sanctions should he not appear. At appellant’s request, the Office rescheduled the original August 23, 2000 examination to October 4, 2000 to accommodate a previously scheduled appointment with his diabetologist. Appellant was advised by a September 21, 2000 letter, that the second opinion examination with Dr. Weiss had been rescheduled to October 4, 2000 at 11:10 a.m. and of the penalties for failing to attend.

Appellant failed to attend the October 4, 2000 examination, despite notification that the Office would consider this an obstruction. In an October 11, 2000 letter, the Office noted appellant’s failure to attend and that his reasons for refusing to attend the examination were not reasonable. The Office followed proper procedures by advising appellant that he was to submit in writing the reasons for failing to undergo the scheduled appointment, within 14 days.¹¹ Appellant responded by an October 16, 2000 letter, that he did not attend the appointment at 1:30 p.m. on October 4, 2000 as he could not reschedule his tuxedo fitting for his daughter’s wedding. Appellant also asserted that Dr. Weiss’ office erred in rescheduling the appointment from 11:10 a.m. to 1:30 p.m. without authorization from the Office.

Appellant asserts that he was not required to attend the rescheduled appointment at 1:30 p.m. on October 4, 2000 because Dr. Weiss’ office unilaterally rescheduled the appointment only two days prior to the examination. On appeal, in a January 30, 2001 letter, appellant stated that on October 2, 2000, NHR, the medical Management Company scheduling second opinion appointments for the Office, notified appellant that his appointment had been changed from 11:10 a.m. to 1:30 p.m. on October 4, 2000. Appellant then called NHR to see if the Office had approved the change in appointment time. An employee of NHR informed appellant that “she did n[o]t have to get approval” and that he must keep the appointment. Appellant was informed that the time change was necessary as “[Dr. Weiss] was going to be in court the whole morning and could only see me in the afternoon.” Appellant explained that he could not attend as he “had to get the final fitting for the tuxedo, for [his] daughter’s wedding on the seventh of October.” Appellant commented that it was “enough that [he] had [the fitting] changed from the morning of

¹⁰ *Daniel J. Perea*, 42 ECAB 214 (1990).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (April 1993).

[October] 4, 2000 because of the appointment with Dr. Weiss, there was no way to have the tailor change the fittings again at that late ... time.”

The Board finds that the Office acted unreasonably in disregarding the fact that Dr. Weiss’ office unilaterally changed the time of the scheduled October 4, 2000 appointment from 11:10 a.m. to 1:30 p.m. The Board notes that appellant made diligent efforts to inform both the Office and Dr. Weiss’ office of his inability to attend the rescheduled 1:30 p.m. appointment due to the tuxedo fitting. The Office’s procedures provide that a claimant has up to 14 days after the scheduled appointment to submit a letter detailing a failure to attend a scheduled examination.¹² In this case, appellant wrote to the Office on October 3, 2000, prior to the scheduled appointment and also made several telephone calls, explaining that he could not attend the 1:30 p.m. appointment due to the final tuxedo fitting for his daughter’s wedding. The Office did provide sufficient argument as to why the tuxedo fitting, which appellant had scheduled so as not to conflict with the original 11:10 a.m. appointment time, was not a “valid excuse” for failing to attend the unilaterally rescheduled appointment, especially considering the short notice provided to appellant

The Office, therefore, abused its discretion in suspending appellant’s compensation and the December 12, 2000 decision must be reversed.¹³

¹² *Id.*

¹³ *Daniel J. Perea*, 42 ECAB 214 (1990).

The decision of the Office of Workers' Compensation Programs dated December 12, 2000 is hereby reversed

Dated, Washington, DC
August 13, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member