

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLIE J. GARDNER and DEPARTMENT OF TRANSPORTATION,
ALASKA RAILROAD, Anchorage, AK

*Docket No. 00-2392; Submitted on the Record;
Issued February 14, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation on October 10, 1999 for failure to submit to a medical examination.

On March 5, 1976 appellant, then a 43-year-old conductor, filed a claim for an injury to the right side of his rib cage sustained on December 5, 1975 when moving a ramp. The Office accepted that appellant sustained a hiatal hernia and began paying compensation for temporary total disability on July 26, 1980, the date appellant stopped work, never to return.

On September 8, 1999 the Office referred appellant to Dr. Kent Hensley, a Board-certified internist, for a second opinion evaluation. Appellant did not appear for the appointment scheduled for September 21, 1999. In letters to Dr. Hensley's office and to the Office dated September 14, 1999, appellant stated that he was unable to keep this medical appointment because he had no one to drive him there, he could not get his medical records on such short notice, his wife was in a nursing home, and Oklahoma City, Oklahoma, where the appointment was scheduled, was a day's drive away.

By letter dated September 23, 1999, the Office proposed to suspend appellant's compensation for refusing to submit to a medical examination. The Office requested that appellant provide his reasons for refusing to submit to the medical examination by Dr. Hensley within 14 days.

By decision dated October 7, 1999, the Office suspended appellant's compensation effective October 10, 1999 on the grounds that he refused to submit to a medical examination, and that he did not establish good cause for this refusal. The Office decision stated that no medical report on appellant's condition had been submitted for three years, despite annual Office requests, that there were no appropriate specialists in appellant's area, that Oklahoma City was the closest location and that transportation would have been provided to appellant *via* reimbursement. The Office also found that not having enough time to obtain medical records and his wife being in a nursing home were not valid reasons for not attending the appointment.

Section 8123(a) of the Federal Employees' Compensation Act¹ authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examinations as it deems necessary. 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. The only limitation on this authority is that of reasonableness.² Section 8123(d) of the Act provides that, "[i]f an employee refuses to submit to or obstructs an examination, his right to compensation ... is suspended until the refusal or obstruction stops."³ If an employee fails to appear for an examination, the Office must ask the employee to provide in writing an explanation for the failure within 14 days of the scheduled examination.⁴

The Board finds that the Office did not properly suspend compensation.

At the time of the Office's referral to Dr. Hensley, the most recent medical report contained in the case record was a January 27, 1997 report from appellant's attending physician, Dr. Jim E. Lytle.⁵ It was not unreasonable for the Office to refer appellant for a second opinion on the issue of whether he was still disabled by residuals of a hiatal hernia sustained on December 5, 1975.

The record, however, does not contain any evidence showing that the Office's referral to a medical specialist in Oklahoma City, Oklahoma, was reasonable. The Office's October 7, 1999 decision stated that "there were no specialists in [appellant's] area and Oklahoma City was the closest location." However, there is no evidence of Office attempts to schedule an appointment closer to appellant's home in Batesville, Arkansas. Although the Office may refer a claimant to a physician in a distant city where no appropriate specialists are available in the claimant's area,⁶ the Office must document its attempts to locate an appropriate specialist in appellant's area. In this case, the condition being analyzed, a hiatal hernia, is not unusual and appellant lives much closer to another major metropolitan area, Little Rock, Arkansas, than to the city of the Office's referral. The record does not support that the referral of appellant to an internist in Oklahoma City, Oklahoma, was reasonable.

¹ 5 U.S.C. § 8123(a).

² *Eva M. Morgan*, 47 ECAB 400 (1996).

³ 5 U.S.C. § 8123(d).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (November 1998).

⁵ *See Warner Bell*, 40 ECAB 438 (1989) (the Board found a referral appropriate where no medical report had been submitted for over six months).

⁶ *See Grady O. Porter*, 35 ECAB 983 (1984) (the Board approved a referral to a physician in a distant city where there were difficulties locating an appropriate specialist in the claimant's area).

The decision of the Office of Workers' Compensation Programs dated October 7, 1999 is reversed.

Dated, Washington, DC
February 14, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member