United States Department of Labor
Employees' Compensation Appeals Board

SCOTT R. WALSH, Appellant	)	
and	)	**Docket No. 04-1962**
	)	**Issued: February 18, 2005**
DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION, NEWARK, NJ, Employer	)	

Appearances:
Scott R. Walsh, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 4, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated July 2, 2004, suspending his compensation for refusing to submit to a medical examination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case. Appellant also seeks to appeal a May 3, 2004 decision, involving his claim for an emotional condition which an Office hearing representative remanded for further development. However, the Board has no jurisdiction to consider the May 3, 2004 decision as it is an interlocutory matter before the Office.[1]

ISSUE

The issue is whether the Office properly suspended appellant's compensation benefits on the grounds that he refused to submit to a medical examination.

[1] *See* 20 C.F.R. § 501.2(c). *See also Gloria Swanson,* 43 ECAB 161 (1991).

FACTUAL HISTORY

On November 25, 2002 appellant, then a 43-year-old asylum officer, filed an occupational disease claim alleging that his emotional condition had been caused/aggravated by illegal workplace practices in the employing establishment. He alleged that management demanded that asylum officers meet unattainable production quotas; that management had coerced a pattern and practice in which asylum officers routinely work off-the-clock to meet demands; and that he had been subject to ongoing hostility and abuse due to his refusal to meet quotas by working off-the-clock. With the claim, appellant submitted a narrative statement along with various factual and medical evidence, including a January 20, 2003 report from Dr. David G. Inwood, his treating psychiatrist. The employing establishment controverted the claim and submitted various factual evidence.

By decision dated June 9, 2003, the Office denied appellant's claim on the grounds that he failed to establish that he sustained an injury while in the performance of duty.

Appellant disagreed with the June 9, 2003 decision and requested an oral hearing, which was held on January 22, 2004. By decision dated May 3, 2004, an Office hearing representative found that he had established a compensable factor of employment with regard to not being able to meet the deadlines for the adjudication of cases. The Office hearing representative, however, found that Dr. Inwood failed to provide sufficient medical rationale to explain how the accepted employment factor caused or contributed to appellant's emotional condition. The hearing representative directed that he be referred to an appropriate Board-certified physician for a reasoned medical opinion regarding whether his claimed condition was causally related to factors of his employment. The Office hearing representative remanded the case for further development.

By letter dated May 24, 2004, the Office informed appellant that it was scheduling him for an examination with a Board-certified specialist as additional expert medical opinion was needed. The letter informed him of his responsibility to attend the appointment and that, if he failed to do so without an acceptable reason, his right to compensation benefits could be suspended in accordance with section 8123(d) of the Federal Employees' Compensation Act.[2]

By letter dated June 1, 2004, the Office informed appellant that it had scheduled an examination by Dr. Vilor Shpitalnik, a Board-certified psychiatrist, on June 15, 2004.

In a facsimile message dated June 14, 2004, appellant informed the Office that he would not be evaluated by Dr. Shpitalnik tomorrow or at any other time and requested that it not reschedule him. He did not appear for his scheduled examination.

By letter dated June 16, 2004, the Office proposed to suspend appellant's compensation benefits on the grounds that he failed to keep the medical examination which was directed pursuant to the hearing representative's decision. The Office noted that, although appellant disagreed with the need for this examination, the examination was needed to proceed with the processing of his claim and it had the authority to determine when referral examinations were

[2] 5 U.S.C. § 8123(d).

needed. The Office allowed appellant 14 days to provide good cause for his failure to appear and informed him of the penalty provision of section 8123(d) of the Act.

In a letter dated June 17, 2004, appellant expressed his belief that the Office did not need additional expert medical opinion to establish his claim as his treating psychiatrist had provided sufficient medical rationale. He further argued that the claims examiner and Office hearing representative made deceitful judgments which were contrary to logic and the facts and that nothing would be gained by sending him to one of the Office's "hired-gun" psychiatrists two years after the fact.

By decision dated July 2, 2004, the Office suspended appellant's entitlement to compensation benefits because he did not establish good cause for refusing to submit to an examination with the second opinion physician as required by the Office.

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.[3] 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.[4] The Office's federal regulation at section 10.320 provides that a claimant must submit to examination by a qualified physician as often and at such time and places as the Office considers reasonably necessary.[5] Section 8123(d) of the Act and section 10.323 of the Office's regulation provide that, if an employee refuses to submit to or obstructs a directed medical examination, his or her compensation is suspended until the refusal or obstruction ceases.[6] However, before the Office may invoke these provisions, the employee is provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.[7] 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.[8]

ANALYSIS

In this case, the Office directed appellant to attend a second opinion evaluation with Dr. Shpitalnik, a Board-certified psychiatrist, in accordance with a directive issued by the Office hearing representative on May 3, 2004. The hearing representative found that appellant established a compensable employment factor in his emotional condition claim but, that further

[3] 5 U.S.C. § 8123(a).

[4] *James C. Talbert*, 42 ECAB 974, 976 (1991).

[5] 20 C.F.R. § 10.320.

[6] 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

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

[8] *Id; see Raymond C. Dickinson*, 48 ECAB 646 (1997).

medical development was required in the matter. The hearing representative was noted that his attending physician had not provided a well-rationalized opinion on casual relationship.

In a letter dated May 24, 2004, appellant was advised of the need for additional medical information in the form of a second opinion medical evaluation and informed him of his obligation to attend an evaluation. In a letter dated June 1, 2004, he was notified of the time and place for the scheduled appointment on June 15, 2004, with Dr. Shpitalnik. Appellant, in a facsimile dated June 14, 2004, informed the Office that he would not be evaluated by Dr. Shpitalnik "tomorrow or at any other time." Thereafter he failed to appear for the scheduled June 15, 2004 evaluation. The Office's June 16, 2004 letter informed him that he had 14 days to provide his reasons for failing to appear. Appellant, in a letter dated June 17, 2004, contested the processing of his claim and expressed his reasons for refusing to attend the second opinion evaluation. He contended that his treating psychiatrist, Dr. Inwood, had provided a rationalized medical opinion as to how accepted compensable employment factors were causally related to his emotional condition and disability. Appellant further argued that the claims examiner and Office hearing representative made judgments that were contrary to logic and the facts and that nothing would be gained by sending him for further examination two years after the fact.

Appellant's stated objections to undergoing a second opinion evaluation, however, do not establish good cause for his failure to submit to the examination with Dr. Shpitalnik. The Board has recognized the Office's responsibility in developing claims. Once an employee has made a *prima facie* case, *i.e.*, when he or she has submitted evidence supporting the essential elements of his or her claim, including evidence of causal relationship, the Office has the responsibility to take the next step, either of notifying the employee that additional evidence is needed to fully establish the claim or of developing evidence in order to reach a decision on the employee's entitlement to compensation.[9] In this case, the Office hearing representative properly acted within his discretion in finding that Dr. Inwood's January 20, 2003 report was not sufficiently well rationalized with respect to explaining how the compensable employment factor accepted in this case caused or aggravated appellant's emotional condition. Appellant's opinion regarding the probative value of Dr. Inwood's report is irrelevant. As the Office hearing representative directed further development, the Office was obligated to further develop the medical evidence in order to reach a decision on appellant's entitlement to compensation. 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.[10] The regulation governing the Office provide that, an injured employee "must submit to examination by a qualified physician as often and at such times and places as the Office considers reasonably necessary.[11] The only limitation on this authority is that of reasonableness.[12] In this case, the referral to an appropriate specialist in appellant's area at the Office's expense cannot be considered unreasonable. Other than his lay assertions, there is no evidence that the hearing

[9] *See Linda L. Mendenhall*, 41 ECAB 532 (1990).

[10] *Donald E. Ewals*, 51 ECAB 428 (2000).

[11] 20 C.F.R. § 10.320.

[12] *See Donald E. Ewals*, *supra* note 10.

representative's remand instructions were unreasonable. As appellant has not shown that the Office's referral to a second opinion physician was unreasonable, his objection to attending such examination is not a valid reason for refusing to submit to such an examination scheduled by the Office. He has not shown good cause for refusing to undergo the directed examination.

The Office properly determined that appellant refused to submit to a properly scheduled medical examination and suspended his right to compensation benefits by decision dated July 2, 2004. The effect of his refusal to attend the examination with Dr. Shpitalnik is a delay in the development of his claim for an emotional condition causally related to his federal employment, as he is not currently entitled to benefits.[13]

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation benefits for his alleged emotional condition as he refused to attend a scheduled medical examination.

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 18, 2005
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[13] *Vicki L. McOmber*, Docket No. 03-1031 (issued August 19, 2003). *See Donald E. Ewals*, *supra* note 10.