

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEONARD R. POPHAM and DEPARTMENT OF THE AIR FORCE,
KELLY AIR FORCE BASE, San Antonio, TX

*Docket No. 01-1624; Submitted on the Record;
Issued August 9, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's right to compensation on the basis that he refused to undergo a medical examination.

On May 3, 1999 appellant, a 38-year-old water mechanic helper, injured his lower, upper and middle back when he slipped on a wet floor. He filed a claim for benefits on the date of injury, which the Office accepted for lumbar, thoracic and cervical strain. The Office commenced payment for temporary total disability compensation and placed appellant on the periodic rolls. He has not returned to work since the date of injury.

In order to determine appellant's current condition and to ascertain whether he still suffered residuals from his accepted conditions, the Office referred him to Dr. Theodore W. Parsons, a Board-certified orthopedic surgeon. In a report dated April 1, 2000, Dr. Parsons stated that there was no evidence of active lumbar, thoracic or cervical strain, that he had a functional overlay and chronic pain syndrome "clouding his ability to return to work." He did not believe that appellant could return to his date-of-injury job, but opined that he could return to sedentary or light work for four hours per day while slowly progressing to an eight-hour day.

On June 2, 2000 the Office determined that there was a conflict in the medical evidence and referred appellant, together with a statement of accepted facts and the case record, to Dr. Eradio Arredondo, a Board-certified orthopedic surgeon, for an impartial medical evaluation. The referral letter, dated June 2, 2000, advised appellant that the examination was scheduled for June 28, 2000 and that, under section 8123(d) of the Federal Employees' Compensation Act, an employee's right to compensation is subject to suspension if the employee refuses to submit or obstructs a medical examination.

By letter dated July 20, 2000, the Office issued a notice of proposed suspension of compensation based on appellant's failure to appear at two scheduled examinations. The Office advised appellant that it had been informed by Dr. Arredondo's office that the examinations had been scheduled for June 28 and July 11, 2000, but that he had failed to attend either of them.

The Office noted that appellant had been advised in the June 2, 2000 letter, that his right to compensation could be suspended if he refused to submit to a medical examination. The Office stated that appellant had 14 days to explain why he failed to keep the appointment with Dr. Arredondo and that, if he did not respond or if his reasons for refusing to keep the appointment were found to be unacceptable, his entitlement to compensation would be suspended until he agreed to submit to the examination as directed.

By letter dated July 21, 2000, appellant advised the Office that he had been visiting his father in the surgical intensive care unit at the time of the July 11, 2000 appointment.

By letter dated August 7, 2000, the Office informed appellant that he could reschedule his appointment with Dr. Arredondo at either the Whitsett or Temple, Texas areas. The Office allotted appellant an additional 14 days to respond. The Office did not receive a response within 14 days.

By decision dated August 28, 2000, the Office suspended appellant's right to compensation effective September 10, 2000, based on his failure to attend a medical examination scheduled with Dr. Arredondo. The Office found that appellant had either refused to submit to or had obstructed the directed medical evaluation.

By letter dated September 11, 2000, appellant requested an oral hearing. By letter dated March 5, 2001, the Office informed appellant that a hearing would be held on April 25, 2001.

In a May 7, 2001 decision, the Office found that appellant abandoned his request for a hearing, as he failed to appear at the time and place set for the hearing and did not show good cause for his failure to appear.

The Board finds that the Office acted improperly by invoking 5 U.S.C. § 8123 in suspending appellant's entitlement to compensation benefits.

Section 8123(a)¹ 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.... If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”

In this case, the Office determined that there was a conflict in medical opinion regarding whether appellant had any residuals causally related to his accepted conditions and scheduled him for an examination by an impartial medical specialist to resolve the conflict in medical opinion.²

¹ 5 U.S.C. § 8123(a).

² When a conflict in medical opinion arises, section 8123(a) of the Act requires the Office to appoint a third physician, also known as a impartial or impartial medical specialist. *Dallas E. Mopps*, 44 ECAB 454, 456 (1993).

By letter dated June 2, 2000, the Office referred appellant to Dr. Arredondo for an examination scheduled on June 28, 2000. The Office apprised appellant of the requirements for examination under section 8123(d), which 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."³

The Board has held a time must be set for a medical examination and the employee must fail to appear for the appointment, without an acceptable excuse or reason, before the Office can suspend or deny the employee's entitlement to compensation on the grounds that the employee failed to submit to or obstructed a medical examination.⁴ In this case, the time for an impartial medical examination by Dr. Arredondo was scheduled on two occasions, however, appellant failed to appear for examination. In this regard, the Office's Federal (FECA) Procedure Manual provides:

"Failure to Appear. If the claimant does not report for a scheduled appointment, he or she should be asked in writing to provide an explanation within 14 days. If good cause is not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d), until the claimant reports for examination."⁵

Following notice that appellant failed to appear for two scheduled examinations with Dr. Arredondo, the Office in a July 20, 2000 letter, allowed appellant 14 days to explain why he failed to keep the June 28 and July 11, 2000 appointments and advised him that if he did not respond or if his reasons were found unacceptable, his entitlement to compensation would be suspended until he agreed to submit to examination as directed. By letter dated July 21, 2000, appellant responded, advising that he had visited his father in a surgical intensive care unit on July 11, 2000. On August 7, 2000 the Office thereafter informed appellant to reschedule his appointment with Dr. Arredondo. The Office did not advise appellant that his reason for not attending the examination was found unacceptable.

Pursuant to the Federal (FECA) Procedure Manual, Part 3 -- Medical Examinations, Chapter 3.500.3 (April 1993),⁶ after contacting the physician and setting the date and time of the appointment, the Office must notify the claimant in writing as to the name and address of the physician to whom he or she is being referred as well as the date and time of the appointment. In this case, however, no date or time for examination by the impartial specialist was set at the time of the suspension of compensation. Appellant's July 21, 2000 letter explained that he had missed the July 11, 2000 appointment to attend to his father. Thereafter, the Office advised appellant to reschedule the examination rather than contacting the physician's office to set a new

³ 5 U.S.C. § 8123(d).

⁴ *Margaret M. Gilmore*, 47 ECAB 718 (1996); *Herbert L. Dazey*, 41 ECAB 271 (1989); *Delores W. Loges*, 38 ECAB 834 (1987).

⁵ Federal (FECA) Procedure Manual, Part 2 -- *Claims, Suspension of Benefits*, Chapter 2.810.14(c) (January 1992).

⁶ Federal (FECA) Procedure Manual, Part 3 -- *Medical Examinations*, Chapter 3.500.3 (April 1993).

time and date for examination. Thus, the Office acted improperly in suspending appellant's compensation.

The August 28, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
August 9, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member