

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARNICE ROGERS and DEPARTMENT OF THE ARMY,
PINE BLUFF ARSENAL, Pine Bluff, AR

*Docket No. 01-1366; Submitted on the Record;
Issued May 2, 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 effective September 13, 1998 on the grounds that he failed to attend a scheduled medical examination.

This is the second appeal before the Board.¹ In the prior appeal, the Board affirmed the Office's denial of his hearing request and the suspension of benefits on the grounds that he failed to attend a scheduled medical examination.² The Board, however, found the Office had abused its discretion in denying appellant's request for reconsideration regarding his failure to attend the scheduled medical examination as appellant raised new contentions not previously considered by the Office. The law and facts as set forth in the Board's decision and order are incorporated by reference.

In a decision dated March 2, 2001, the Office denied modification of appellant's suspension of medical benefits on the grounds that he refused to attend a scheduled medical examination. The Office found that the Office properly used the Fort Worth area to select a second opinion physician. In reaching this conclusion, the Office noted there was a limited number of physicians in Arkansas who agree to perform an independent or second opinion evaluation for the Office and appellant "had already seen several physicians in the Arkansas area for prior second opinions."

¹ Docket No. 99-1694 (January 22, 2001).

² In the June 23, 1998 letter referring appellant to Dr. Joe Schooler for an impartial examination, the Office informed appellant of the consequences of his refusal to submit to the examination under 5 U.S.C. § 8123(d). Appellant did not attend the initial appointment or the rescheduled appointment. The Office advised appellant by a July 9, 1998 letter of the consequences of his refusal to submit and provided him 15 days to provide reasons for his failure to attend the initial scheduled appointment. By decision dated September 1, 1998, the Office suspended compensation for refusing to submit to an examination with Dr. Schooler.

The Board finds that the Office properly suspended appellant's compensation effective September 13, 1998 on the grounds that he failed to attend a scheduled medical examination.

On appeal, appellant contends that the Office was not justified in requiring appellant to submit to an impartial examination and that it was not justified in requiring appellant to travel to Forth Worth, Texas from Pine Bluff, Arkansas for an examination.

Section 8123(a)³ of the Federal Employees' Compensation 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. Section 8123(d) states:

“If an employee refuses to submit to or obstructs an examination, his right to compensation under [the Act] 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.”⁴

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.⁵ The only limitation on this authority is that of reasonableness.⁶ The Office's regulation, 20 C.F.R. § 10.320, provides 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.” Furthermore, when the Office determines a conflict in the medical opinion exists, it has the authority under 20 C.F.R. § 10.321 to “direct the employee to undergo a referee examination to resolve the issue.”

In the instant case, the Office was instructed by the hearing representative in a September 1, 1998 decision to refer appellant for an impartial medical examination due to the conflict in the medical opinion evidence.⁷ To determine the extent and degree of appellant's impairment, the Office referred appellant to Dr. Joe Schooler, a physician specializing in physical rehabilitation and orthopedic surgery on July 9, 1998. Appellant did not appear at the scheduled appointment. The Board finds that the Office acted within its discretion to send appellant for an evaluation as directed by the hearing representative. As noted above, the Act authorizes the Office to require appellant to under a physical examination as it deems necessary.

³ 5 U.S.C. § 8123(a).

⁴ 5 U.S.C. § 8123(d).

⁵ *James C. Talbert*, 42 ECAB 974 (1991).

⁶ *Raymond J. Hubenak*, 44 ECAB 395 (1993).

⁷ The Board notes that the hearing representative also instructed the Office to refer appellant for a second opinion evaluation on the issue of whether his shoulder condition was employment related. The Office referred appellant on April 2, 1998 to Dr. Thomas Rooney, a Board-certified orthopedic surgeon, for a second opinion evaluation on the issue of whether appellant's shoulder condition was employment related.

The Board rejects appellant's contention that the Office was not justified in requiring appellant to travel to Forth Worth, Texas for an examination. The Board notes *Billie J. Gardner*,⁸ is clearly distinguishable from the facts of the instant case. In *Gardner*, the Office referred appellant to a medical specialist in a distant city without any evidence that it had attempted to schedule an appointment closer to appellant's home and appellant lived much closer to another metropolitan area than the one used by the Office. In the instant case, the Office noted appellant had been referred to a physician in Fort Worth, Texas due to the limited number of physicians in Arkansas who agree to perform an independent or second opinion evaluation for the Office and as appellant further limited the pool of available physicians by having been seen by several physicians for prior Office referrals.

The March 2, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
May 2, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁸ 53 ECAB ____ (Docket No. 00-2392, issued February 14, 2002).