

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOROTHY DILLARD and DEPARTMENT OF HEALTH & HUMAN SERVICES, INDIAN HEALTH SERVICES, Aberdeen, SD

*Docket No. 02-180; Submitted on the Record;
Issued July 19, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied compensation on the grounds that appellant failed to submit to an impartial medical evaluation.

On January 27, 1998 appellant, then a 55-year-old physician, filed a notice of occupational disease and claim for compensation alleging that she suffered from a respiratory condition and depression caused by stress in her employment. In a decision dated December 22, 1998, the Office accepted that appellant developed pneumonia as a result of work factors but found that she failed to establish a causal relationship between her emotional condition and compensable factors of her employment. On appeal, the Board determined that a conflict existed in the medical record and vacated the Office's December 22, 1998 decision. The Board's decision discussed the medical evidence and procedural history of this claim and is incorporated by reference herein.¹ The Board remanded the case for the Office to obtain an impartial medical evaluation to resolve the conflict of medical opinion.

On remand, the Office scheduled appellant for an impartial medical examination for December 8, 2000. She subsequently advised the Office that she was unable to attend the scheduled examination because she had suffered a herniated cervical disc and was awaiting surgery. Appellant underwent a laminectomy on January 15, 2001 and was advised by her physician not to travel for at least six weeks.

By letter dated February 2, 2001, appellant was asked to notify the Office as soon as she was cleared for travel. Six weeks went by and there was no word from appellant. Therefore, by letter dated March 21, 2001, the Office notified appellant that the examination was to be rescheduled.

¹ *Dorothy Dillard*, Docket No. 99-1211 (issued September 18, 2000).

The next appointment was scheduled for April 30, 2001 with Dr. Igmidio Santos, a Board-certified psychiatrist, in Bismark, ND. It was later discovered, however, that he had a professional conflict and the Office cancelled the appointment. Because Dr. Santos was the only qualified physician in appellant's commuting area who was qualified to perform an impartial medical evaluation, the Office rescheduled appellant's impartial medical evaluation with Dr. Bert Furmansky, a Board-certified psychiatrist, for June 8, 2001 in Denver, Colorado.

On May 31, 2001 the Office received a facsimile (fax) of a letter from appellant's neurosurgeon, Dr. Daniel Schmelka, that was also dated May 31, 2001. The fax was sent from Dr. Schmelka's office and the letter stated as follows:

"It has been brought to my attention that [appellant] had to drive to Bismark for a psychiatric appointment on April 30, 2001. When she arrived there, that appointment had been cancelled and she was unable to complete it. It has also been brought to my attention that you now want [appellant] to travel to Denver from North Dakota for an evaluation. I am writing to you on her behalf and I would think it would be better if [appellant] were evaluated in Grand Forks by one of the psychiatrists here, or possibly a psychiatrist in Fargo. The less she has to endure in travels and distance certainly would go a long way in rehabilitating her. I think the trip to Bismark triggered off some problems for [appellant] and one can well appreciate what a long plane ride and hustling through the airports will do to her then. In [appellant's] interest, I think [the government] could certainly look through the psychiatrists in Grand Forks or Fargo and have one of them see her here.... I am not a psychiatrist, but I certainly think that pain from her original condition might be contributing to some of her depressive disorder...."

The Office faxed a letter to appellant on June 1, 2001. The fax was not sent to Dr. Schmelka's office. The Office noted that it had already attempted to reschedule appellant with an impartial medical specialist closer to home but that there was no one available to perform the examination. The Office noted that claimants were often asked to fly to Denver from out of state and apologized for any inconvenience to appellant in this situation. Appellant was advised to attend the June 8, 2001 appointment as scheduled and noted that it had not been cancelled.

On June 7, 2001 appellant sent a fax to the Office, which stated "this is sent because I received no confirmation of [f]ax sent [June 1, 2001] recancellation of appointment with Dr. Furmansky, Denver CO, on [the] advice [of my physician]." Appellant indicated that she wished to resolve the case and noted that she was still under psychiatric care.

The Office received notification from Dr. Furmansky that appellant did not appear for her examination on June 8, 2001.

In a decision dated June 20, 2001, the Office denied compensation on the grounds that appellant refused to submit to an impartial medical evaluation. The Office noted in its decision that she gave no indication that she would attend another scheduled appointment if it had been rescheduled.

Appellant next filed a request for reconsideration on July 11, 2001 and accused the Office claims examiner of callous disregard of her physician's written recommendation of May 30, 2001 that she not travel to Denver. She further argued that she had not been notified that the appointment was rescheduled for June 8, 2001 since the Office's fax was not received because her fax machine had been dismantled and inoperable at the time. Appellant also submitted copies of an investigation report on harassment and recent medical treatment notes.

In a decision dated July 19, 2001, the Office denied modification of its prior decision.

The Board finds that the Office improperly denied appellant's compensation for refusing to submit to an impartial medical examination.

Section 8123(a) of the Federal Employees' Compensation Act² 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 local and the choice of medical examiners are matters within the province and discretion of the Office.³ The only limitation on this authority is that of reasonableness.⁴ 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 refusal or obstruction stops."⁵ 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.⁶

The Board notes in this case that the Office did not comply with its established procedure before it denied compensation on June 20, 2001. Following appellant's failure to attend the schedule June 8, 2001 appointment, the Office should have asked appellant to provide in writing an explanation for the failure within 14 days of the scheduled examination. The fact that the Office, in its June 20, 2001 decision, addressed the letter from appellant's treating physician dated May 31, 2001 and deemed appellant's concern for traveling to Denver to be invalid given that the physician was the only one available within the area, does not satisfy this procedural requirement. Furthermore, the June 1, 2001 fax does not comply with the procedural requirement as it was sent to appellant prior to her failure to appear at the appointment.

² 5 U.S.C. § 8123(a).

³ See *Dorine Jenkins*, 32 ECAB 1502, 1505 (1981).

⁴ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts. *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

⁵ 5 U.S.C. § 8123(d).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14a (April 1993).

The decisions of the Office of Workers' Compensation Programs dated July 19 and June 20, 2001 are hereby reversed.

Dated, Washington, DC
July 19, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member