

**United States Department of Labor
Employees' Compensation Appeals Board**

DINEEN L. JORDAN, Appellant

and

**U.S POSTAL SERVICE, New Haven, CT,
Employer**

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**Docket No. 04-382
Issued: August 24, 2004**

Appearances
Danny R. Ellis, for the Appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On November 26, 2003 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated July 2 and March 13, 2003. Under 20 C.F.R §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly suspended appellant's compensation on the basis that she refused to undergo a medical examination.

FACTUAL HISTORY

On April 8, 1991 appellant, a 29-year-old mail handler, injured her lower back while lifting a sack of mail. She filed a claim for benefits on February 15, 1991, which the Office accepted for lumbar sprain and herniated nucleus pulposus at L4-5 and L5-S1. The Office commenced payment for temporary total disability compensation.

In order to determine appellant's current condition and to ascertain whether she still suffered residuals from her accepted lumbar condition, the Office referred her to Dr. Carl W.

Huff, a specialist in orthopedic surgery and preventive medicine. In a report dated August 29, 2002, he stated that he was unable to establish that appellant had any residuals from her April 8, 1991 employment injury. Dr. Huff opined that appellant had no objective evidence of physical disability and advised that she had subjective complaints that did not correspond with the objective findings. He stated that appellant could return to work without restrictions. Appellant's attending Board-certified internist, Dr. Robert L. Winston, continued to opine that she had residuals from her accepted lumbar condition and that she was unable to return to work due to this condition.

The Office determined that there was a conflict in the medical evidence regarding whether appellant still had residual disability stemming from her accepted work-related conditions. In order to determine her current condition, the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. John Janovich, a specialist in orthopedic surgery, for an impartial medical evaluation. The referral letter dated December 4, 2002, advised appellant that the examination was scheduled for January 2, 2003 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. She failed to attend the examination.

By letter dated January 7, 2003, the Office issued a notice of proposed suspension of compensation based on appellant's failure to appear at the scheduled January 2, 2003 appointment. The Office noted that she had been advised in the December 4, 2002, letter that her right to compensation could be suspended if she refused to submit to a medical examination. The Office stated that appellant had 14 days to explain why she failed to keep the appointment with Dr. Janovich and that, if she did not respond or if her reasons for refusing to keep the appointment were found to be unacceptable, her entitlement to compensation would be suspended until she agreed to submit to the examination as directed.

By decision dated January 24, 2003, the Office suspended appellant's right to compensation effective January 2, 2003 based on her failure to submit to the medical examination scheduled with Dr. Janovich on January 2, 2003. The Office found that she failed to submit a satisfactory explanation justifying her refusal to attend the impartial medical evaluation.

By telephone call dated February 3, 2003, appellant told the Office that the reason she failed to attend the January 2, 2003 examination was because the Office mailed its letters to an incorrect zip code. As a result of this error, appellant claimed, she never received the letters from the Office informing her that the appointment had been scheduled or that her compensation would be suspended. By letter dated February 4, 2003, the Office advised appellant that it would conditionally reinstate her compensation in light of her allegation that she did not receive the December 4, 2002 and January 7, 2003 letters until January 24, 2003, which the Office considered possible justification for her nonattendance at the January 2, 2003 examination. The Office informed appellant that it would reinstate on the condition that she immediately contact Dr. Janovich's office to schedule another appointment. In addition, the Office asked her to confirm her current address and zip code and indicate why she had not contacted Dr. Janovich. By telephone call dated February 5, 2003, appellant reiterated that she had not received any of the Office's correspondence regarding the January 2, 2003 examination; she also provided the

Office with her current address and zip code. She stated that she would call Dr. Janovich and reschedule the appointment. The Office advised appellant that it gave her the benefit of the doubt that she had not received its correspondence and would reinstate her compensation provided she immediately telephoned Dr. Janovich's office and rescheduled the appointment. The Office explained to her, however, that if she failed to reschedule the appointment as directed, her compensation would be suspended again.

By letter dated February 6, 2003, the Office advised appellant that it was suspending her compensation based on her failure to contact Dr. Janovich in accordance with her expressed agreement. In a letter dated February 26, 2003, the Office advised her that it had vacated the February 6, 2003 decision because it had incorrectly suspended her compensation on the basis of her failure to schedule an examination. The Office noted that another examination with Dr. Janovich had been scheduled for March 13, 2003 and that her compensation would again be suspended if she failed to attend the appointment. There is nothing in the record, however, which indicates that the Office ever sent appellant a properly addressed letter informing her of the March 13, 2003 appointment, which was referenced by the Office in its February 26, 2003 letter. In a memorandum dated March 13, 2003, the Office stated that she had called the office of her congressional representative on March 12, 2003 and advised that she would not be attending the scheduled March 13, 2003 impartial examination based on the advice of her attorney.

By decision dated March 13, 2003, the Office suspended appellant's right to compensation based on her failure to submit to the medical examination scheduled with Dr. Janovich on March 13, 2003. The Office stated:

"We advised you in our letter of February 26, 2003, that we had vacated our decision of February 6, 2003 and paid you compensation through March 12, 2003, based on your having rescheduled the examination with the impartial (referee) specialist, Dr. John R. Janovich for today at 11:00 a.m. and with the understanding that you would attend the March 13, 2003 scheduled examination, as you had agreed to do.... You did not call or otherwise notify Dr. Janovich's office that you would not be attending the scheduled examination. As such, in accordance with 5 U.S.C. § 8123(d) of the Act, your right to compensation is hereby suspended, effective March 13, 2003, until the refusal or obstruction ceases."

The Office found that appellant failed to submit a satisfactory explanation justifying her refusal to attend the impartial medical evaluation. The Office noted that, since she had previously requested a hearing on the February 6, 2003 decision, it was referring her case to the Branch of Hearings and Review.¹ The Office scheduled a review of the written record by an Office hearing representative.

¹ The Office is apparently referring to a letter appellant wrote to the Branch of Hearings and Review dated February 6, 2003, in which she complained about having to see an impartial medical specialist. The Office mischaracterized appellant's request as one for an oral hearing. Appellant, in fact, requested a review of the record.

By decision dated July 2, 2003, an Office hearing representative, based on review of the written record, affirmed the March 13, 2003 decision suspending compensation based on appellant's refusal to attend the March 13, 2003 impartial medical examination. The hearing representative noted that appellant had advised her congressional representative on March 12, 2003 that she would not be attending the March 13, 2003 examination with Dr. Janovich on the advice of her attorney. The hearing representative found, however, that this did not constitute sufficient grounds for not attending the scheduled examination and, therefore, found that appellant had refused to attend the examination without good cause.

LEGAL PRECEDENT

Section 8123(a)² of the 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.... If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”

Section 8123(d)³ of the Act provides:

“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....”⁴

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.⁵

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

² 5 U.S.C. § 8123(a).

³ 5 U.S.C. § 8123(d).

⁴ 20 C.F.R. § 10.323 states: “If an employee refuses to submit to or in any way obstructs an examination required by the Office, ... her right to compensation is suspended until such refusal stops. The action of the employee's representative is considered to be the action of the employee for purposes of this section.”

⁵ *Margaret M. Gilmore*, 47 ECAB 718 (1996); *Herbert L. Dazey*, 41 ECAB 271 (1989); *Delores W. Loges*, 38 ECAB 834 (1987).

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.”⁶

ANALYSIS

The Office failed to follow proper procedure in suspending appellant’s compensation. By letter dated February 26, 2003, the Office advised her that she had an appointment with Dr. Janovich for an impartial medical examination scheduled for March 13, 2003. However, the record contains no documentation that the Office ever sent appellant a properly addressed letter informing her that the time for the impartial medical examination by Dr. Janovich was set for March 13, 2003, as it was required to do.⁷ The only indication contained in the record that appellant was duly advised of the scheduled appointment was in the Office’s February 26, 2003 letter, which mentioned a March 13, 2003 appointment, but did not contain the required formal notification.⁸ Even if the Office did send such a letter and appellant did fail to appear at the March 13, 2003 evaluation -- based only on the memorandum of a telephone call -- the Office failed to send appellant a letter giving her 14 days to provide good cause for her nonattendance. Instead, the Office acted improperly by immediately suspending her compensation in a decision issued the same day, March 13, 2003, without considering any argument or explanation from appellant which might have established good cause for her failure to attend the examination. The Office’s March 13, 2003 memorandum, pursuant to a March 12, 2003 telephone call, does not vitiate the Office’s requirement to send appellant the 14-day letter prior to suspending compensation. This memorandum deals with an ostensible reason for not showing up which was offered before March 13, 2003; appellant might have been submitted an entirely different reason after March 13, 2003, had she been given an opportunity. Moreover, it is unclear from the record how the Office received the information reflected in the March 13, 2003 memorandum; *i.e.*, that she failed to attend the examination. The Office neglected to mention in the March 13, 2003 decision, which initially suspended compensation, whether appellant had advanced any reason for not attending the March 13, 2003 examination. Although the Office did mention her reasons for not attending in its July 2, 2003 decision, which affirmed the May 13, 2003 suspension of compensation, this is not sufficient. The Office has an obligation to provide this information prior to any suspension of compensation.⁹ Based on the circumstances described above, therefore, the Board finds that the Office acted improperly in suspending appellant’s compensation.

⁶ Federal (FECA) Procedure Manual, Part 2 -- *Claims, Suspension of Benefits*, Chapter 2.810.14(c) (January 1992).

⁷ See *Margaret M. Gilmore*, *supra* note 5.

⁸ Pursuant to the Federal (FECA) Procedure Manual, Part 3 -- *Medical, Medical Examinations*, Chapter 3.500.3 (April 1993), after contacting the physician and setting the date and time of the appointment, the Office must notify the claimant in writing as to the name and address of the physician to whom he or she is being referred as well as the date and time of the appointment.

⁹ The Board notes that this case was referred for determination by an Office hearing representative in a highly irregular manner. The Office referred the case to a hearing representative based on a letter appellant sent before her compensation was suspended.

CONCLUSION

The Board finds that the Office acted improperly in suspending appellant's compensation.

ORDER

IT IS HEREBY ORDERED THAT the March 13, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 24, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member