

**United States Department of Labor
Employees' Compensation Appeals Board**

JEFFREY E. LONG, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS
VETERANS ADMINISTRATION
CHILLICOTHE HOSPITAL, Chillicothe, OH,
Employer**

**Docket No. 05-1613
Issued: April 7, 2006**

Appearances:
Richard E. Homer, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 25, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 5, 2004, denying his claim for a schedule award on the grounds that he had obstructed 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.

ISSUE

The issue is whether the Office properly denied appellant's claim for a schedule award on the grounds that he refused to submit to a medical examination.

FACTUAL HISTORY

On July 11, 2000 appellant, then a 49-year-old engineering equipment operator, was injured while lifting a wooden overhead door on equipment shed. He stopped work on July 12,

2000 and returned on July 13, 2000.¹ The Office accepted the claim for left rotator cuff tear with surgery and paid appropriate compensation.

In a December 17, 2001 report, Dr. Brian S. Cohen, a Board-certified orthopedic surgeon and appellant's treating physician, noted his history of injury and treatment, which included a left rotator cuff tear and surgery on September 11, 2000. He also noted that appellant was only able to manage a partial repair through an open incision of his rotator cuff as the tear was retracted all the way back to the glenoid. Dr. Cohen indicated that appellant failed to progress and was treated on May 29, 2001 with a left latissimus dorsi muscular transfer. He noted that he was treated postoperatively in a shoulder abduction brace for eight weeks and progressed very slowly. Dr. Cohen indicated that appellant was unable to elevate his arm past 40 degrees, had no significant external rotation and was significantly disabled. He indicated that he had significant pain with any motion of his left shoulder and diagnosed a massive rotator cuff tear and failed to improve with the latissimus dorsi transfer. Dr. Cohen opined that appellant had reached maximum medical improvement and had no use of the arm above 10 degrees of forward elevation. Dr. Cohen indicated that the arm was only functional at his side.

In a February 25, 2003 report, Dr. Cohen noted that appellant recently underwent a revision of the right shoulder for a re-tear of a previously repaired rotator cuff injury. He noted that he was concerned that the right shoulder injury was "most likely related to the increased use secondary to his decreased function and disability on his left side." Dr. Cohen noted "the shoulder was doing fine until his left shoulder became disabled."

Appellant requested a schedule award on February 24, 2003.

By letter dated March 17, 2003, the Office informed appellant of the type of evidence needed to support his claim for a left arm schedule award and a consequential right shoulder condition. The Office requested that he submit such evidence within 30 days. In a separate letter also dated March 17, 2003, the Office requested that appellant's treating physician, Dr. Cohen, provide his opinion and findings based upon the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (*hereinafter* A.M.A., *Guides*) and requested that he submit such evidence within 30 days. On May 30, 2003 the Office sent a second request to Dr. Cohen.

The Office continued to develop the claim and by letters dated July 3 and 17, 2003, referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon.

In a July 29, 2003 report, Dr. Fisher noted appellant's history of injury and treatment. He noted that he had two well-healed scars and mild to moderate muscle atrophy of the deltoid, supraspinatus, infraspinatus muscles of the left shoulder, as well as slight decreased sensation over the incisional scar over the posterolateral aspect of the scapula. Dr. Fisher noted marked decreased range of motion in all directions related to the shoulder and decreased strength in the

¹ The record reflects that appellant has several prior claims for various work-related injuries; however, none of these were to the left arm or shoulder, with the exception of a sprain to the left wrist, a smashed left middle finger and a puncture wound to the left hand.

shoulder of 3 +/-5. He referred to Chapter 16 and utilized Figures 40, 43 and 46.² Dr. Cohen noted that appellant had one percent for extension, seven percent for forward flexion, six percent for adduction, one percent for abduction, one percent for external rotation and three percent for internal rotation. He added these figures and opined that he had a total impairment of 19 percent to the left upper extremity.

In an August 13, 2003 report, Dr. Cohen indicated that appellant had reached maximum medical improvement on January 1, 2003. He noted that he could only elevate his left arm 45 degrees and that appellant had objective findings which included loss of active motion and muscle weakness. Dr. Cohen opined that appellant had an impairment of 25 percent of the left arm based upon Figures 16-38 and 16-40 of the A.M.A., *Guides*.³

In a September 5, 2003 report, the Office medical adviser determined that appellant sustained an impairment of 18 percent to the left upper extremity. She noted that Dr. Fischer gave appellant an impairment of 19 percent; however, the 1 percent was incorrect as Figure 16-46⁴ showed 0 percent impairment for external rotation of 70 degrees.⁵

On September 11, 2003 the Office requested that the Office medical adviser provide a supplemental report, as the report of Dr. Cohen was not previously reviewed.

In a September 24, 2003 report, the Office medical adviser repeated her reasons for the discrepancy of one percent between her report and Dr. Fisher's report. She also noted that Dr. Cohen's report was not complete enough to provide an impairment rating as he did not provide any calculations to support his findings.

By letter dated October 29, 2003, the Office advised appellant that a conflict had been created between his treating physician and the second opinion physician regarding the extent of appellant's impairment. He was advised 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 obstruction stops. Compensation is not payable while a refusal or obstruction is deducted from the period for which compensation is payable to the employee...."

On May 18, 2004 the Office referred appellant along with a statement of accepted facts, and the medical record to Dr. Thomas Bender, a Board-certified orthopedic surgeon, for a June 9, 2004 impartial medical evaluation to resolve the conflict in opinion between his physician, Dr. Cohen and Dr. Fisher, the second opinion physician, regarding the extent of appellant's work-related disability. The Office sent this to appellant's address of record and advised him that compensation could be suspended if he did not attend the examination.

² A.M.A., *Guides* 476-79, Figures 16-40, 16-43, and 16-46.

³ A.M.A., *Guides* 475-76, Figures 16-38 and 16-40.

⁴ Although the Office medical adviser stated table, this appears to be a typographical error, as it is Figure-16-46.

⁵ A.M.A., *Guides* 479, Figure 16-346.

In a June 21, 2004 memorandum, the Office was notified by Dr. Bender's staff that appellant did not appear for the examination.

By letter dated June 21, 2004, the Office stated that appellant had 15 days to provide his explanation for failing to keep his appointment.

By decision dated August 5, 2004, the Office found that appellant had failed to appear for the referee examination to resolve the conflict in medical opinion between Dr. Cohen and Dr. Fisher. The Office advised him that no response was received from appellant regarding his failure to appear and found that his claim for a schedule award was denied as he had not met the requirements to receive a schedule award.

LEGAL PRECEDENT

Section 8123 of the Federal Employees' Compensation Act authorizes the Office to require an employee to undergo a physical examination as it deems necessary.⁶ 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.⁷ 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 times and places as the Office considers reasonably necessary.⁸ Section 8123(d) of the Act and section 10.323 of the Office's regulations provide that, if an employee refuses to submit to or obstructs a directed medical examination; his or her compensation is suspended until the refusal of obstruction ceases.⁹ 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.¹⁰

The Board has previously found that these sections of the Act and the regulation do not provide a basis for the rejection of a claim for compensation; rather it suspends the right of an employee to compensation during the period he refuses to submit to an examination.¹¹

⁶ 5 U.S.C. §§ 8101-8193, 8123(a).

⁷ *James C. Talbert*, 42 ECAB 974, 976 (1991).

⁸ 20 C.F.R. § 10.320.

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

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

¹¹ *Karen K. Cassel*, 35 ECAB 1053, 1059 (1984). The Board has also noted that, when a claimant refuses or obstructs a medical examination while a claim is under development, the effect of such obstruction merely delays the development of the claim for the period of the obstruction. *Vicki L. McOmber*, Docket No. 03-1031 (issued August 19, 2003).

ANALYSIS

The Office directed appellant to attend a referee medical evaluation with Dr. Bender, a Board-certified orthopedic surgeon. The Office found a conflict of medical opinion evidence between Dr. Cohen, appellant's treating physician and Dr. Fisher, the second opinion physician, regarding the extent of appellant's impairment for schedule award purposes. The Office referred him to Dr. Bender on June 9, 2004 and informed appellant of his obligation to attend the examination. Appellant did not appear or provide any response. By letter dated June 21, 2004, the Office stated that he had 15 days to provide his explanation for failing to keep his appointment.

By decision dated August 5, 2004, the Office found that appellant refused to attend the February 14, 2003 medical examination without good cause. The Office further denied appellant's request for a schedule award as he had not met the requirements regarding entitlement to a schedule award.

The Board finds that appellant did not provide any reasons to establish good cause¹² for his failure to appear at the referee medical examination with Dr. Bender on June 9, 2004. The evidence of record establishes that no response was received from him and there is no information to suggest that appellant did not receive the letter advising him to attend the impartial medical examination. There is no evidence rising to the level of good cause to support failure to appear at his scheduled medical examination. Although appellant was given an additional 15 days to provide an explanation for his failure to appear, no response or explanation was received and good cause was not established.

However, the Board finds that the Office did not have the authority to deny appellant's claim for a schedule award based on his obstruction of a scheduled medical examination. The Board has found that section 8123(d) of the Act does not provide a basis for the rejection of a claim for compensation.¹³ The Office may only suspend the right of an employee to compensation during the period he refuses to submit to an examination.¹⁴ Thus, the Office's denial of appellant's claim for a schedule award, as opposed to suspension of his entitlement to compensation benefits, was improper.

CONCLUSION

The Board finds that the Office improperly denied appellant's claim for a schedule award based on his obstruction of a medical examination as the Act only allows for a suspension of compensation benefits.

¹² See *Raymond C. Dickinson*, 48 ECAB 646 (1997) (if good cause is not established for failure to attend a medical examination, entitlement to compensation should be suspended until the claimant reports for examination).

¹³ See *Karen K. Cassel*, *supra* note 11.

¹⁴ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2004 decision of the Office of Workers' Compensation Programs is hereby reversed.

Issued: April 7, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board