

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY H. JACKSON and U.S. POSTAL SERVICE,
POST OFFICE, East Hartford, CT

*Docket No. 00-2627; Submitted on the Record;
Issued May 14, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits, effective August 19, 1999, for obstruction of a medical examination on May 21, 1999.

On July 8, 1997 appellant, then a 47-year-old mailhandler, filed an occupational disease claim alleging that on June 24, 1997 he became aware that he developed a disc herniation in his lower back, "complications to his lower extremities," and complications from blood clotting as a result of repetitive lifting and bending on his job. Appellant's job duties involved removing mail from hand trucks, pushing and pulling hampers or "OTRS" weighing up to 1,750 pounds and performing safety demonstrations and training. Appellant stopped working on June 13, 1997 and underwent a right L3-4 discectomy on June 27, 1997.

By decision dated March 13, 1998, the Office denied appellant's claim, stating that the evidence of record did not establish that he sustained an injury as alleged.

By letter dated March 20, 1998, appellant requested an oral hearing before an Office hearing representative, which was held on November 17, 1998.

In a report dated December 9, 1998, appellant's treating physician, Dr. Kevin J. Kiwak, a Board-certified neurological surgeon, opined that appellant's herniated disc was related to constant, repetitive lifting at work. He also opined that appellant's pulmonary embolus was indirectly related to appellant's surgery and, therefore, indirectly related to his work injury.

By decision dated March 10, 1999, finalized on March 12, 1999, the Office hearing representative found that the opinion of appellant's treating physician, Dr. Kiwak, required further development by the Office. The Office hearing representative remanded the case and instructed the Office to refer appellant, with a statement of accepted facts and the medical evidence of record, to an appropriate medical specialist to obtain a second opinion on whether appellant's diagnosed condition and discectomy were work related.

On April 21, 1999 the Office referred appellant to Dr. Thomas J. Stevens, a Board-certified orthopedic surgeon, for a physical examination on May 21, 1999. The Office informed appellant that under section 8123(d) of the Federal Employees' Compensation Act, if he refused to submit or obstructed the examination, his right to compensation would be suspended until the refusal or obstruction stopped. The Office informed appellant that under section 8123(d) compensation was not payable while a refusal or obstruction continued and the period of the refusal or obstruction would be deducted from the period for which compensation was payable to him.

By letter dated May 21, 1999, Dr. Stevens stated that appellant's lawyer, John S. Rubrich, insisted on being present in the room with appellant during the examination. Dr. Stevens stated that he felt that it was inappropriate for Mr. Rubrich to be present during the examination and was supported in his decision by a senior claims officer in Boston, Mike Evers. Dr. Stevens stated that, when he advised appellant that his attorney could not be present, appellant and his attorney decided to forego the examination. Dr. Stevens stated that he spent approximately 45 minutes reviewing appellant's chart and an additional 30 to 35 minutes resolving appellant's request to have his attorney present until they left.

On August 19, 1999 the Office suspended appellant's entitlement to compensation for obstructing the physical examination on May 21, 1999.

By letter dated September 7, 1999, appellant requested an oral hearing before an Office hearing representative, which was held on February 24, 2000. At the hearing, Mr. Rubrich stated that, upon arriving at Dr. Stevens' office on May 21, 1999, he told Dr. Stevens that he would appreciate being present during the examination and that he would just be a silent, passive observer. Appellant denied that he impeded Dr. Stevens from examining him but stated that when Dr. Stevens told him he would not examine him with his attorney present, appellant stated that he would be more comfortable if his attorney were present. Appellant testified that from his viewpoint, Dr. Stevens refused to examine him. Mr. Rubrich stated that, when Dr. Stevens told them he would not be allowed to be present in the examining room, it was unclear to him whether the physician had made that decision or someone had authorized him to make that decision. After approximately a half hour of discussion, Dr. Stevens stated that the time for the examination was up and he would have to call it off. Mr. Rubrich claimed that he did not believe there was any obstruction particularly where he had stated that he would not do or say anything during the examination.

By decision dated May 17, 2000, the Office hearing representative affirmed the Office's August 19, 1999 decision.

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.¹ The determination of the need for an examination, the type of examination, the

¹ 5 U.S.C. § 8123(a).

choice of locale and the choice of medical examiners are matters within the province and discretion of the Office.² The regulations governing the Office provide:

“The employee must submit to examination by a qualified physician as often and at such times and places as [the Office] considers reasonably necessary. The employee may have a qualified physician, paid by him or her, present at such examination. However, the employee is not entitled to have anyone else present at the examination unless [the Office] decides that exceptional circumstances exist. For example, where a hearing-impaired employee needs an interpreter, the presence of an interpreter would be allowed....”³

The only limitation on this authority is that of reasonableness.⁴ The Act provides that, “[i]f 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.”⁵ The Office procedures provide for a period of 14 days, within which to present in writing his or her reasons for the refusal or obstruction.⁶

Appellant and his attorney, Mr. Rubrich, testified that appellant did not undergo the physical examination by Dr. Stevens on May 21, 1999 as instructed by the Office because Dr. Stevens would not conduct the examination with appellant’s attorney present. Dr. Stevens stated that when Mr. Rubrich made the request to be present during the examination, he did not feel that having him present was appropriate and called a senior claims officer in the Boston office, who confirmed that appellant’s attorney should not be present. Section 10.320 states that appellant is not entitled to have anyone present in the examination other than a qualified physician unless the Office decides exceptional circumstances exist.⁷ Appellant did not make any showing that exceptional circumstances existed requiring his attorney to be present. The Office, therefore, properly suspended appellant’s compensation benefits for obstruction of a medical examination on May 21, 1999.

² *Donald E. Ewals*, 51 ECAB ____ (Docket No. 98-2180, issued April 3, 2000); *see also Antanacio G. Sambrano*, 51 ECAB ____ (Docket No. 98-2071, issued June 23, 2000); *Corlisia L. Sims (Smith)*, 46 ECAB 172, 180 (1994).

³ 20 C.F.R. § 10.320.

⁴ *See Antanacio G. Sambrano*, *supra* note 2; *William G. Saviolidis*, 35 ECAB 283, 286 (1983).

⁵ 5 U.S.C. § 8123(d); *Edward Burton Lee*, 53 ECAB ____ (Docket No. 00-1498, issued October 24, 2001).

⁶ *Antanacio G. Sambrano*, *supra* note 2.

⁷ *See* 20 C.F.R. § 10.320.

The May 17, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 14, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member