

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of IRIS FREEDMAN and DEPARTMENT OF JUSTICE,
U.S. CUSTOMS SERVICE, Key West, FL

*Docket No. 03-2057; Submitted on the Record;
Issued January 16, 2004*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs 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.

On May 20, 2002 appellant, then a 58-year-old secretary, filed a traumatic injury claim alleging that on that date she sustained a gash on the right side of her forehead near the eyebrow when she tripped on the carpet while approaching a table to remove old newspapers. Appellant stopped work on May 20, 2002.

By letter dated July 3, 2002, the Office accepted appellant's claim for aggravation of carpal tunnel syndrome, laceration of the forehead and cervical, lumbar and bilateral arm strains.

Appellant submitted periodic reports from Dr. Robert Catana, an orthopedic surgeon and her treating physician, finding that she was disabled for work. In a February 19, 2003 letter, the Office advised Dr. Catana that, although its records indicated that he had not released appellant to return to work in any capacity, he had not defined what precluded appellant from performing modified work. The Office advised him that appellant would be referred to a second opinion orthopedic medical evaluation to obtain an update on her work-related medical condition and work capability.

On March 11, 2003 the Office referred appellant together with medical records, a statement of accepted facts and a list of specific questions, to Dr. Robin Lockwood, a Board-certified orthopedic surgeon, for a second opinion medical examination.

Dr. Lockwood submitted an April 2, 2003 report, providing a history of appellant's May 20, 2002 employment injury, medical treatment and employment at the employing establishment. He noted her complaints of back and neck pain. Dr. Lockwood provided normal findings on physical examination of appellant's neck and back. He noted a review of her medical records, which included Dr. Catana's office notes regarding treatment of appellant's

back 10 days prior to her May 20, 2002 employment injury and following her work-related injury. With respect to her back complaints, Dr. Lockwood noted that, when Dr. Catana saw appellant on May 21, 2002,¹ he did not mention any problem related to her lower back and there was no mention of back problems on her May 28, 2002 office visit. He also noted that Dr. Catana first mentioned that appellant experienced pain to her neck and upper and lower back and radiation down her left arm on her June 28, 2002 visit. Dr. Lockwood stated that appellant was having less symptoms on the date of his examination than the symptoms she had on May 10, 2002, 10 days prior to her fall. Appellant had posterior muscle tenderness at the levator scapulae area which underlied the trapezius. Dr. Lockwood noted that this area was injected by Dr. Catana on May 10, 2002 and that she had the same symptom on the day of his examination. At that time, she also had pain going down both legs and pain all the way down her left arm. Dr. Lockwood stated that appellant no longer had pain down her left arm, but she still had the muscle pain on the posterior aspect of the left shoulder that she had on May 10, 2002. Dr. Lockwood diagnosed chronic left levator scapulae muscle strain and lumbar pain. With respect to appellant's cervical condition, he stated that it was clear that her symptoms prior to her fall were much worse than the same symptoms she was currently having. He found no causal relationship between appellant's current cervical condition and her May 20, 2002 employment injury. Regarding the lumbar spine, Dr. Lockwood stated that it had improved since the time prior to her May 20, 2002 employment injury and, based on the record, there was no relationship between her current back condition and the May 20, 2002 employment injury. He noted that appellant was scheduled for back surgery three times prior to her May 20, 2002 employment injury, which she did not undergo and that her prior symptoms had mostly resolved. He stated that appellant's work injuries were resolved as of April 2, 2003, the date of his examination and it was difficult to attribute any of her complaints, including her neck and back complaints, to the May 20, 2002 injury. Dr. Lockwood concluded that appellant could perform the physical duties of her secretarial position based on a review of a description of this position.

In a May 1, 2003 letter, the Office requested that Dr. Catana review Dr. Lockwood's report and provide any comments. In an April 14, 2003 response letter, Dr. Catana stated that appellant's physical examination remained unchanged. She was in persistent pain and required neck and back surgery.

The Office determined that a conflict existed between Dr. Catana and Dr. Lockwood regarding appellant's medical condition and ability to work. On May 15, 2003 the Office referred appellant to Dr. Bruce Young, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict. The appointment was scheduled for June 4, 2003 at 12:45 p.m., at 1821 NE 25th Street in Lighthouse Point, Florida. The Office advised appellant that failure to attend the appointment would be interpreted as obstruction and result in the suspension of her compensation benefits pursuant to 5 U.S.C. § 8123(d).

In a May 20, 2003 letter, appellant advised the Office that she was unable to attend the scheduled examination because she could not travel long distances due to severe back pain which limited her ability to stand, sit or lie down for any period of time. In addition, she stated that her

¹ The Board notes that it appears Dr. Lockwood inadvertently indicated that Dr. Cantana first saw appellant on May 21, 2001 rather than May 21, 2002.

medication caused extreme drowsiness. Appellant noted that, if she could travel to her scheduled appointment, she would have had spinal surgery a year prior.

Dr. Catana submitted a May 22, 2003 letter indicating that he was unsure of the location of appellant's examination, but that she had severe disability and pain. He stated that she had difficulty with short distances and that driving to Marathon, Florida, would be quite a project for her. Dr. Catana noted that Marathon was the next town just north of Key West, where his office was located. He stated that he did not feel that appellant could drive for any extended period of time without multiple and frequent breaks. Also, she could not sit and stand in one position for any prolonged period of time.

In a letter dated June 12, 2003, the Office advised appellant that it had received notification that she failed to attend the scheduled examination of June 4, 2003 with Dr. Young. The Office noted a May 20, 2003 telephone conversation with appellant in which she reported that she needed to use an ambulance to transport her to the medical appointment. The Office instructed appellant to submit a written report from her physician explaining this need. The Office noted Dr. Catana's finding that appellant needed to make multiple and frequent stops while driving. She was given 14 days to explain why she failed to keep the appointment. Appellant was advised that, if her reasons for failing to attend the examination were invalid, she would be found in obstruction of the examination within the meaning of section 8123(d) of the Federal Employees' Compensation Act and her benefits would be suspended until the obstruction ceased.

On June 30, 2003 the Office received Dr. Catana's June 9, 2003 report. He indicated that appellant's evaluation was essentially unchanged since her last evaluation. Dr. Catana stated appellant still had pain and that, on a scale of 1 to 10, with 10 being the worse, appellant was a 10. He noted that she was in need of back surgery prior to her May 20, 2002 employment injury and that after this injury her condition worsened. Dr. Catana stated that appellant required more pain medication to tolerate her pain. He noted an unsuccessful attempt to bring a spine surgeon to Key West to perform the surgery. Dr. Catana stated that appellant was in no condition to travel to Miami or Ft. Lauderdale, to have back surgery. He reviewed Dr. Lockwood's report again and noted that Dr. Lockwood did not indicate whether appellant's employment injury had contributed to or aggravated her preexisting injuries. Dr. Catana opined that the new injury aggravated appellant's problems and she required surgery prior to them which would have changed her condition, but now the new injury required her to use more pain medication. He stated that, due to the medications that she had to take, it was difficult for her to return to work. Dr. Catana stated that, for this reason, the contributing cause for surgery was based on the May 20, 2002 employment injury which prevented appellant from returning to work.

By decision dated July 3, 2003, the Office suspended appellant's compensation effective on that date on the grounds that she refused to submit as ordered for a medical examination by Dr. Young.²

² The Board notes that subsequent to the Office's July 3, 2003 decision appellant submitted additional evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision; *see Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952); 20 C.F.R. § 501.2(c).

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.

Section 8123(a) of the Act provides: “[A]n 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.”³

Section 8123(d) of the Act provides: “[I]f an employee refuses to submit to or obstructs an examination, [her] right to compensation under this subchapter 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

Section 10.323 of the Office's implementing federal regulations, provides:

“If an employee refuses to submit to or in any way obstructs an examination required by [the Office], his or her right to compensation under the [Act] is suspended until such refusal or obstruction stops.... The employee will forfeit compensation otherwise paid or payable under the [Act] for the period of the refusal or obstruction and any compensation already paid for that period will be declared an overpayment and will be subject to recovery pursuant to 5 U.S.C. § 8129.”⁵

The Board has reviewed the evidence of record and finds that appellant obstructed the June 4, 2003 impartial medical examination scheduled with Dr. Young. The Office properly determined that a conflict in the medical record existed between the opinions of appellant's treating physician and the Office referral physician.⁶ Dr. Catana opined that appellant continued to have residuals of her May 20, 2002 employment injury and she was totally disabled while Dr. Lockwood opined that she no longer had any residuals of her accepted employment injury and she was able to resume her duties as a secretary. Accordingly, appellant was referred to a Board-certified orthopedic surgeon for an impartial medical evaluation to determine whether she had any continuing work-related disability due to her May 20, 2002 employment injury.

By letter dated May 15, 2003, appellant was instructed to attend a medical appointment with Dr. Young on June 4, 2003 at 12:45 p.m. The Office was notified by appellant on May 20, 2003 that she was unable to appear for the scheduled medical appointment due to severe

³ 5 U.S.C. § 8123(a).

⁴ 5 U.S.C. § 8123(d).

⁵ 20 C.F.R. § 10.323.

⁶ Section 8123(a) of the Act provides: [I]f 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. 5 U.S.C. § 8123(a); *see Charles E. Burke*, 47 ECAB 185 (1995).

back pain. Dr. Catana submitted a May 22, 2003 report stating that appellant could not travel long distances without multiple and frequent breaks due to severe disability and back pain. The Board finds Dr. Catana's report insufficient to justify appellant's failure to attend the scheduled impartial medical evaluation as the physician noted that appellant should take frequent breaks while driving long distances. Dr. Catana did not preclude travel by appellant to the scheduled appointment.

Dr. Catana's June 9 and 23, 2003 reports, indicating that appellant was not physically able to attend the scheduled medical appointment due to pain are insufficient to justify her failure to appear for the impartial medical examination. The reports failed to explain how or why appellant's pain prevented her from attending the scheduled impartial medical examination. While Dr. Catana indicated that appellant could not travel to the scheduled impartial medical examination, Dr. Lockwood's April 2, 2003 report finding that appellant's work-related conditions had resolved and that she was able to perform the duties of her secretarial position constitutes probative evidence to the contrary *i.e.*, that appellant was physically able to attend the scheduled impartial medical examination.

Because appellant failed to provide sufficient justification for her refusal to attend an impartial medical evaluation and there is no reasoned medical opinion to establish that such an evaluation would aggravate her carpal tunnel syndrome, laceration of the forehead and cervical, lumbar and bilateral arm strains, the Board concludes that appellant has not shown good cause for her refusal to attend an impartial medical evaluation.

Moreover, the Office satisfied its regulations by notifying appellant of the penalty for refusing to submit to or obstructing an examination required by the Office in letters dated May 15 and June 12, 2003 and by allowing appellant 14 days to explain why she could not report to the scheduled examination in the June 20, 2003 letter.⁷ Consequently, the Office properly suspended appellant's eligibility for compensation.

⁷ Federal (FECA) Procedure Manual, Part 2 -- *Claims, Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (November 1998).

The July 3, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 16, 2004

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member