

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TYRONE HUFF and SMITHSONIAN INSTITUTION,
ARTS & INDUSTRIES MUSEUM, Washington, DC

*Docket No. 01-1503; Submitted on the Record;
Issued June 10, 2002*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request to participate in the selection of an impartial medical specialist; and (2) whether the Office properly suspended appellant's compensation effective March 16, 2001 for failure to submit to a scheduled medical examination.

This case was previously before the Board.¹ By decision dated September 15, 2000, the Board found an unresolved conflict in the medical evidence and reversed the Office's October 3, 1997 decision, which had affirmed a November 15, 1996 decision terminating appellant's compensation. The Board also reversed the Office's April 7, 1998 decision denying modification of its October 3, 1997 decision. The Board's September 15, 2000 decision is herein incorporated by reference.

By letter dated January 12, 2001, the Office advised appellant that he was scheduled to undergo an examination on February 2, 2001 by an impartial medical specialist, Dr. Phillip H. Omohundro, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence of whether he had any residuals due to his September 17, 1992 employment-related cervical sprain.

By letter dated January 26, 2001, appellant contended that an orthopedic surgeon was not an appropriate specialist to examine him and noted that he had been treated by rheumatologists, physiatrists and chiropractors. He asked that he be allowed to participate in the selection of an impartial medical specialist.

¹ Docket No. 98-2283 (issued September 15, 2000). Appellant sustained injury on September 17, 1992 accepted for cervical sprain.

By letter dated January 31, 2002, appellant, through his representative, requested that he be allowed to participate in the selection of an impartial medical specialist. He asserted that he should be examined by a rheumatologist or physiatrist for his condition of fibromyalgia.

Appellant submitted an April 20, 1998 letter from his attending Board-certified physiatrist, Dr. David P. Sniezek, who stated that appellant's conditions of myofascial pain syndrome and fibromyalgia are not treated by orthopedic surgeons and that his opinion regarding appellant's condition and the opinion of Dr. Clauw, appellant's attending Board-certified rheumatologist, should be of more weight than that of an orthopedic surgeon.

By decision dated March 13, 2001, the Office denied appellant's request to participate in the selection of an impartial medical specialist because he did not provide a valid reason for wishing to participate in the selection process. The Office noted that appellant's reason for wishing to participate was his opinion that an orthopedic surgeon was not an appropriate specialist to evaluate someone with fibromyalgia. The Office noted, however, that appellant's accepted employment injury was a cervical sprain and no other condition, including fibromyalgia, had been accepted as being causally related to his employment injury. The Office stated that an orthopedic surgeon was an appropriate specialist to examine appellant to resolve the conflict in the medical evidence of whether appellant had any residual disability or medical condition causally related to his September 17, 1992 employment-related cervical sprain. The Office indicated that if the orthopedic surgeon selected to act as the impartial medical specialist determined that another type of specialist should examine appellant, the Office would allow such consultation. The Office advised appellant to report to the impartial medical specialist's office for an examination on March 16, 2001 and advised him that failure to comply could result in the suspension of compensation under section 8123 of the Federal Employees' Compensation Act.

By letter dated March 15, 2001, appellant, through his representative, stated his disagreement with the Office's March 13, 2001 decision. He stated that he would not attend the examination scheduled for March 16, 2001 and requested his appeal rights.

By decision dated March 21, 2001, the Office suspended appellant's compensation on the grounds that he had refused to submit to a scheduled medical examination.²

The Board finds that the Office did not abuse its discretion in denying appellant's request to participate in the selection of the impartial medical specialist.

Under Office procedures, a claimant who asks to participate in the selection of an impartial medical specialist or who objects to the selected physician must provide a valid reason.³ In two instances, the Office will prepare a list of three specialists for selection by the claimant: first, when there is a specific request for participation and a valid reason for participation is provided; or when there is a valid objection to the physician selected by the

² Appellant's compensation had been reinstated after the Board's September 15, 2000 decision.

³ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (March 1994); see also *Terrance R. Stath*, 45 ECAB 412, 422 (1994); *Roger S. Wilcox*, 45 ECAB 265, 273 (1994).

Office to serve as an impartial medical specialist.⁴ The procedural right of a claimant to participate in the selection process is not an unqualified right as the Office has imposed the requirement that the employee provide a valid reason for any participation request or for any objection raised against a designated impartial medical examiner.⁵ In this case, appellant stated that he wished to participate in the selection of an impartial medical specialist because the physician selected by the Office was an orthopedic surgeon and he felt that he should be examined by a rheumatologist or physiatrist because he had fibromyalgia. However, the accepted condition in this case is a cervical sprain and appellant has not shown that an orthopedic surgeon is not qualified to evaluate this condition.⁶ The Board finds that appellant did not provide a valid reason for wishing to participate in the selection of the impartial medical specialist and, therefore, the Office properly denied his request to participate in the selection.

The Board further finds that the Office properly suspended appellant's compensation effective March 16, 2001 for failure to attend a scheduled medical examination.

Section 8123(a) of the Act authorizes the Office to require an employee who claims disability as a result of federal employment to undergo a physical examination as it deems necessary.⁷ 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.⁸ The regulations governing the Office provide that an injured employee "must submit to examination by a qualified physician as often and at such times and places as [the Office] considers reasonably necessary."⁹ The only limitation on this authority is that of reasonableness.¹⁰ The Act 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."¹¹

In this case, appellant refused to submit to the medical examination scheduled by the Office for March 16, 2001 because he wished to participate in the selection of the impartial

⁴ *Id.*

⁵ See *Davis Alan Patrick*, 46 ECAB 1020, 1025 (1994).

⁶ The Board notes that the Office indicated in its March 13, 2001 decision its willingness to defer to any decision of the selected impartial medical specialist to refer appellant to any other type of specialist after examining appellant regarding his accepted condition.

⁷ 5 U.S.C. § 8123(a).

⁸ See *Corlisia L. Sims (Smith)*, 46 ECAB 172, 180 (1994); *James C. Talbert*, 42 ECAB 974, 976 (1991).

⁹ 20 C.F.R. § 10.320.

¹⁰ See *Raymond J. Hubenak*, 44 ECAB 395, 401 (1993); *William G. Saviolidis*, 35 ECAB 283, 286 (1983).

¹¹ 5 U.S.C. § 8123(d).

medical specialist. However, the Office had denied his request by decision dated March 13, 2001, on the grounds that he had not provided a valid reason for wishing to participate in the selection of the impartial medical specialist. Appellant had been advised in the Office's March 13, 2001 decision, that his failure to submit to the scheduled examination could result in the suspension of his compensation under section 8123 of the Act. Nevertheless, he refused to submit to the scheduled examination. Considering all the circumstances of this case, the Board finds that the Office properly suspended appellant's compensation effective March 16, 2001 for his failure to submit to a scheduled medical examination.

The decisions of the Office of Workers' Compensation Programs dated March 21 and 13, 2001 are affirmed.

Dated, Washington, DC
June 10, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member