U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN PRUITT and DEPARTMENT OF THE ARMY,
PINE BLUFF ARSENAL, AR

Docket No. 01-1043; Submitted on the Record;
Issued January 8, 2002

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits on the grounds that he obstructed an Office examination; and (2) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

On May 6, 1991 appellant, then a 43-year-old equipment inspector, injured his back in the performance of duty.[1] The Office accepted the claim for lumbar sprain and approved a laminectomy and discectomy. Appellant stopped work and did not return.

The record reflects that Dr. Zachary Mason, attending physician, initially treated appellant for his accepted condition and that appellant was further evaluated by various physicians for back pain and other unrelated conditions. In 1995, Dr. Paul Davis, an attending physician, began treating appellant for back pain and other conditions including, embolic events and heart aneurysms, hypertension and disc disease unrelated to the work injury. In various reports of record, Dr. Davis and other physicians indicated that, due to appellant's conditions, he was unable to hold any gainful employment.

On May 2, 2000 the Office referred appellant for a second opinion examination with Dr. John Lytle, a Board-certified orthopedic surgeon. In a June 28, 2000 report, Dr. Lytle reviewed appellant's medical and employment history, noted his subjective complaints and findings on examination and reported that appellant claimed total disability because of sequelae of his May 6, 1991 work injury. Dr. Lytle diagnosed failed back syndrome and recommended that appellant undergo a functional capacity evaluation.

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[1] The record reflects that appellant worked light duty in this position after he sustained injuries in a March 1991 motor vehicle accident unrelated to his federal employment. He worked light duty until his May 6, 1991 work injury.

Anthony Brown, exercise physiologist, subsequently informed the Office that appellant did not complete the functional capacity evaluation requested by Dr. Lytle. After the test began on July 6, 2000, appellant requested a break from testing until 1:00 p.m., but did not return. He later called stating that he had taken pain medication and gone to bed. Appellant was rescheduled for evaluation the following day at 1:00 p.m., but did not keep his appointment. On July 10, 2000 appellant informed Mr. Brown that as far as he was concerned, the evaluation was over. Mr. Brown reported that fewer than 20 criteria were scored on July 6, 2000 because appellant failed to complete the evaluation and, therefore, appellant's functional capacity could not be determined.

In a letter dated August 28, 2000, the Office proposed to suspend appellant's compensation because he failed to complete the July 6, 2000, functional capacity evaluation requested by Dr. Lytle as required by the Office. The Office further afforded appellant 14 days with which to provide an explanation for refusing to submit to the evaluation. The Office did not receive a response from appellant within the allotted time period.

By decision dated September 13, 2000, the Office suspended appellant's compensation on the grounds that he did not establish good cause for refusing to submit to or obstructing an examination with Dr. Lytle.

Thereafter, appellant completed a functional capacity evaluation on October 5, 2000. The results indicated sub-maximal effort or exaggerated symptoms, which rendered the evaluation invalid. By letter dated October 18, 2000, the Office advised appellant that the September 13, 2000 suspension of benefits remained in effect and that he could exercise his appeal rights as previously outlined in that decision.

On December 21, 2000 appellant requested an oral hearing. By decision dated February 1, 2001, the Office denied his request as untimely.

The Board finds that the Office properly suspended appellant's compensation under section 8123(d) of the Federal Employees' Compensation Act.[2]

Section 8123(a) of the Act[3] authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examination, 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 reasonableness.[4] 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.[5]

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8123(a).

[4] *See Dorine Jenkins*, 32 ECAB 1502, 1505 (1981).

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

Section 8123(a) of the Act also 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...."[6]

Section 8123(d) 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. 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."[7]

In this case, Dr. Lytle directed appellant to undergo a functional capacity evaluation to determine his physical capabilities. Appellant showed up and completed a portion of the evaluation on July 6, 2000 but left the facility during a requested break and did not return. While appellant contends that he could not complete the test, because of pain, he submitted no medical evidence to support this contention. Further, he failed to appear when the evaluation was rescheduled the following day. Appellant later reportedly stated that he considered testing complete. The Board finds that the Office properly suspended compensation on the grounds that appellant had obstructed his testing on July 6, 2000.

Moreover, the Office satisfied its regulations by notifying appellant on August 28, 2000 of the penalty for refusing to submit or obstructing an examination required by the Office.[8] The Office also provided appellant with an opportunity to explain his refusal to complete the functional capacity evaluation requested by Dr. Lytle.

While appellant completed a second functional capacity evaluation on October 5, 2000, the results revealed that appellant's functional capacity could not be determined because he exhibited sub-maximal effort during testing or exaggerated symptoms. Because this evaluation was invalid, the Office properly continued suspension of appellant's compensation under 5 U.S.C. § 8123(d).

The Board further finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of

[6] 5 U.S.C. § 8123(a).

[7] *Id*. at § 8123(d).

[8] See 20 C.F.R. § 10.407(b) (providing that the Office shall inform an employee of the penalty for refusing or obstructing an examination required by the Office when giving notification of such an examination required by the Office).

the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[9] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[10]

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant or deny a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[11]

In this case, the Office issued its decision suspending appellant's compensation on September 13, 2000. Subsequently, appellant requested an oral hearing by letter dated and postmarked December 21, 2000. The Board finds that the hearing request was made more than 30 days after the Office's decision and thus was untimely. Consequently, appellant was not entitled to a hearing under section 8124 of the Act as a matter of right.

In its decision dated February 1, 2001, the Office advised appellant that it considered his request in relation to the issue involved and the hearing was also denied on the grounds that he could address the issue equally well on reconsideration, by submitting evidence not previously considered, which established that appellant had not refused to submit to or obstructed an examination requested by Dr. Lytle. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[12] In this case, there is no evidence that the Office abused its discretion in denying appellant's request for a hearing.

The February 1, 2001 and September 13, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
January 8, 2002

[9] 5 U.S.C. § 8124(b)(1).

[10] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

[11] *Henry Moreno*, 39 ECAB 475 (1988).

[12] *Daniel J. Perea*, 42 ECAB 214 (1990).

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member