

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIE J. EVERETT and U.S. POSTAL SERVICE,  
POST OFFICE, North Reading, MA

*Docket No. 03-991; Submitted on the Record;  
Issued October 10, 2003*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's right to compensation on the basis that he refused to undergo a medical examination.

On September 30, 2000 appellant, a 57-year-old letter carrier, injured his left shoulder while pulling on a sliding door. He filed a claim for benefits on October 2, 2000, which the Office accepted for left shoulder tendinitis and rotator cuff syndrome. The Office also authorized surgery for left shoulder rotator cuff repair.<sup>1</sup> The Office paid appellant appropriate compensation for temporary total disability compensation. Appellant has not returned to work since the date of injury.

In a report dated October 29, 2001, Dr. Robert Y. Pick, a Board-certified orthopedic surgeon, noted appellant's history of a left shoulder rotator cuff tear and opined that the prognosis was guarded based on the fact that he did not appear to be motivated. Dr. Pick advised that appellant was currently two and one half months post surgery and should be able to engage in at least restricted work activities with minimal use of the left upper extremity, particularly the left shoulder.

By letter dated June 24, 2002, the Office informed appellant that it was scheduling him for an examination with a Board-certified specialist in order to determine his current condition and to ascertain whether he still had residuals from his accepted conditions. The letter indicated that only legitimate documented emergencies would be deemed adequate grounds for not keeping the appointment, and that, under section 8123(d) of the Federal Employees' Compensation Act, an employee's right to compensation is subject to suspension if the employee refuses to submit or obstructs a medical examination.

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<sup>1</sup> Appellant previously sustained a lumbosacral strain and subluxation at work on March 14, 1998.

By letter dated July 25, 2002, the Office informed appellant that it had scheduled him to be examined by Dr. George E. Lewinnek, a Board-certified orthopedic surgeon, on August 12, 2002. Appellant telephoned the Office on August 8, 2002 and stated that he was unable to attend the proposed examination because his entire family was sick and because he did not want to drive the 18-mile distance from his home to the examination site.

By letter received August 9, 2002, appellant informed the Office that he wanted to reschedule the appointment with Dr. Lewinnek to a location closer to his home because he was not able to drive that far and was in a lot of pain, and because his wife's medical condition required him to remain close to home in order to be available to drive her to her appointments.

By letter dated August 9, 2002, the Office informed appellant that he had 14 days from the date of the letter to provide good cause, in writing, in support of his refusal to attend the medical examination scheduled for August 12, 2002, or his entitlement to compensation would be suspended pursuant to 5 U.S.C. § 8123(d).

By letter dated August 15, 2002, the Office issued a notice of proposed suspension of compensation based on appellant's refusal to attend his scheduled examination with Dr. Lewinnek. The Office noted that appellant had been advised in the June 24, 2000 letter that his right to compensation could be suspended if he refused to submit to a medical examination. The Office advised appellant to submit an explanation as to why he failed to keep the appointment with Dr. Lewinnek and that, if he did not respond or if his reasons for refusing to keep the appointment were found to be unacceptable, his entitlement to compensation would be suspended until he agreed to submit to the examination as directed.

In a letter received by the Office on August 26, 2002, appellant stated that the reasons he gave for not attending the August 12, 2002 appointment were made in good faith, but that his intention was "to see Dr. Lewinnek whenever you make the appointment." Appellant further stated in a postscript that he was still in a lot of pain, but that he would make every effort to keep an appointment with Dr. Lewinnek as soon as it was scheduled by the Office.

By decision dated August 30, 2002, the Office suspended appellant's right to compensation based on his failure to attend a medical examination scheduled with Dr. Lewinnek. The Office found that appellant had either refused to submit to or had obstructed the directed medical evaluation.

In a letter received by the Office on October 17, 2002, appellant requested reconsideration of the Office's August 30, 2002 decision. By decision dated December 16, 2002, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

The Board finds that this case is not in posture for decision. The Board finds that the Office did not consider all evidence submitted in support of appellant's claim.

On August 15, 2002 the Office wrote to appellant and issued a notice of proposed suspension of compensation based on his refusal to attend his scheduled examination with Dr. Lewinnek. The Office gave appellant an additional 14 days to submit an adequate

explanation as to why he failed to keep the appointment with Dr. Lewinnek and reiterated that, if he did not respond or if his reasons for refusing to keep the appointment were found to be unacceptable, his entitlement to compensation would be suspended until he agreed to submit to the examination as directed. In a letter received by the Office on August 26, 2002, appellant responded to the Office's letter, stating his intention to see Dr. Lewinnek whenever the Office made the appointment. Appellant reiterated in a postscript that he would make every effort to keep an appointment with Dr. Lewinnek as soon as it was scheduled by the Office. The Board notes, however, that it is evident from the Office's August 30, 2002 decision that this evidence was not reviewed by the Office prior to issuing its final decision. In its decision, the Office stated that appellant was notified on August 15, 2002 that the reasons for his obstruction were not sufficient and that he had 14 additional days to respond, and found, "No further statement was received."

The Act<sup>2</sup> provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim.<sup>3</sup> Since the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision,<sup>4</sup> it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed,<sup>5</sup> it is crucial that all evidence relevant to that subject matter which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.<sup>6</sup>

The Office did not review the evidence received prior to the issuance of its August 30, 2002 final decision, *i.e.*, appellant's August 26, 2002 letter stating his intention to attend Dr. Lewinnek's medical examination. The Board, therefore, will set aside the Office's August 30, 2002 decision and remand the case to the Office to fully consider the evidence which was submitted by appellant prior to the August 30, 2002 decision.

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8124(a)(2); 20 C.F.R. § 10.125-26. *See generally* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.8, (November 1993). Receipt of new evidence where compensation has been suspended.

<sup>4</sup> *See* 20 C.F.R. § 501.2(c).

<sup>5</sup> 20 C.F.R. § 501.6(c).

<sup>6</sup> *William A. Couch*, 41 ECAB 548 (1990).

The decision of the Office of Workers' Compensation Programs, dated August 30, 2002, is hereby set aside and the case remanded for further action as set forth in this decision.

Dated, Washington, DC  
October 10, 2003

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member