

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOAN M. VAN DEN BERG and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Sacramento, CA

*Docket No. 02-2141; Submitted on the Record;  
Issued February 12, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits effective December 30, 2001 based on her obstruction of a medical examination; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely.

On March 1, 1977 appellant, then a 46-year-old special agent, fell and sprained her right wrist while attending a training class. The Office accepted appellant's claim for right wrist sprain. On September 19, 1980 appellant reported that she suffered from irritable bowel syndrome brought on by work stress. The Office accepted appellant's claim for adjustment disorder and affective disorder.<sup>1</sup> Appellant has not worked since August 21, 1980.

On July 24, 2001 the Office referred appellant to two second opinion examinations to determine the extent of her accepted injuries. The record indicates that there were errors initially, in scheduling the examinations, but the appointments were rescheduled. Appellant's original appointment for her traumatic injury was scheduled with Dr. Jerrold Sherman, a Board-certified orthopedic surgeon, on July 31, 2001 at 1:20 p.m. and her psychiatric appointment was scheduled with Dr. Jillian Daly on September 28, 2001 at 3:30 p.m.

By letters dated August 10 and August 17, 2001, appellant reported that she was confused as to the dates and times of the examinations since she received the notices after the scheduled appointments. By letter dated August 23, 2001, the Office apologized for the scheduling errors and indicated that the appointments would be rescheduled. On August 17, 2001 appellant was notified that her psychiatric appointment was rescheduled with Dr. Andrea Bates, a Board-certified psychiatrist, for August 28, 2001 at 4:00 p.m. and her appointment for the traumatic injury was rescheduled with Dr. Philip Wirganowicz, a Board-certified orthopedic surgeon, for September 8, 2001 at 12:00 p.m. The record indicates that the appointment with Dr. Bates was

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<sup>1</sup> The two claims were eventually joined and the occupational illness file was designated as the master file.

rescheduled a second time for September 15, 2001 at 1:00 p.m. Appellant did not keep either of the scheduled appointments with Dr. Wirganowicz or Dr. Bates on September 8 and September 15, 2001.

By letter dated November 14, 2001, the Office notified appellant that further psychiatric appointments were made with Dr. Bates and Dr. Daly on December 15, 2001. Appellant also did not attend these appointments. She stated in a November 27, 2001 letter that she was returning the unopened envelope to Bay Brook Medical Services and that she would “appreciate it” if they would comply with the request of her attending physician Dr. Janak Mehtani, a Board-certified psychiatrist, and mail him any correspondence.

On December 3, 2001 the Office issued a notice of proposed suspension of compensation, stating that appellant’s return of the Office’s letter “unopened” is considered obstruction under 5 U.S.C. § 8129. The Office informed appellant that she may submit her reasons for refusing to submit to the examination in writing, within 14 days of the date of the Office’s letter. She did not submit anything to the Office.

By decision dated December 20, 2001, the Office finalized the proposed suspension of appellant’s compensation, effective December 30, 2001. The Office found that appellant did not establish good cause for refusing to submit to the examination with Dr. Bates on December 15, 2001.

By letter dated March 26, 2002, appellant claimed that she had not ignored the Office’s appointment notices, but had been under the impression that Dr. Mehtani had contacted the Office requesting a postponement until she had a chance to review her medical records.

By letter dated April 10, 2002, appellant requested an oral hearing. She claimed that both she and Dr. Mehtani had requested a postponement from the Office.

By decision dated July 8, 2002, the Office denied appellant’s request for an oral hearing as untimely, since the request was postmarked April 12, 2002, more than 30 days after the Office’s December 20, 2001 decision.

The Board finds that the Office properly suspended appellant’s compensation benefits effective December 30, 2001, based on her obstruction of a medical examination.

Section 8123(a) 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.<sup>2</sup> 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.<sup>3</sup> 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

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<sup>2</sup> 5 U.S.C. § 8123(a).

<sup>3</sup> *Donald E. Ewals*, 51 ECAB 428 (2000).

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.”<sup>4</sup>

The only limitation on this authority is that of reasonableness.<sup>5</sup> The Act provides that, “[i]f an employee refuses to submit to or obstructs an examination, his or her right to compensation under this subchapter is suspended until the refusal or obstruction stops.”<sup>6</sup> 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.<sup>7</sup>

In this case, appellant’s appointments for her traumatic injury and psychiatric evaluation were rescheduled numerous times and appellant failed to attend any of the scheduled appointments. Even though initially there was an error on the part of the Office in scheduling the examinations, the issue was resolved and appellant had ample notice and plenty of time to attend her future appointments. In the December 3, 2001 notice of proposed suspension of compensation, the Office informed appellant that her return of the “unopened” letter advising her of her appointments was considered an obstruction under the Act. They advised her that she may also submit a written explanation with her reasons for refusing to submit to the examination within 14 days of the date of the Office’s letter. Appellant did not submit anything to the Office. Her only contention is that both she and her attending physician, Dr. Mehtani, requested that the Office postpone the examinations, in order for appellant to have time to review her medical records. There are no such requests for postponement found in the record. Further, letters and reports from Dr. Mehtani himself suggest that appellant had ample time to review her medical files and that she simply did not wish to submit to another psychiatric examination. Dr. Mehtani stated in a September 18, 2001 report:

“[Appellant] was seen for a psychiatric follow-up visit. She is not doing very well. [Appellant] is very despondent, depressed and very withdrawn. She is in a lot of pain. [Appellant] is very angry and upset. [She] apparently received a notice from her workers’ compensation carrier to see another psychiatrist. That was received so late that she could not make that appointment. [Appellant] does not think it is necessary. She is feeling very stressed out with the current situation and does not want to go to yet another psychiatric evaluation.”

Also, in a March 14, 2002 report, Dr. Mehtani stated:

“[Appellant] was seen today in a psychiatric follow-up visit. She is not doing well. [Appellant] remains very angry and irritable. She is very much obsessed

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<sup>4</sup> 20 C.F.R. § 10.320.

<sup>5</sup> *Antanacio G. Sambrano*, 51 ECAB 557 (2000).

<sup>6</sup> 5 U.S.C. § 8123(d); *Edward Burton Lee*, 53 ECAB \_\_\_ (Docket No. 00-1498, issued October 24, 2001).

<sup>7</sup> *Antanacio G. Sambrano*, *supra* note 5.

with paperwork. [Appellant] is very upset about another psychiatrist's examining her for workers' compensation purposes. She is going through tons of paperwork and wants me to give all her reports to her. I have gone over those reports with [appellant] numerous times, but she wants to read those reports again."

The Board finds that the Office properly notified appellant of the time of the examination with Dr. Bates on December 15, 2001 and of the penalty for refusing to submit to the examination. Not only did appellant not keep the scheduled appointment, she returned the letter to the medical facility and stated that they should contact her attending physician, Dr. Mehtani. Appellant also did not submit any reasons for her failure to attend the scheduled appointment within 14 days of the Office's notice. The Board notes that it is not sufficient to state that appellant was under the impression that her physician had contacted the Office to request an extension. The notices of examination and notice of proposed suspension of compensation were all properly addressed to her address of record. Appellant did not attend the December 15, 2001 examination despite repeated notices concerning the penalty for not attending.

The Board further finds that the Office properly denied appellant's request for an oral hearing.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states, "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>8</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>9</sup>

Regulations implementing the Act provide that a claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.<sup>10</sup> In computing the time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, Sunday or a legal holiday.<sup>11</sup> The Board has applied this rule to determine questions of timeliness arising under the Act.<sup>12</sup>

In this case, the Office issued a decision suspending appellant's compensation on December 20, 2001. The 30-day period for determining the timeliness of appellant's hearing request commenced on the first day following the issuance of the Office's December 20, 2001 decision or December 21, 2001 and ended on January 21, 2002, since the last day of the period

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<sup>8</sup> 5 U.S.C. § 8124(b)(1).

<sup>9</sup> *Frederick D. Richardson*, 45 ECAB 454 (1994).

<sup>10</sup> 20 C.F.R. § 10.616(a).

<sup>11</sup> *John B. Montoya*, 43 ECAB 1148 (1992).

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

was not a Saturday, Sunday or a holiday. As appellant's request was postmarked April 12, 2002 and her request was due by January 21, 2002, she is not entitled to a hearing as a matter of right. Moreover, the Office considered whether to grant her a discretionary review and correctly advised appellant that the issue of the suspension of her compensation benefits could equally well be addressed by requesting reconsideration. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for an oral hearing.

The July 8, 2002 and December 20, 2001 decisions of the Office of Worker's Compensation Programs are hereby affirmed.

Dated, Washington, DC  
February 12, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member