

FACTUAL HISTORY

On December 11, 2002 appellant, then a 45-year-old seasonal file clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained a herniated disc causing upper extremity and back pain due to repetitive arm motions while lifting files. Appellant first noticed her condition and realized it was work related on October 3, 2002. She stopped work on November 12, 2002 and did not return. The Office accepted aggravation of cervical disc herniation. Appellant received compensation on the daily rolls beginning in November 2002. Her case was placed on the periodic rolls effective March 23, 2003.

Appellant was treated for herniated cervical disc and left upper extremity symptoms from December 2002 to September 2003. In a June 24, 2003 report, an Office medical management field nurse noted that appellant was a “no show” for a plan assessment, was noncompliant and inconsistent with physician visits and did not attend a scheduled June 2, 2003 meeting at the employing establishment regarding a possible return to work.

In an October 23, 2003 report, Dr. Allan T. Rison, an attending Board-certified family practitioner specializing in interventional pain management, provided a history of an October 2002 onset of neck and left upper extremity pain without a specific injury. On examination, he noted “decreased sensation to touch of the second, third and fourth digits on the left,” “diffusely decreased strength” throughout the muscles of the left upper extremity, “exquisite tenderness to palpation of the bilateral greater and lesser occipital nerves and tenderness to the C2 through T2 on the left and C2 through C5 on the right” and possible C5 radiculopathy. Dr. Rison reviewed an October 30, 2002 magnetic resonance imaging scan showing a “large right paracentral and foraminal disc protrusion at C6-7 compressing the thecal sac” cord and right neuroforaminal root at C7. He also noted spondylitic and degenerative changes from C5-7 with a small central disc protrusion at C4-5. Dr. Rison diagnosed a herniated cervical disc, cervical radiculopathy questionable at left C5-6 and C6-7, cervical spondylosis and occipital neuralgia. From November 3, 2003 to February 25, 2004, Dr. Rison performed nerve block injections from C2 to T2, authorized by the Office.

To ascertain the nature and extent of any continuing work-related disability and appellant’s work limitations, the Office referred her, the medical record and a statement of accepted facts to Dr. James P. Duffy, a Board-certified orthopedic surgeon. In a December 16, 2003 report, Dr. Duffy provided a history of the October 30, 2002 injury and subsequent treatment. On examination, he found limited cervical and left shoulder motion. He opined that appellant’s work-related condition had resolved without residuals and that she was able to perform sedentary work using her right arm. Dr. Duffy stated that appellant had reached maximum medical improvement as of December 9, 2003. In a December 9, 2003 work capacity evaluation (Form OWCP-5), Dr. Duffy checked a box indicating that appellant could perform sedentary duty for eight hours a day but did not list specific work limitations.

In a January 23, 2004 report, Dr. Rison reviewed Dr. Duffy’s report. He contended that Dr. Duffy’s opinion was vague as he did not approve appellant’s job description or find her capable of any specific tasks. Dr. Rison opined that appellant had not reached maximum medical improvement as she continued to have C6 radicular pain treated with epidural injections.

In a February 10, 2004 file memorandum, the Office determined that there was a conflict of medical opinion between Dr. Rison, for appellant, and Dr. Duffy, for the government, regarding whether the work-related conditions had resolved without residuals and the scope of appellant's work capabilities.

In a March 1, 2004 letter sent to appellant at her address of record, 322 Lafayette Avenue, Bellevue, Kentucky, the Office advised that a conflict of medical opinion had arisen regarding the nature and extent of any work-related disability and whether she was able to work. To resolve this conflict, the Office referred appellant to Dr. Leroy Shouse, a Board-certified orthopedic surgeon, for a referee examination at 9:00 a.m. on March 17, 2004. The Office advised appellant that under section 8123(d) of the Act, "[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." The Office instructed appellant that if she could not keep the appointment for any reason, she must advise the Office in writing of her reasons "for not doing so within seven days of the appointment." If appellant failed to provide an acceptable reason for not appearing for examination, her benefits would be suspended under section 8123(d). The Office advised appellant that if the "medical examination require[d] [her] to travel outside of [her] local commuting area, and [she] [could not] use [her] usual means of transportation due to distance and/or inconvenience, contact this office immediately."

In a March 2, 2004 note, appellant advised the Office that, effective March 1, 2004, her address would change from 322 Lafayette Avenue Bellevue, Kentucky 41073 to 401 Elm Street, Apartment C, Ludlow, Kentucky 41016. On March 10, 2004 the Office entered appellant's change of address into its automated system.

On a copy of the March 1, 2004 letter received by the Office on March 17, 2004, appellant asserted that Dr. Shouse's office was 1 hour and 31 minutes driving distance from her home at 322 Lafayette Avenue in Bellevue, Kentucky. She appended a map and driving directions prepared on March 15, 2004, showing that the driving distance between her home at 322 Lafayette Avenue and Dr. Shouse's office at One West McDonald Parkway, Maysville, Kentucky was 60.8 miles, with an approximate travel time of 1 hour 31 minutes.

On April 16, 2004 Dr. Rison performed "[t]hermal destruction of the medial nerves to the posterior primary ramus using radiofrequency thermocoagulation through the following facet joints: left C5-6, C6-7, C7-T1 and T1-2." Thermocoagulation at the left facet joints at C2 to C6 was performed on May 6, 2004. These procedures were authorized by the Office.

In a May 11, 2004 telephone memorandum, the Office noted that an employee of Dr. Shouse's office advised that on an unspecified date, "someone called canceling the appointment.... She was complaining about the distance. According to [Dr. Shouse's] office it is only one hour from [appellant's] house."

By May 11, 2004 notice sent to appellant at her new address of record, 401 Elm Street, Ludlow, Kentucky, the Office proposed to suspend compensation based on her failure to appear for the May 17, 2004 impartial medical examination with Dr. Shouse. The Office noted that appellant was advised by the March 1, 2004 letter of the consequences for not attending the

examination. The Office again advised appellant that her compensation could be suspended for refusal or obstruction of the scheduled examination under section 8123(d) of the Act. The Office afforded appellant 14 days to provide her reasons for refusing to attend the scheduled examination. If her reasons were found invalid, she would be found “in obstruction of a medical examination within the meaning of 5 U.S.C. § 8123(d) ... and [her] compensation [would] be suspended until the obstruction cease[d].” If appellant’s reasons were found valid, the examination would be rescheduled and appellant advised accordingly. The record indicates that appellant did not respond to the May 11, 2004 letter prior to June 9, 2004.

By decision dated June 9, 2004, the Office suspended appellant’s compensation benefits effective June 12, 2004 on the grounds that she did not attend the scheduled March 17, 2004 examination with Dr. Shouse. The Office found that appellant had not shown good cause for failing to attend the appointment. Appellant was advised by March 1 and May 11, 2004 letters of her obligation to cooperate with the scheduled impartial examination and the consequences for not doing so. Appellant did not provide “an explanation of her failure to attend or cooperate.” The Office found that she “failed to attend, or obstructed an examination” as directed, thereby resulting in the suspension of compensation benefits under section 8123(d) of the Act. The Office noted that her benefits would be reinstated “after verification that [she] attended and fully cooperated with the examination,” retroactive to the date of her compliance.

LEGAL PRECEDENT

Section 8123 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 choice of locale and the choice of medical examiners are matters within the discretion of the Office.² The Act’s implementing regulation at section 10.320 provides that a claimant must submit to examination by a qualified physician as often and at such times and places as the Office considers reasonably necessary.³ Section 8123(d) of the Act and section 10.323 of the regulation provides that, if an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction ceases.⁴ However, before the Office may invoke these provisions, the employee is provided a period of 14 days to present in writing his or her reasons for the refusal or obstruction.⁵ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of the Act.⁶

¹ 5 U.S.C. § 8123(a).

² *James C. Talbert*, 42 ECAB 974, 976 (1991).

³ 20 C.F.R. § 10.320.

⁴ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

⁶ *Id.*

ANALYSIS

The Board finds that the Office properly determined that a conflict in medical opinion existed between Dr. Rison, appellant's attending physician, and Dr. Duffy, for the government, regarding whether the work-related conditions had resolved and the scope of her work capabilities. Dr. Rison found that appellant had not reached maximum medical improvement and required continuing treatment for the accepted aggravation of a herniated cervical disc. Dr. Duffy found that appellant's work-related condition had resolved without residuals.⁷ Based on this conflict, the Office referred her to Dr. Shouse, a Board-certified orthopedic surgeon, for an impartial evaluation.

By letter dated March 1, 2004, the Office advised appellant to attend a medical appointment with Dr. Shouse at 9:00 a.m. on March 17, 2004. Appellant did not attend the scheduled appointment.

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 or obstructed a medical examination.⁸ In this case, the time for the impartial medical examination by Dr. Shouse was set, appellant was properly advised of the scheduled appointment and failed to appear for the examination on March 17, 2004. The only remaining issue is whether appellant presented a valid reason for her failure to appear.

The Office's procedures provide that if a claimant "does not report for a scheduled appointment, he or she should be asked in writing to provide a written explanation within 14 days." If good cause for the failure to appear is not established, compensation is then suspended under section 8123(d) of the Act until such date on which the claimant agrees to attend the examination.⁹ In a note received by the Office on March 17, 2004, appellant objected to the distance between her home at 322 Lafayette Avenue in Bellevue, Kentucky and Dr. Shouse's office, indicating that it was approximately 61 miles, with an estimated travel time of 1 hour and 31 minutes.

The appointment with Dr. Shouse was scheduled for 9:00 a.m. on March 17, 2004, the same date that the Office received appellant's note and map. The record indicates that the Office did not consider appellant's contentions prior to issuance of the June 9, 2004 decision. The Board has held that if a claimant raises the issue of having difficulty attending a scheduled examination prior to the date of the examination and the Office failed to address those concerns,

⁷ Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, and the opposing reports are of virtually equal weight, a third physician shall be appointed to make an examination to resolve the conflict. 5 U.S.C. § 8123(a), *Delphia Y. Jackson*, 55 ECAB ___ (Docket No. 04-165, issued March 10, 2004).

⁸ *Maura D. Fuller (Judson H. Fuller)*, 54 ECAB ___ (Docket No. 02-625, issued January 28, 2003).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating the Medical Evidence*, Chapter 2.810.14(d) (November 1998).

then the claimant would have grounds after the suspension order for challenging the propriety of the order. The Board noted, however, that the claimant must properly raise his or her concern prior to the scheduled examination.¹⁰ In this case, appellant's note and map were received by the Office on the same date as the scheduled examination. The Board finds that the contention regarding the traveling distance to the scheduled appointment was not properly raised as it was moot as of March 1, 2004.

Appellant alleged that the distance between her home at 322 Lafayette Avenue and Dr. Shouse's office was inconvenient. The Office's letter advising appellant of the time and location of the examination was dated March 1, 2004. As of that date, appellant's address of record was 322 Lafayette Avenue in Bellevue, Kentucky. In a March 2, 2004 note, appellant advised the Office that as of March 1, 2004, she had moved from 322 Lafayette Avenue to 401 Elm Street in Ludlow, Kentucky. Thus, as of the March 17, 2004 examination, appellant no longer lived at the location which she alleged was too far to travel to Dr. Shouse's office. Appellant did not contend that it was too difficult for her to travel to Dr. Shouse's office from her new residence at 401 Elm Street in Ludlow, where she resided at the time of the March 17, 2004 appointment. Although a May 11, 2004 telephone memorandum indicates that appellant cancelled the appointment and "complain[ed] about the distance," there is no indication that appellant was referring specifically to her Ludlow address. Also, the date of the call is not evident from the memorandum.

Additionally, the Board notes that appellant did not submit any medical evidence establishing that travel to Dr. Shouse's office would aggravate her accepted condition.¹¹ She did not present any other reasons for her failure to attend the examination other than the distance from her Bellevue Avenue residence to Dr. Shouse's office.¹² The Board finds that appellant did not present a valid reason for her refusal to attend the scheduled impartial medical examination.

¹⁰ See *Gustavo H. Mazon*, 49 ECAB 156 (1997).

¹¹ See *Iris Freedman*, 55 ECAB ____ (Docket No. 03-2057, issued January 16, 2004) (the Board upheld the Office's suspension of the claimant's compensation benefits under section 8123(d) of the Act, finding that she submitted insufficient medical evidence to support her contention that she was medically unable to travel to a scheduled impartial medical examination).

¹² The Board notes that on appeal, appellant contended that she telephoned the Office stating that she would attend an examination if one were scheduled closer to her home. However, there is no memorandum or other documentation of record regarding this telephone call.

The Board concludes that appellant's failure to attend the impartial medical evaluation constituted a refusal to submit without good cause, to a medical examination that was reasonably required. Thus, the Office properly invoked the penalty provision of section 8123(d) of the Act.¹³

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation benefits under 5 U.S.C. § 8123(d) on the grounds that she failed to attend a scheduled medical examination.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 9, 2004 is affirmed.

Issued: December 17, 2004
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹³ Following issuance of the Office's June 9, 2004 decision, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).