U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LYNN C. HUBER and DEPARTMENT OF LABOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Jacksonville, FL

Docket No. 01-1704; Oral Argument Held October 15, 2002;
Issued December 31, 2002

Appearances: *Richard Young, Esq.*, for appellant; *Julia Mankata-Tamakloe, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits based on her refusal to submit to examinations with impartial medical specialists.

The Office accepted appellant's claim for depressive neurosis and appellant was paid continuing temporary total disability benefits. Appellant has not worked since March 7, 1991.

In a report dated July 3, 1995, appellant's treating physician, Dr. Joseph A. Virzi, a Board-certified psychiatrist and neurologist, diagnosed avoidant, dependent, schizoid and "probably" passive aggressive personality. Dr. Virzi recommended that appellant attend partial hospitalization at Oak Center's Day Treatment Program and stated that she would be required to take medications. The doctor opined that she was totally disabled.

In a report dated December 15, 1995, Dr. Virzi stated that appellant was in need of psychiatric treatment but taking care of her sick mother prevented her from reporting for treatment. He also stated that appellant had not complied with taking psychotropic medications because she was doubtful of the benefits. Dr. Virzi opined that appellant could "do some work in some areas" and her disability was not so severe that she was "incapable of doing anything."

In a report dated April 20, 1998, a second opinion physician, Dr. Eduardo A. Sanchez, considered appellant's history of injury and performed a mental status examination. Dr. Sanchez stated that the most conclusive diagnosis of appellant was by Dr. George M. Joseph, a Board-certified psychiatrist and neurologist, who reported on June 30, 1992 that appellant had an occupational problem, dysthymia and personality disorder not otherwise specified, with obsessive and schizoid features. Dr. Sanchez stated that appellant was not disabled from any psychiatric standpoint, that there was a "great deal of manipulation and perhaps malingering,"

and that he did not see any evidence of depression. Dr. Sanchez further stated that appellant had a personality disorder not otherwise specified with dependent, obsessive and avoidant features and moderate psychosocial stressors.

To resolve the conflict in the evidence between Drs. Virzi and Sanchez's opinions regarding whether appellant was disabled due to her depressive neurosis, the Office referred appellant to an impartial medical specialist, Dr. Atul M. Shah, a Board-certified psychiatrist and neurologist. On March 18, 1999 the Office scheduled an appointment for appellant to have a physical examination by Dr. Shah on April 12, 1999 at 3:00 p.m. The Office informed appellant that if an employee refused to submit or obstructed a physical examination, the right to compensation would be suspended until the refusal or obstruction stopped.

By letter dated April 1, 1999, appellant stated that she saw Dr. Sanchez for only 23 minutes, that he performed no tests and that he could not have based his report on the evaluations of five other psychiatrists in the record who diagnosed that she was depressed. She also stated that the Office telephoned Dr. Sanchez prior to her visit with him in what she believed was the Office's attempt to influence Dr. Sanchez to give the diagnosis it wanted although she said Mr. Charles O. Ketcham, Jr., the Regional Director, stated the call was limited to making arrangements for her medical examination. By letter dated April 26, 1999, Mr. Ketcham explained that the Office's verbal communication with Dr. Sanchez, who was not an impartial medical specialist, was not in itself reason for the exclusion of his report.

By letter dated May 12, 1999, the Office issued a notice of proposed suspension of compensation, stating that Dr. Shah's office advised that appellant cancelled her appointment on April 12, 1999, rescheduled the appointment for another date, but failed to show for that appointment. The Office reiterated that compensation would not be payable while the refusal or obstruction of an examination by a physician as required by the Office continued. The Office provided appellant 14 days to respond to the letter.

By letter dated May 20, 1999, appellant stated that the objection she raised earlier that Dr. Sanchez's opinion was tainted should be addressed before the Office decided that she should see an impartial medical specialist. In another letter dated May 20, 1999, appellant stated:

> "Mr. Ketcham has actually taken the position that it is proper for a CE [claims examiner] to telephone a doctor chosen to give a second opinion and discuss a substantive issue. Even, apparently, in this context where the CE told the examining physician what diagnosis was expected."

In a third letter dated May 20, 1999, appellant explained her opinion that Dr. Sanchez's report was tainted in greater detail.

By letter dated June 24, 1999, the Acting Director, Sheila M. Williams, explained to appellant that "current procedures do not prohibit telephone calls from a claims examiner to a physician selected for a second medical opinion examination." Ms. Williams stated that appellant did not submit evidence of impropriety by the district office or evidence that the physician made conclusions based on leading questions which might constitute a basis for excluding the physician's report.

By decision dated June 2, 1999, the Office finalized suspension of appellant's compensation because she did not establish good cause for refusing to submit to or obstructing the examination with Dr. Shah as required by the Office.

Appellant saw Dr. Shah on or around June 14, 1999 for a physical examination and in a report dated June 21, 1999, Dr. Shah opined that appellant had dysthymia versus major depressive illness, chronic; had "noncompliance" (with treatment); work inhibition; and he ruled out malingering. He also suggested that she was totally disabled.

After appellant attended her physical examination with Dr. Shah, her compensation benefits were reinstated.

In a report dated March 12, 1999, Dr. Mohammed O. Saleh, a Board-certified psychiatrist and neurologist, performed a mental status examination and diagnosed major depression recurring without psychosis, adjustment reaction with mixed features and occupational problems. He stated that appellant attributed her current symptoms to her employment and his goal in treating appellant was to reduce depressive symptoms and prevent further deterioration in functioning. Dr. Saleh stated that he did not anticipate that appellant would progress rapidly due to her chronic condition.

To resolve the conflict between Drs. Saleh and Sanchez regarding whether appellant continued to suffer from depressive neurosis, on November 22, 1999 the Office referred appellant to an impartial medical specialist, Dr. Michael P. Pruitt, a Board-certified psychiatrist and neurologist. The Office informed appellant that the appointment was scheduled for December 16, 1999 at 10:30 a.m.

By letter dated December 7, 1999, appellant stated that she had already seen Dr. Shah to resolve the conflict between Drs. Sanchez and Virzi and reiterated her objection to the use of Dr. Sanchez's opinion in finding a conflict in the evidence because his opinion was "contaminated."

In an undated, handwritten note received by the Office on January 7, 2000, appellant informed the Office that she was unable to attend her appointment with Dr. Pruitt because of a conflict with another medical appointment, and stated that she rescheduled the appointment with Dr. Pruitt to January 14, 2000 at 11:15 a.m.

In a telephone report dated January 14, 2000, the Office stated that a medical assistant from Dr. Pruitt's office called the Office and stated that appellant was not able to make the appointment that day. The Office stated that it called appellant and she advised that she was sick with the flu and did not want to spread the flu to the doctor's office. The Office called the medical assistant and rescheduled the appointment for January 24, 2000 and called appellant to inform her of the new examination date. By letter dated January 14, 2000, the Office also informed appellant in writing that the appointment with Dr. Pruitt was scheduled for January 24, 2000 at 3:30 p.m.

By letter dated January 20, 2000, appellant informed Dr. Pruitt that she was canceling her appointment with him and would like to reschedule it "in about a week." She stated that the appointment was scheduled by the Office without consulting her and that she was still trying to recover from the flu. Appellant said she was coughing and needed to be near a restroom. She also stated that to subdue her coughing she took a heavy dose of Robitussin DM which put her

"temporarily in a fractured mental state" which she did "not think" she could "afford to have during an important psychological examination."

By letter dated January 20, 2000 to the Office, appellant questioned why the Office was urging her to keep the appointment with Dr. Pruitt. She restated that the conflict in the evidence had been resolved by Dr. Shah and further, Dr. Sanchez's opinion could not form a basis for creating a conflict with Dr. Saleh's opinion because the Office was characterizing Dr. Sanchez as a second opinion physician when his opinion had been obtained prior to Dr. Saleh's opinion.

In another letter to the Office dated January 20, 2000, appellant reiterated her objections to the inclusion of Dr. Sanchez's report in her file, stating that Dr. Sanchez examined her for only 15 minutes, no other doctor in the record agreed with him and his diagnoses were inconsistent.

By letter dated January 20, 2000, appellant told the Office that she had been informed in the telephone call on January 14, 2000 that Dr. Pruitt was extremely angry with her for canceling the appointment. She stated that when she called Dr. Pruitt's office to cancel the appointment, the staff was "very courteous and understanding" and she had no reason to suspect any animosity from Dr. Pruitt.

By letter dated January 24, 2000, appellant stated that she was "still struggling to shake the illness that first delayed [her] appointment."

On January 28, 2000 the Office issued appellant a notice of proposed suspension of compensation, stating that she failed to keep the scheduled appointment of January 24, 2000 in addition to the appointments on December 16, 1999 and January 14, 2000. The Office gave appellant 14 days to respond and advised that if she did not establish good cause for refusing or obstructing an examination as required by the Office, her benefits would be suspended during the period of the refusal or obstruction.

By letter dated February 7, 2000, appellant stated that she felt the Office should address the issues she had raised regarding whether scheduling her to see an impartial medical specialist was appropriate prior to rescheduling another appointment.

By letter dated February 17, 2000, the Office rescheduled another appointment for appellant to see Dr. Pruitt on March 7, 2000 at 10:15 a.m. The Office attempted to deliver notice of the appointment by Federal Express (FedEx) on February 17, 2000 but the envelope returned as undelivered on March 2, 2000.

In a report of a telephone call dated March 2, 2000, the Office stated that it left a tape recorded message on appellant's answering machine (which was answered as "Lee" for a business) and informed appellant that the February 17, 2000 letter advising her of the March 7, 2000 appointment had been returned and she should call the Office.

In a telephone report between the Office and Dr. Pruitt's office dated March 10, 2000, the Office noted that appellant missed the March 7, 2000 appointment.

On March 14, 2000 the Office finalized the suspension of appellant's compensation because appellant did not establish good cause for refusing to submit to or obstructing an examination with Dr. Pruitt as required by the Office.

Appellant requested an oral hearing before an Office hearing representative which was held on August 17, 2000.

At the hearing, appellant's attorney reiterated appellant's objections to the Office's reliance on Dr. Sanchez's report and urged that Dr. Sanchez's opinion be excluded. Her attorney suggested that Dr. Shah's opinion was also biased because, among other reasons, the questions the Office gave Dr. Shah to answer in his report were leading in that the Office asked whether appellant might be "milking the system."

Appellant's attorney stated that appellant canceled the appointment on January 14, 2000 because she had the flu and the Office called appellant and told her that Dr. Pruitt was angry or in fact, "furious" with her for missing the appointment. The attorney did not think appellant should see Dr. Pruitt because if he was angry she would not receive an independent, fair examination. He also stated that appellant had to go to De Land, Florida to attend to family matters (*i.e.*, her father was recently deceased) and health matters related to her husband. The attorney stated that there was no one at appellant's home to receive the FedEx notice of her March 7, 2000 appointment with Dr. Pruitt and that the answering machine at her home was malfunctioning. He stated that appellant did not receive notice of the March 7, 2000 appointment with Dr. Pruitt.

Appellant testified that she canceled the appointment on January 14, 2000 because she had the flu, and when the Office subsequently called her, she was told that Dr. Pruitt was "furious" with her. Appellant explained that in late February or early March, she went to De Land, Florida where her late father's home was. Appellant's husband testified that there were problems with the answering machine at their home address while they were in De Land. He also testified that when they returned from De Land, they had "no clue" that an appointment had been scheduled on March 7, 2000 with Dr. Pruitt. He stated that they learned an appointment had been scheduled when they received notice of the decision and suspension of appellant's benefits.

By decision dated March 8, 2001 finalized on March 12, 2001, the Office hearing representative affirmed the Office's June 2, 1999 and March 14, 2000 decisions.

The Board finds that the Office properly suspended benefits for appellant's refusal to submit to or obstruct the examination with Dr. Shah. The Board further finds that the Office erred in suspending benefits for appellant's refusal to submit to or obstruction of the examination scheduled on March 7, 2000 with Dr. Pruitt.

Section 8123(a) of the Federal Employees' Compensation Act authorizes the Office to require an employee who claims disability as a result of federal employment injury to undergo a physical examination as it deems necessary.[1] 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.[2] The regulations governing the Office provide that an injured employee "must submit to examination by a qualified physician as often and at

[1] 5 U.S.C. § 8123(a).

[2] *Donald E. Ewals*, 51 ECAB 428, 432 (2000); *Antanacio G. Sambrano*, 51 ECAB 557, 559 (2000); *Corlisia L. Sims (Smith)*, 46 ECAB 172, 180 (1994).

such times and places as the Office considers reasonably necessary."[3] The only limitation on this authority is that of reasonableness. 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.[4]

Section 8123(d) states:

> "If an employee refuses to submit or obstructs an examination, his [or her] 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."

The Office procedures provide that the Office must properly notify appellant of his or her responsibility with respect to the medical examination scheduled. This means that appellant and his or her representative, if any, must be notified in writing of the name and address to the physician to whom he or she is being referred as well as the date and time of appointment.[5] The Office procedures provide for a period of 14 days within which to present, in writing, his or her reasons for the refusal or obstruction.[6] If good cause is not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d) until appellant reports for the examination.[7]

In this case, appellant's repeated objections to Dr. Sanchez's report have no bearing on the issue of whether she failed to submit to or obstructed a physical examination with Dr. Shah or Dr. Pruitt. Under the Act, unless appellant shows good cause for not attending the scheduled physical examinations with these doctors, appellant was required to submit to the physical examination the Office required. To resolve the conflict between Drs. Virzi and Sanchez's opinions regarding whether appellant continued to be disabled due to her depressive neurosis, the Office referred appellant to the impartial medical specialist, Dr. Shah. This was proper and in accordance with the statute.[8] The Office scheduled the appointment with Dr. Shah for April 12, 1999 at 3:00 p.m. Appellant cancelled that appointment and rescheduled another appointment but did not show up for the second appointment. On May 12, 1999 the Office issued the notice of proposed suspension of benefits and, after receiving appellant's correspondence objecting to the use of Dr. Sanchez's report, the Office finalized the suspension of benefits on June 2, 1999. Appellant saw Dr. Shah for an examination on June 14, 1999 and her benefits were reinstated.

Appellant's objections to attending Dr. Shah's examination, that Dr. Sanchez's opinion was defective and that it was improper for the Office to rely on his opinion in finding a conflict

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[3] 20 C.F.R. § 10.320.

[4] 5 U.S.C. § 8123(a).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development and Evaluation of Medical Evidence*, Chapter 2.814 (a), (b) (April 1993). *See Dorothy Dillard*, 53 ECAB ___ (Docket No. 02-180, issued July 19, 2002).

[6] *Antanacio G. Sambrano*, *supra* note 2.

[7] *Raymond C. Dickinson*, 48 ECAB 646, 647 (1997).

[8] *See* 5 U.S.C. § 8123(a); *Theresa Goode*, 51 ECAB 650, 652 (2000).

in the evidence and referring appellant to an impartial medical specialist, are not valid reasons for refusing to see Dr. Shah.[9] If, after seeing Dr. Shah, an adverse decision had been rendered based on his opinion, appellant could raise objections to the probative value of Drs. Sanchez and Shah's opinions at that time. Where, as here, appellant has not shown that the Office's reliance on Dr. Sanchez's opinion was in some way egregious but rather she objects to the probative value of Dr. Sanchez's opinion, her objection to his opinion is not a valid reason for refusing to submit to future physical examinations scheduled by the Office.[10] Appellant therefore refused to submit to or obstructed a physical examination without good cause, and the Office's suspension of her compensation benefits during the period of her refusal to see Dr. Shah was proper.

Appellant's objections to Dr. Sanchez's report are also not relevant regarding her failure to attend the March 7, 2000 appointment with Dr. Pruitt. However, the record establishes that appellant did not receive notice of the March 7, 2000 appointment with Dr. Pruitt until the March 14, 2000 decision suspending her compensation benefits was issued. On November 22, 1999 the Office referred appellant to the impartial medical specialist, Dr. Pruitt, to resolve the conflict in the medical evidence between Drs. Saleh and Sanchez regarding appellant's ongoing disability. The appointment was scheduled for December 16, 1999. Appellant canceled that appointment due to a conflict in her schedule and rescheduled another appointment with Dr. Pruitt on January 14, 2000. Appellant canceled the January 14, 2000 appointment because she had the flu. Appellant's attorney then advised her not to see Dr. Pruitt because, as relayed by the Office, Dr. Pruitt was "furious" with her for missing the appointment. By letter dated January 14, 2000 letter, the Office informed appellant that her appointment was rescheduled for January 24, 2000. Appellant informed the Office on January 20, 2000 that she was canceling the January 24, 2000 appointment because the Office made the appointment without consulting her, she still had the flu and the medicine she was taking for her flu affected her mental state.

On January 28, 2000 the Office issued appellant a notice of proposed suspension of compensation for appellant's failure to keep the January 14, 2000 appointment. By letter dated February 17, 2000, the Office scheduled an appointment for appellant to see Dr. Pruitt on March 7, 2000. Although the Office issued appellant a proposed notice of suspension of compensation for failing to attend the January 24, 2000, when the Office scheduled the appointment with Dr. Pruitt on March 7, 2000, in effect it forgave or excused appellant's failure to attend the January 14, 2000 and December 16, 1999 appointments.

The Office sent the letter FedEx notifying appellant of the March 7, 2000 appointment with Dr. Pruitt on February 17, 2000 to her correct home address in Jacksonville, Florida which was returned as undelivered on March 2, 2000. The Board has held that, absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have arrived at the mailing address in due course.[11] Because of the letter sent FedEx was returned as undelivered, the mailbox presumption is rebutted. Appellant and her husband testified they were in De Land, Florida at the time of the attempted delivery and that the answering machine at their home was malfunctioning. They contended that they did not receive

[9] *See Donald E. Ewals*, *supra* note 2, at 432, 434; *Antanacio G. Sambrano*, *supra* note 2 at 560; *Roger S. Wilcox,* 45 ECAB 265, 272-73 (1993).

[10] *Id*.

[11] *Marlon G. Massey*, 49 ECAB 650, 652 (1998); *Charles R. Hibbs*, 43 ECAB 699, 700-01 (1992).

notice of the March 7, 2000 appointment until the compensation benefits were suspended on March 14, 2000. There is no evidence in the record to the contrary. Because the record shows that appellant did not receive notice of the March 7, 2000 appointment with Dr. Pruitt, appellant has established good cause in not showing up for the appointment and the Office's suspension of her compensation benefits on March 14, 2000 was improper.[12] Appellant's compensation benefits should therefore be reinstated retroactive to March 14, 2000.

The March 8, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed in part and reversed in part. The Office's suspension of compensation benefits for appellant's failure to attend the appointment with Dr. Shah on April 12, 1999 is affirmed. The Office's suspension of compensation benefits for appellant's failure to attend the appointment with Dr. Pruitt on March 7, 2000 is reversed.

Dated, Washington, DC
December 31, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] Moreover, the Office failed to conform with the regulations in failing to issue appellant a notice of proposed suspension of her benefits regarding the March 7, 2000 appointment. *See Dorothy Dillard*, *supra* note 5. The January 28, 2000 notice of proposed suspension of compensation applied only to appellant's failure to attend the January 24, 2000 appointment. When the Office rescheduled the appointment for March 7, 2000, the January 28, 2000 notice was no longer applicable.