

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DANNY C. DOEGE and DEPARTMENT OF THE NAVY,  
NAVAL AIR STATION, Pensacola, FL

*Docket No. 00-1855; Submitted on the Record;  
Issued May 14, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits under 5 U.S.C. § 8123(d) for failure to submit to an examination with Dr. Andre J. Fontana, a Board-certified orthopedic surgeon.

This is appellant's third appeal before the Board. In the first appeal, the Board affirmed an August 18, 1986 decision of the Office, which found that the Office was not obligated to pay appellant's attorney fees.<sup>1</sup> In the second appeal, the Board reversed a September 19, 1991 termination of compensation and appellant's compensation benefits were reinstated.<sup>2</sup>

In this case, the Office accepted that on July 30, 1985 appellant, then a 37-year-old tool room mechanic, sustained a strained right knee.<sup>3</sup> Appropriate compensation benefits were paid until September 19, 1991, when the Office terminated appellant's compensation. This decision was affirmed by the Branch of Hearings and Review on June 9, 1992 but was reversed by the Board by decision dated November 18, 1993.

On March 18, 1994 the Office referred appellant for a medical evaluation. He did not report for the examination and on July 8, 1994 his benefits were suspended for obstruction. However, appellant requested reconsideration and on July 3, 1996 the July 8, 1994 decision was vacated and appellant was placed back on the periodic rolls.

Due to the lack of current medical evidence since 1994, the Office referred appellant to Dr. Fontana for an evaluation on October 13, 1997. However, appellant explained that he had

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<sup>1</sup> Docket No. 86-2088 (issued May 18, 1987).

<sup>2</sup> Docket No. 93-660 (issued November 18, 1993).

<sup>3</sup> The record reveals that appellant also sustained two other accepted work-related injuries: a left knee condition on October 15, 1981 and cervical strain on June 19, 1994.

been out of town in Honduras through October 5, 1997<sup>4</sup> and had a conflicting preexisting orthopedic examination for preparation for reconstruction of his right knee anterior cruciate ligament scheduled for October 13, 1997<sup>5</sup> and he requested that the examination be rescheduled and made with a physician within the State of Florida rather than in Alabama, some 60+ miles away.

By letter dated October 17, 1997, the Office advised appellant that his examination would be rescheduled.

By letter dated October 22, 1997, the Office rescheduled appellant's examination for October 30, 1997 at 1:00 p.m.<sup>6</sup> It further advised appellant that in accordance with 5 U.S.C. § 8123: "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 refusal or obstruction is deducted from the period for which compensation is payable to the employee."

However, by letter from appellant to the Office dated October 24, 1997, he advised the Office that he was not refusing to be examined but that he would be on a mission trip from October 25 through November 1, 1997 in Canton, Georgia. Appellant further stated that he was having right knee surgery on November 3, 1997, followed by recovery, such that he would be available for the period November 8 until December 20, 1997 for the Office's requested examination. Appellant left town again on Saturday, October 25, 1997 the day after he mailed his October 24, 1997 letter to the Office explaining his schedule. The Office received this letter on October 27, 1997.

Appellant returned to his home in time for his November 3, 1997 knee surgery.

No further response from appellant was received by the Office regarding the October 22, 1997 letter advising him of the October 30, 1997 appointment.

On February 28, 1998 appellant completed and submitted a Form CA-1032 report.

By letter dated September 11, 1998, the Office finalized the proposed suspension of appellant's compensation finding that he had failed to show up for the October 30, 1997 examination with Dr. Fontana.<sup>7</sup> It noted that by letter from appellant received by the Office on October 27, 1997, appellant had been participating in a voluntary mission trip during the time of the scheduled appointment and it stated that such a voluntary trip did not justify his

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<sup>4</sup> As evidence appellant submitted a copy of his passport which demonstrated that he left Honduras on October 5, 1997.

<sup>5</sup> The right knee reconstruction was performed on November 3, 1997.

<sup>6</sup> However, there is no evidence in the record to establish the date the Office mailed this letter, or to establish that appellant received it prior to his leaving for a previously planned trip to Canton, Georgia.

<sup>7</sup> The Board notes that no notice of preliminary determination of suspension of compensation appears in the case record.

nonappearance for the scheduled examination. The Office stated that voluntary, nonemergency travel plans were not sufficient reason for not attending an examination scheduled by the Office.<sup>8</sup>

Appellant's compensation benefits were suspended effective September 13, 1998 for obstruction of a medical examination by nonattendance. He requested reconsideration and argued that he never received the Office's October 22, 1997 letter.

By letter dated October 7, 1998, appellant requested an oral hearing before an Office hearing representative.

A hearing was held on May 25, 1999 at which appellant testified that he never received a copy of the October 22, 1997 letter. He testified that he had advised the Office that he would be out of town from October 25 through November 1, 1997, but would be available for examination from November 8 through December 20, 1997 and claimed that, therefore, he was not obstructing a medical examination.

By decision dated September 14, 1999, the hearing representative affirmed the September 11, 1998 decision finding that appellant did not keep the second scheduled medical examination as directed.

The Board finds that the Office improperly suspended appellant's compensation benefits under 5 U.S.C. § 8123(d) for failure to submit to a directed medical examination.

Section 8123(a) of the Federal Employees' Compensation Act 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."<sup>9</sup>

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.<sup>10</sup> In the present case, the time for the second opinion examination with Dr. Fontana was set on October 30, 1997 and appellant was duly advised of the scheduled appointment by letter dated October 22, 1997, which was properly addressed to the address at which appellant had received all of his other mail before and after the October 22, 1997 letter and which was mailed in the due course of business.

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<sup>8</sup> This would be the case if the Office could demonstrate that appellant had knowledge of the rescheduled examination prior to his departure on the trip.

<sup>9</sup> 5 U.S.C. § 8123(a).

<sup>10</sup> See *Raymond C. Dickinson*, 48 ECAB 646 (1997); *Margaret M. Gilmore*, 47 ECAB 718 (1996).

Under the “mailbox rule,” it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.<sup>11</sup> This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. The appearance of a properly addressed copy of the notice in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.<sup>12</sup>

As a copy of the October 22, 1997 notice appears in the case record and was properly addressed to appellant at the address at which he received all of his other mail, both before and after the October 2, 1997 letter and as it was mailed in the due course of business, the presumption of receipt by appellant arises. Therefore, it is presumed to have been received by appellant.

Following the mailing of the properly addressed notice, appellant failed to appear at the scheduled examination. There is no question about whether or not appellant appeared.

The next issue, however, is whether appellant presented an acceptable excuse or reason for his failure to appear at the scheduled examination. 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.”<sup>13</sup>

Following appellant’s failure to appear at the scheduled October 30, 1997 examination, the Office did not promptly follow up to determine whether he attended the October 30, 1997 examination and did not request that, within 14 days of the date of the appointment, he explain his reasons for not attending the examination<sup>14</sup> and appellant did not, when he returned from Canton, GA, specifically respond to the notice of appointment with his reasons for not showing up for examination. The only subsequent communication with the Office was the Form CA-1032 submitted on February 28, 1998.

The Board has held that 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 date of the scheduled examination.<sup>15</sup>

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<sup>11</sup> See *Kimberly A. Raffile*, 50 ECAB 243 (1999); *Clara T. Norga*, 46 ECAB 473 (1995); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

<sup>12</sup> *Id.*

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

<sup>14</sup> The Office did not determine that appellant failed to appear for the October 30, 1997 examination until September 11, 1998.

<sup>15</sup> *Ida L. Townsend*, 45 ECAB 750 (1994).

The Board finds, therefore, that the Office did not follow its own implementing regulations and properly allow appellant to submit in writing and have considered, his stated reasons for his failure to keep the scheduled orthopedic examination on October 30, 1997. Although appellant advised the Office by letter dated October 24, 1997 and received on October 27, 1997 that he was going out of town from October 25 until November 1, 1997, this decision to leave town on a voluntary absence was made by and acted upon by him apparently prior to his presumed receipt of the October 22, 1997 notice of the October 30, 1997 appointment, such that the voluntary travel plans under the circumstances of this case might be considered an exception to the rule that voluntary travel plans are not considered sufficient reasons for not attending an examination scheduled by the Office. However, the Office merely repeated that voluntary travel plans are not an excuse for nonattendance, without considering appellant's individual circumstances where he left town before presumably receiving the notice of appointment. As the Office did not specifically ask appellant to provide in writing, within 14 days, his reasons for nonattendance at the scheduled examination, it did not afford him the opportunity to explain his absence.

The decision of the Office of Workers' Compensation Programs dated September 14, 1999 is, therefore, reversed.

Dated, Washington, DC  
May 14, 2002

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member