U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of URIJAH HIEL and DEPARTMENT OF THE ARMY, CARPENTRY-MASONRY SECTION, Fort Rucker, AL

Docket No. 00-2697; Submitted on the Record;
Issued January 8, 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 benefits effective May 12, 2000 for obstruction of a medical examination.

The Office accepted that on November 23, 1987 appellant, then a 38-year-old carpenter sprained his right wrist when he picked up a door in the performance of duty.[1] Appellant performed limited duty following the injury. The Office subsequently accepted that appellant sustained a recurrence of disability approximately November 28, 1988 and expanded his original claim to include tendinitis of the right wrist and authorized arthroscopic surgery. Appellant did not return to work.

Appellant underwent surgery and treatment for his wrist injury from Dr. Samuel Miller, a Board-certified orthopedic surgeon. Dr. Miller assigned permanent work restrictions; particularly noting that appellant had minimum use of his hands and could no longer work as a carpenter. In or about September 1990, the Office began vocational rehabilitation efforts in order to provide appellant appropriate reemployment opportunities. Appellant was unable to participate in active rehabilitation due to unrelated medical problems, therefore, rehabilitation was closed in July 1982.

On June 6, 1996 appellant's rehabilitation case was reopened at the request of the employing establishment. However, in a memorandum to the file dated October 15, 1996, the Office noted that appellant had not cooperated with rehabilitation. The memorandum indicated that he failed to attend two scheduled functional capacity evaluations, failed to maintain

[1] The record reflects that appellant sustained two previous injuries in the performance of duty. On October 12, 1984 appellant injured both wrists and fractured his right foot after jumping from a two-story window in the course of his work duties. On November 22, 1982 appellant was struck by a piece of lumbar while at work and fractured his right arm.

communication with his rehabilitation counselor and failed to inform his counselor that his telephone service was terminated and that he had moved to a new address. Subsequently, in a January 22 and February 19, 1997 memorandum, an Office claims examiner indicated that appellant had been incarcerated until approximately July 1997 and could not cooperate with vocational testing.

On December 1, 1997 appellant contacted the Office and underwent a functional capacity evaluation, which revealed his capacity to perform medium work. A vocational evaluation report dated January 12, 1998 indicated that based upon testing, appellant had potential employment opportunities in positions including that of expediter, sales representative (building/hardware) and sales clerk. By letter dated March 16, 1998, a rehabilitation specialist indicated that a labor market survey was completed and that positions as a cashier, fast food worker and sales clerk were determined available in appellant's area. In a memorandum to the file dated November 3, 1998, an Office claims examiner indicated that the position of fast food worker was a more fair representation of appellant's capacity to earn wages.

On November 3, 1998 the Office provided appellant with notice of a proposed reduction of compensation, based on his ability to perform the duties of a fast food worker. The Office issued this proposed decision after appellant's rehabilitation specialist advised that appellant was no longer cooperating with vocational services. The Office advised appellant that if he disagreed with the proposed action, he could submit additional factual or medical evidence relevant to his capacity to earn wages. Appellant thereafter submitted further evidence.

By decision dated April 28, 1999, the Office reduced appellant's compensation, effective May 23, 1999, based on an earning capacity of $388.00 per week in the selected position. In a June 1, 1999 letter, appellant requested an oral hearing before an Office hearing representative.

A hearing was held to determine whether the position of fast food worker fairly represented appellant's wage-earning capacity and whether the Office properly reduced appellant's compensation. On August 27, 1999 an Office hearing representative found that the medical evidence supported that appellant was not physically capable of performing the position of fast food worker and set aside the prior decision to reduce compensation based on appellant's earning capacity in that position.

Following the remand order, the Office adjusted appellant's compensation retroactively. By letter dated October 4, 1999, the Office thereafter referred appellant to Dr. Willburn Smith, a Board-certified orthopedic surgeon, for an impartial medical examination to determine the remaining extent of any work-related condition and the extent of resulting work tolerance limitations.

In a medical report dated October 21, 1999, Dr. Smith reported that he examined appellant, reviewed his medical record and noted that appellant complained of persistent and debilitating right wrist pain. On examination, he determined that appellant's continued wrist pain appeared to be a persistent symptom related to the original injury in 1986, which remained unchanged at that time. Dr. Smith noted further that appellant had sustained a one percent whole person permanent impairment due to lack of flexion. He opined that appellant could return to work as long as it did not involve heavy lifting, pushing or pulling, however, he specifically

noted that appellant could not perform unrestricted carpentry work. Dr. Smith then reviewed the job descriptions identified as vocationally appropriate for appellant and indicated that fast food worker was most appropriate according to his work restriction of lifting no more than 20 pounds.

On November 10, 1999 the Office requested that Dr. Smith submit a report clarifying his opinion that the position of fast food worker was most appropriate for appellant. The Office noted that the physician had indicated in a form report that appellant's wrist movement, along with pushing and pulling activities should be limited, however, the selected position required duties outlined as reaching, handling and frequent fingering. Dr. Smith did not submit an additional report, although the Office made several attempts to receive clarification from the physician.

The Office subsequently referred appellant to Dr. John Cromptom, a Board-certified orthopedic surgeon for examination on April 25, 2000. On the scheduled examination date, the Office was advised that appellant cancelled his appointment.

On April 26, 2000 the Office proposed to suspend appellant's compensation because he cancelled his medical appointment and did not reschedule. The Office provided appellant with the opportunity to present his reasons in writing for failing to keep the scheduled appointment. In a letter dated April 26, 2000, appellant advised the Office that he did not attend the appointment due to transportation problems. He was informed that his appointment had been rescheduled for May 11, 2000.

In a letter dated May 11, 2000, the Office was informed that appellant did not appear for his rescheduled medical appointment that day.

By decision dated May 12, 2000, the Office suspended appellant's entitlement to compensation pursuant to 5 U.S.C. § 8123(d) because he failed to undergo a scheduled second opinion evaluation.

The Board finds that the Office properly suspended appellant's eligibility to compensation on the grounds that he obstructed a medical examination.

Section 8123(a) of the Federal Employees' Compensation Act authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examinations, as it deems necessary.[2] The determination of the need for an examination, the type of examination, the choice of the locale and the choice of medical examiners are matters within the discretion of the Office. The only limitation on this authority is that of reasonableness.[3] Section 8123(d) of the Act provides: "[i]f an employee refuses to submit to or obstructs an examination, his right to compensation is suspended until the refusal or obstruction stops."[4] If an employee fails to appear for an examination, the Office must request

[2] 5 U.S.C. § 8123(a).

[3] *See Eva M. Morgan*, 47 ECAB 400 (1996); *Dorine Jenkins*, 32 ECAB 1502 (1981).

[4] 5 U.S.C. § 8123(d).

the employee to provide in writing an explanation for the failure within 14 days of the scheduled examination.[5]

The Board has reviewed the evidence of record and finds that appellant obstructed the second opinion examination scheduled with Dr. Cromptom on April 25 and May 11, 2000. By letter dated April 26, 2000, the Office notified appellant of the sanctions for refusing to submit to the first medical examination and provided him with 14 days to give sufficient reason for failing to attend. Appellant responded that he had a problem with transportation. The Office rescheduled the appointment with Dr. Cromptom on May 11, 2000 for a second opinion evaluation with appellant regarding his wrist condition and work capacity. The Office was advised on May 11, 2000 that appellant failed to appear for the second scheduled appointment, therefore a suspension decision was issued.

As noted, this claim has been developed by the Office, as instructed by the Board, through the gathering and review of additional evidence pertaining to appellant's claim of an employment-related wrist condition. As appellant's claim pertains to his eligibility for benefits under the Act, the Office has been delegated the statutory authority to require that he submit to an examination at such times as may be reasonably required. His refusal to undergo an examination by Dr. Cromptom on May 11, 2000 effectively precludes the Office from further development of his claim as was instructed by the Board. For these reasons, the Office properly suspended his eligibility for compensation.

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

The decision of the Office of Workers' Compensation Programs dated May 12, 2000 affirmed.[6]

Dated, Washington, DC
January 8, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[6] The Board notes that the Office received verification on or about November 13, 2000 that appellant attended the second opinion examination rescheduled by the Office and the Office as a consequence reinstated benefits effective July 12, 2000. However, as this evidence was not before the Office at the time of the May 12, 2000 decision, the Board is precluded from reviewing this evidence; *see* 20 C.F.R. § 501.2(c).