

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL L. WHITAKER and DEPARTMENT OF AGRICULTURE,
NATURAL RESOURCES CONSERVATION SERVICE, Syracuse, NY

*Docket No. 00-801; Submitted on the Record;
Issued January 16, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

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

On February 15, 1996 appellant, a 38-year-old water quality liaison, injured her neck when the car in which she was a passenger was struck by another vehicle. She filed a claim for benefits on February 23, 1996, which the Office accepted for cervical strain on May 14, 1996. The Office commenced payment for temporary total disability compensation and placed appellant on the periodic rolls.

In order to determine appellant's current condition and to ascertain whether she still suffered residuals from her accepted cervical injury, the Office referred appellant to Dr. Stanley M. Ball, Board-certified in psychiatry and neurology. In a report dated January 10, 1997, Dr. Ball stated that appellant had no objective evidence of physical disability and advised that her current disability resulted only from her chronic pain syndrome. In a supplemental report dated February 18, 1997, Dr. Ball advised that appellant was capable of performing the duties of her date-of-injury job.

Appellant returned to work on March 19, 1997 on light duty.

On March 27, 1997 the Office determined that there was a conflict in the medical evidence and it referred appellant, together with a statement of accepted facts and the case record, to Dr. Gabriel Aguilar, Board-certified in neurological surgery, for an impartial medical evaluation. The referral letter dated April 10, 1997 advised appellant that the examination was scheduled for May 7, 1997 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 April 21, 1997, appellant informed the Office that Dr. Aguilar's office was actually located in Kingston, New York and not in Schenectady, New York, as the April 10,

1997 referral letter had indicated. She stated that she had advised the employing establishment of this error, which informed her that they would contact the Office and try to schedule an appointment with a local physician.

By letter dated April 22, 1997, the employing establishment informed the Office that it had erroneously indicated that Dr. Aguilar's office was located in Schenectady, not Kingston and requested that she be rescheduled for an appointment with a physician whose office was closer to her home. In an Office memorandum of telephone call dated April 28, 1997, the Office advised the employing establishment that it was occasionally unable to schedule medical appointments close to the claimant's residence because its choices were limited to physicians available in the physician's directory system.

In a telephone call dated May 2, 1997, the Office advised appellant that it had exhausted all possibilities in attempting to arrange a medical appointment in her local area. The Office explained that, for various reasons, none of the impartial medical examiners listed in the Albany area were available and that, therefore, she was obligated to keep the appointment with Dr. Aguilar in Kingston, N.Y., in order to continue receiving benefits.¹ Appellant failed to appear at the scheduled May 7, 1997 appointment.

By letter dated May 12, 1997, the Office issued a notice of proposed suspension of compensation based on appellant's failure to appear at the scheduled May 7, 1997 appointment. The Office noted that appellant had been advised in the April 10, 1997 letter that her right to compensation could be suspended if she refused to submit to a medical examination. The Office stated that appellant had 14 days to explain why she failed to keep the appointment with Dr. Aguilar and that, if she did not respond, or if her reasons for refusing to keep the appointment were found to be unacceptable, her entitlement to compensation would be suspended until she agreed to submit to the examination as directed.

By letter dated May 19, 1997, appellant advised the Office that traveling to Kingston was "an unreasonable distance when considering my medical condition, which precludes me from attending." She stated that she, her attorney and her congressional representative had all contacted the Office, but had received no response. Appellant stated that this constituted "total harassment of a disabled person" and asserted that she would be willing to attend an appointment if it were scheduled in her commuting area.

By decision dated May 30, 1997, the Office suspended appellant's right to compensation effective May 7, 1997 based on her failure to submit to the medical examination scheduled with Dr. Aguilar on that date. The Office found that appellant failed to submit a satisfactory explanation justifying her refusal to attend the impartial medical evaluation.

¹ The Office noted in a May 12, 1997 letter to appellant's congressional representative that Dr. Aguilar's office in Kingston was approximately 55 miles from appellant's home in Schenectady, which constituted about an hour in commuting time. The Office stated that it had made a concerted effort to schedule an appointment with a physician in close proximity to appellant's residence, but that all of the other impartial physicians in the area either had already examined appellant, were not accepting compensation cases, or were booked months in advance. The Office reiterated that appellant was required to attend the May 7, 1997 examination.

By letter dated June 29, 1997, appellant requested an oral hearing, which was held on May 26, 1999.

By letter dated November 9, 1998, appellant's attorney stated that she "remains willing to submit to a physical examination by Dr Aguilar at his Kingston, New York office."

By letter dated February 8, 1999, the Office scheduled an examination for appellant with Dr. Aguilar for March 10, 1999. She attended the examination as scheduled.

At the hearing, appellant's attorney noted that the Office's April 10, 1997 letter did not list Dr. Aguilar's correct address, which did not accord with the Federal Employees' Compensation Act Procedure Manual, Chapter 2.810, paragraph 14.b. He stated that the Office failed to respond to repeated requests to reschedule the May 7, 1997 appointment with Dr. Aguilar and transfer the location of the impartial medical examination to an office closer to her home. Appellant's attorney further noted that she submitted a December 16, 1996 report from Dr. Barton L. Sachs, a Board-certified orthopedic surgeon and her treating physician, indicating that she was unable to sit for prolonged periods of time. Finally, appellant's attorney asserted that there is no evidence in the record supporting the Office's assertion that it made efforts to schedule an examination with an impartial physician whose office was located closer to her home.²

By decision dated October 13, 1999, an Office hearing representative affirmed the May 30, 1997 decision suspending compensation based on appellant's refusal to attend the May 7, 1997 impartial medical examination. The hearing representative found that appellant failed to provide sufficient cause for her failure to attend the examination. The hearing representative found that the suspension effectively ended on November 9, 1998, the date of the letter from appellant's attorney to the Office.

The Board finds that the Office properly suspended appellant's compensation for refusing to submit to a medical examination that she was directed to undergo.

Section 8123(a)³ of the Act provides:

"An employee shall submit to [an] 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 the medical opinion regarding whether appellant had any residuals causally related to her accepted cervical condition

² In letters dated August 11 and September 13, 1999, appellant stated that the employing establishment had terminated her position, effective August 13, 1999, due to her medical inability to perform the position.

³ 5 U.S.C. § 8123(a).

and scheduled her for an examination by an impartial medical specialist to resolve the conflict in the medical opinion.⁴

By letter dated April 10, 1997, the Office referred appellant to Dr. Aguilar for an examination scheduled on May 7, 1997. 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."⁵

By letter dated April 21, 1997, appellant indicated to the Office that she had asked the employing establishment to arrange for a medical appointment closer to her home than Kingston, New York. The Office informed the employing establishment in an April 28, 1997 telephone call, that because of the limited number of physicians listed in the directory, they were occasionally unable to accommodate a claimant's request to be examined by a local physician. In a May 2, 1997 telephone call, the Office advised appellant that it had been unable to arrange an appointment closer to her geographic area and that she was, therefore, required to attend the May 7, 1997 appointment with Dr. Aguilar in Kingston, N.Y., in order to continue receiving compensation. Appellant did not appear for the May 7, 1997 medical appointment with Dr. Aguilar.

The Board has held that 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.⁶ In the present case, the time for the impartial medical examination by Dr. Aguilar was set, appellant was duly advised of the scheduled appointment and failed to appear for medical evaluation. The only remaining issue is whether appellant presented an acceptable excuse or reason for her failure to appear. 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."⁷

Following notice that appellant failed to appear for examination by Dr. Aguilar, the Office, in a May 12, 1997 letter, allowed her 14 days to explain why she failed to keep the May 7, 1997 appointment and advised her that, if she did not respond, or if her reasons were

⁴ 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 referee or impartial medical specialist. *Dallas E. Mopps*, 44 ECAB 454, 456 (1993).

⁵ 5 U.S.C. § 8123(d).

⁶ *Margaret M. Gilmore*, 47 ECAB 718 (1996); *Herbert L. Dazey*, 41 ECAB 271 (1989); *Delores W. Loges*, 38 ECAB 834 (1987).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Suspension of Benefits*, Chapter 2.810.14(c) (January 1992).

found unacceptable, her entitlement to compensation would be suspended until she agreed to submit to examination as directed. Appellant informed the Office in a May 19, 1997 letter that the commuting distance to Kingston was unreasonable because of her medical condition, which prevented her from attending the May 7, 1997 appointment. She stated that although she and others on her behalf had attempted to contact the Office to arrange an examination with a local physician, which she would be willing to attend, the Office had not responded to these requests.

The Board finds that the Office properly allowed appellant to submit in writing and duly considered her stated reasons for the failure to keep the appointment on May 7, 1997. Appellant was notified of the reasons necessitating her referral for examination by Dr. Aguilar and she has failed to suggest any reasonable justification for failing to keep the appointment that was scheduled. Although appellant contends that her condition disabled her from going to Kingston due to the excessive distance and need to sit in one place for such an extended period of time, the Office hearing representative properly rejected this argument, noting that she was able to attend the subsequent appointment with Dr. Aguilar scheduled on March 10, 1999. Thus, appellant did not provide sufficient excuse for her failure to appear for the May 7, 1997 examination. The Office had properly scheduled a medical examination with Dr. Aguilar to resolve the outstanding conflict in medical opinion, for May 7, 1997. Appellant, however, did not attend the May 7, 1997 medical examination despite repeated notices concerning the penalty for not attending. Accordingly, the Board finds that her failure to keep the May 7, 1997 appointment with Dr. Aguilar constituted a refusal to submit to a medical examination without good cause. The Office properly invoked the penalty provision of section 8123(d) of the Act and suspended appellant's compensation until November 9, 1998, the date of the letter from appellant's attorney, which indicated her willingness to attend a second scheduled appointment with Dr. Aguilar.⁸ The Board, therefore, affirms the October 13, 1999 decision of the Office hearing representative affirming the May 30, 1997 Office decision.

⁸ 20 C.F.R. § 10.323 states:

“If an employee refuses to submit to or in any way obstructs an examination required by the Office, his or her right to compensation under the Act is suspended until such refusal or obstruction stops. The action of the employee's representative is considered to be the action of the employee for purposes of this section. The employee will forfeit compensation otherwise paid or payable under the Act for the period of refusal or obstruction and any compensation already paid for that period will be declared an overpayment and will be subject to recovery pursuant to 5 U.S.C. § 8129.”

The October 13, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
January 16, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member