

below ground meter box. She stopped work that day and did not return. Appellant was placed on the periodic rolls as of November 10, 2003.

Appellant was treated for right leg injuries by Dr. Paul Cooperman, an osteopathic physician consulting to the employing establishment, and Dr. Kamal K. Batra, an attending internist. Dr. Deepak Sachdev, an attending Board-certified neurologist, submitted October 6 and 21, 2003 reports describing appellant's cervical, lumbar and right lower extremity pain, indicating that these symptoms were related to the accepted June 16, 2003 injury. Dr. M.A. Farescal, an attending Board-certified family practitioner, submitted periodic chart notes and physical therapy slips from September 2003 to February 2004, noting low back pain with a possible herniated disc, lumbar radiculopathy with radiation into the right leg, neck pain and stiffness. He held appellant off work indefinitely.

To determine the extent to which appellant's ongoing conditions were related to the accepted June 16, 2003 injury, the Office referred her, the medical record and a statement of accepted facts, to Dr. Nauhinal S. Singh, a Board-certified neurologist, for a second opinion examination. In a December 29, 2003 letter, the Office advised appellant of her obligation to attend the examination and that, if she did not do so, her entitlement to compensation could be suspended under section 8123(d) of the Act. Appellant was advised of the time and location of the appointment in a January 2, 2004 letter from Medical Consultants Network, a company providing medical management services to the Office.

Dr. Singh submitted an undated report of a January 19, 2004 examination. He provided a history of injury and treatment, reviewed the medical record and noted no abnormal findings on examination. Dr. Singh diagnosed resolved cervical and lumbosacral sprains with unexplained pain in the "web of right foot" requiring evaluation by a specialist.

Following Dr. Singh's examination, appellant submitted additional evidence. In physical therapy notes and chart notes dated from March 8 to June 11, 2004, Dr. Farescal opined that appellant's neck, lumbar, right shoulder, right leg and right foot pain symptoms were caused by the June 16, 2003 injury. In April 2004, appellant was also treated by Dr. Michael Dellacorte, an attending podiatrist, who diagnosed stress fractures of the second and third metatarsals of the right foot, secondary to a tendon rupture.

In a May 11, 2004 follow-up report, Dr. Singh opined that appellant's right foot pain could be indicative of either a primary injury or L5 lumbar nerve root pain possibly related to the June 16, 2003 incident. On May 20, 2004 the Office authorized a reevaluation of appellant's right foot to determine if there was any injury or condition causally related to the June 16, 2003 injury. Dr. Singh concurred with this recommendation in a June 1, 2004 letter.

In a June 11, 2004 letter, Medical Consultants Network advised appellant to report for a second opinion examination by Dr. Singh on June 28, 2004 at 11:30 a.m. Appellant was instructed to bring identification and pertinent medical records. The letter did not refer to any provision of the Act or indicate that there would be any penalty for failing to attend the appointment. The record indicates that appellant did not appear for the scheduled June 28, 2004 examination.

By notice dated June 28, 2004, the Office advised appellant that she failed to attend the scheduled June 28, 2004 second opinion examination with Dr. Singh. The Office noted that appellant had been advised by June 11, 2004 letter of “the act that [her] failure to keep the examination would be considered obstruction by the Office, [she] failed to attend the examination.” The Office afforded appellant 14 days to explain her failure to keep the appointment, noting that her “explanation should contain medical evidence if [she were] using a medical excuse.” The Office noted that, if appellant failed to provide “a good cause for [her] failure to keep the appointment” or if she failed to respond, she would be found to have obstructed the examination under section 8123 of the Act and her entitlement to benefits would be suspended.

In a June 24, 2004 note received by the Office on June 29, 2004, Dr. Ramesh K. Bhatia, an attending physician specializing in pediatrics, “certified that [appellant] was seen today and she ha[d] Ac[ute] OM [otitis media] and needs to resch[edule] app[ointment] for MID [medical independent doctor].”¹

By decision dated July 13, 2004, the Office finalized the suspension of appellant’s compensation effective July 11, 2004 on the grounds that she failed to attend the scheduled June 28, 2004 second opinion examination. The Office noted that it had directed appellant by June 11, 2004 letter to report for the examination and notified her of the consequences for not attending. The Office found that appellant failed to respond to the June 28, 2004 notice affording her 14 days to provide good cause for her failure to attend the examination.

Appellant requested a hearing in a letter and form dated August 12, 2004 and postmarked August 16, 2004. She asserted that she did not attend the June 28, 2004 examination as Dr. Bhatia advised her to stay home due to an ear infection. She submitted a November 18, 2003 chart note from Dr. Sachdev, who noted appellant’s complaints of headaches, neck pain, neck stiffness radiating into the right shoulder and arm, lumbar pain radiating into the right lower extremity and pain and numbness of the right leg and foot. Appellant also submitted physical therapy and chart notes from Dr. Farescal dated from October 6, 2003 to August 18, 2004. Dr. Farescal opined in July 7, 2004 reports that appellant remained totally disabled for work due to sequelae of the June 16, 2003 injury. On July 7, 2004 Dr. Dellacorte diagnosed a stress fracture of the third metatarsal of the right foot.

By decision dated October 19, 2004, the Office denied appellant’s request for a hearing on the grounds that it was not timely filed. The Office found that appellant’s request was postmarked August 16, 2005, more than 30 days after issuance of the July 13, 2004 decision. The Office further denied the claim on the grounds that the issue involved could be addressed equally well through submitting a valid request for reconsideration.

¹ On appeal, appellant asserted that she faxed a copy of Dr. Bhatia’s June 24, 2004 slip to the Office on June 25, 2004, prior to the scheduled June 28, 2004 second opinion examination. However, there is insufficient evidence of record to establish that appellant sent the slip or that the Office received it prior to June 29, 2004.

LEGAL PRECEDENT -- ISSUE 1

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.² 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.³ The Office's implementing 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.⁴ 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 right to compensation is suspended until the refusal or obstruction ceases.⁵ 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.⁶ If good cause for the refusal or obstruction is not established either because the employee failed to submit additional evidence or the evidence submitted was found insufficient, entitlement to compensation is suspended in accordance with section 8123(d) of the Act.⁷

ANALYSIS -- ISSUE 1

In this case, the Office suspended appellant's compensation effective July 11, 2004 under section 8123(d) of the Act on the grounds that she obstructed a scheduled second opinion examination. The Board finds that the suspension in this case was improper.

The Office failed to follow its procedures by providing appellant proper notice of the scheduled June 28, 2004 second opinion examination. The Office's procedures require a written notice to appellant of the second opinion appointment, including a "warning that benefits may be suspended pursuant to 5 U.S.C. § 8123(d) for failure to report for examination."⁸ The June 11, 2004 letter by the medical management company did not advise appellant of her statutory obligation to attend or of the penalty provisions under section 8123(d) of the Act for her failure to attend. There is no evidence of record that the Office sent a separate letter to appellant advising her of the scheduled June 28, 2004 examination or of the penalty provision under section 8123(d). As the Office did not provide appellant proper notice in accordance with its procedures, the suspension of her compensation was improper.

² 5 U.S.C. § 8123(a).

³ *James C. Talbert*, 42 ECAB 974, 976 (1991).

⁴ 20 C.F.R. § 10.320.

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

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations, Second Opinion Examinations*, Chapter 3.500.3d(4) (March 1994).

Moreover, the Office did not consider the medical evidence appellant submitted to demonstrate good cause for her inability to attend the scheduled examination. As noted, before the Office may invoke the penalty provision under section 8123(d) of the Act, the employee must be provided a period of 14 days to provide written reasons for the refusal or obstruction.⁹ In this case, the Office's June 28, 2004 notice provided appellant 14 days to respond. Appellant did so on June 29, 2004 and submitted the June 24, 2004 note from Dr. Bhatia who explained that she could not attend the scheduled examination due to severe otitis media. However, the Office did not address Dr. Bhatia's June 24, 2004 note or otherwise consider appellant's reason for not attending the June 28, 2004 examination.

As the Office improperly suspended appellant's compensation, the second issue regarding the timeliness of her hearing request is moot. On return of the case to the Office, appellant's compensation should be reinstated.

CONCLUSION

The Board finds that the Office improperly suspended appellant's compensation under section 8123(d) of the Act. The Board further finds that the second issue regarding the timeliness of appellant's request for a hearing on the suspension issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2004 decision of the Office of Workers' Compensation Programs is reversed. The Office's October 19, 2004 decision denying her request for a hearing is set aside.

Issued: June 14, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).