

compensation because he refused to attend a medical examination.¹ The Board held that the Office properly determined that a conflict in medical opinion existed and referred the employee for an impartial medical examination. The employee, however, did not attend the scheduled November 2, 2000 appointment with the impartial medical specialist. The Board held that the Office properly determined that the employee's reasons for failing to attend the scheduled medical examination were not acceptable. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

In a letter dated February 3, 2003, appellant's attorney noted that the Board's January 28, 2003 decision stated that compensation remained suspended until a claimant agreed "to attend the examination." The attorney enclosed copies of letters dated May 4 and July 2, 2001 that he sent to the Office stating that the employee would submit to a medical examination and requesting a prompt referral to an impartial medical specialist. Appellant's attorney requested that, based on this information, the Office retroactively reinstate benefits from May 4, 2001 until the date of the employee's death on January 2, 2002.²

The Office, in a letter dated May 7, 2003, informed appellant's attorney that, in order for benefits to be reinstated retroactively, after a claimant has refused to undergo a scheduled examination without good cause, the claimant must both agree to the scheduled examination and actually attend the examination. The Office noted that, at the time appellant informed the Office on May 4, 2001 that the employee would attend an impartial medical examination, the case was with the Branch of Hearings and Review pending an oral hearing and consequently the examination was not scheduled prior to the employee's death on January 2, 2002. The Office concluded that the employee did not attend an examination as required for entitlement to retroactive compensation benefits.

On June 23, 2003 appellant's attorney requested a formal decision on the denial of retroactive compensation.

In a decision dated September 17, 2003, the Office found that the estate of the employee was not entitled to compensation for the period May 4, 2001 through January 2, 2002.

Appellant's attorney requested a hearing on October 15, 2003. He submitted a statement dated May 20, 2004 arguing that the employee "was denied the opportunity to attend an examination because one was not scheduled by [the Office] despite repeated requests by the claimant."

At the May 25, 2002 hearing, appellant's attorney noted that eight months elapsed between the time he notified the Office of the employee's willingness to attend an examination and the time of his death without any action or acknowledgement of his request by the Office. The attorney contended that it was the Office's fault that the employee did not attend a scheduled examination after he notified the Office of his willingness to do so and argued that it failed to perform its main function of managing cases in a timely and proper manner.

¹ *Maura D. Fuller (Judson H. Fuller)*, 54 ECAB ____ (Docket No. 02-625, issued January 28, 2003).

² The employee died on January 2, 2002 in a motor vehicle accident.

In a decision dated August 16, 2004, the hearing representative affirmed the Office's September 17, 2003 decision. The hearing representative found that the estate of the employee did not meet the criteria necessary under the Federal Employees' Compensation Act³ to establish entitlement to retroactive compensation. He noted that, although the Office failed to promptly schedule an examination for the employee, the "situation would have never occurred had [the employee] participated in the originally scheduled examination...."

LEGAL PRECEDENT

Section 8123(a) of the Act provides: "[A]n employee shall submit to examination by a medical offer 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."⁴

Section 8123(d) of the Act provides: "[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. 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."⁵

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 the 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."⁶

The Office's procedure manual, regarding suspension of benefits, provides as follows:

Legal Provisions. Section 5 U.S.C. § 8123(d) states that, 'if an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstructions stops.' To invoke this provision of the law, the [claims examiner] must ensure that the claimant has been properly notified of his or her responsibilities with respect to the medical examination scheduled. In accordance with 20 C.F.R. § 10.323, the actions of an employee's representative will be considered the actions of the employee for the

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8123(a).

⁵ 5 U.S.C. § 8123(d).

⁶ 20 C.F.R. § 10.323.

purpose of determining whether a claimant refused to submit to, or in any way obstructed, an examination required by [the Office].

“d. *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 good cause is not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d) until the date on which claimant agrees to attend the examination.

“Such agreement may be expressed in writing or by telephone (documented on Form CA-110). When the claimant actually reports for examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made.”⁷

Regarding responsibilities of the claims examiner, the Office’s procedure manual provides:

“The main tasks of the [claims examiner] are to adjudicate claims; authorize benefits and set up compensation payments; manage individual cases, so that timely and proper actions are taken in each claim; and manage a case-load, so that all cases are handled promptly and effectively.”⁸

ANALYSIS

In its January 28, 2003 decision, the Board affirmed the Office’s suspension of the employee’s compensation on the grounds that he refused to attend a scheduled medical examination without good cause pursuant to section 8123(d). Appellant’s attorney, on February 3, 2003, submitted letters dated May 4 and July 2, 2001 which indicated that the employee agreed to attend an impartial medical examination and requested that an examination be promptly scheduled.⁹ He argued that the employee’s estate was entitled to compensation from the time that the employee agreed to attend an examination on May 4, 2001 until the date of his death on January 2, 2002. The attorney further maintained that the Office did not properly manage the employee’s claim “promptly and effectively” as required under its procedures by its failure to respond to the employee’s request for a promptly scheduled medical examination. He contended that the Office, through its actions, deprived the employee of the opportunity to attend a scheduled medical examination and end the suspension of his benefits.

The Act and the Office’s implementing regulations provide that an employee is not entitled to compensation if he refuses to attend or obstructs a required examination until the

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

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *General Provisions of the Federal Employees’ Compensation Act*, Chapter 2.200.3 (July 2004)

⁹ The May 4 and July 2, 2001 letters do not appear to be contained in the case record prior to the attorney’s February 2003 submission.

refusal or obstruction stops.¹⁰ The Office's procedure manual provides that compensation is suspended for employee's who fail to attend a scheduled medical appointment without good cause until the date that the employee agrees to attend the examination. The procedure manual states, "When the claimant actually reports for examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made."¹¹ In this case, appellant's attorney notified the Office on May 4 and July 2, 2001 of the employee's general willingness to attend an impartial medical examination; however, none was scheduled prior to the employee's death on January 2, 2002. Therefore, the employee did not actually report for examination as required under the procedure manual for the retroactive payment of compensation.

Appellant's attorney contended that the Office's delay in scheduling a new impartial medical examination precluded the employee from attending the examination. He argued that the Office failed to manage the employee's claim as required by its procedure manual. Regarding responsibilities of the claims examiner, the Office's procedure manual provides:

"The main tasks of the [claims examiner] are to adjudicate claims; authorize benefits and set up compensation payments; manage individual cases, so that timely and proper actions are taken in each claim; and manage a case-load, so that all cases are handled promptly and effectively."¹²

In this case, the Office scheduled a medical examination for the employee on November 2, 2000 to resolve a conflict in medical opinion. The employee did not attend the scheduled examination and, consequently, in a decision dated February 21, 2001, the Office suspended his compensation. The employee, through his attorney, requested a hearing on February 21, 2001. He then notified the Office of his willingness to attend a scheduled medical examination on May 4, 2001, six months after the scheduled medical examination and almost three months after the Office decision suspending his compensation. The case remained at the Branch of Hearings and Review until the hearing representative's decision on December 20, 2001. The Board finds that appellant's attorney has not demonstrated, under the facts of this case, that the Office did not properly adjudicate the employee's claim in accordance with Office procedures. The employee had ample time to inform the Office of his willingness to attend the scheduled medical examination prior to its February 2001 decision suspending his compensation. After the suspension, this issue was appealed and ultimately affirmed by the Board. As the employee did not inform the Office that he would attend a scheduled examination

¹⁰ See 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

¹¹ *Supra* note 7.

¹² *Supra* note 8.

and “actually report” for the examination prior to his death on January 2, 2002, his estate is not entitled to retroactive compensation for the period May 4, 2001 through January 2, 2002.¹³

CONCLUSION

The Board finds that the employee’s estate is not entitled to compensation for the period May 4, 2001 through January 2, 2002.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated August 16, 2004 is affirmed.

Issued: March 11, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

¹³ Counsel’s argument is essentially an assertion that the employee and his estate have been prejudiced by the delay of the Office and that such delay should constitute the basis for the payment of retroactive compensation. In *Steven M. Gourley (Louise E. Gourley)*, 39 ECAB 413 (1988) the Board noted that payments under the Act are limited to the amounts and circumstances specified; neither the Office nor the Board has the authority to enlarge the terms of the Act or make an award under terms other than those specified in the statute. No abuse of discretion is demonstrated by the evidence of record in the scheduling of the medical examinations. The circumstances of this case, while unfortunate, do not warrant the payment of retroactive compensation.