

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

LYNN C. HUBER, Appellant

and

**DEPARTMENT OF LABOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Jacksonville, FL, Employer**

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**Docket No. 05-1321
Issued: February 6, 2006**

Appearances:
Lynn C. Huber, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 4, 2005 appellant filed a timely appeal of an April 20, 2005 decision of the Office of Workers' Compensation Programs which suspended her compensation benefits for refusal or obstruction of an impartial medical examination. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly suspended appellant's compensation benefits because she failed to submit to an examination by an impartial medical specialist.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated December 31, 2002, the Board found that the Office properly suspended appellant's compensation benefits for refusal to submit to an examination with Dr. Atul M. Shah, a Board-certified psychiatrist and neurologist. The Board found that the Office erred in suspending benefits for her refusal to submit to or obstruct the examination scheduled on March 7, 2000 with Dr. Michael P. Pruitt, a

Board-certified psychiatrist and neurologist, as appellant was not given adequate notice of the proposed suspension. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.¹ The relevant facts and medical evidence regarding the claim are as noted.

On March 8, 1991 appellant, then a 43-year-old claims examiner, filed an occupational disease claim for stress resulting in major depression. The Office accepted her claim for depressive neurosis and appellant was paid appropriate temporary total disability benefits. Appellant has not worked since March 7, 1991.

On August 13, 1992 the Office referred appellant to Dr. M. Saleh, a Board-certified psychiatrist and neurologist, for an impartial examination. In a report dated August 31, 1992, and addendums dated September 9 and October 1, 1992, he opined that she had a depressive neurosis and that factors of appellant's federal employment had contributed to the development of the current condition. Dr. Saleh opined that appellant was emotionally incapacitated. As of June 22, 1995, her treatment was transferred to Dr. Joseph A. Virzi, a Board-certified psychiatrist. In a report dated July 3, 1995, he diagnosed avoidant, dependent, schizoid and "probably passive aggressive personality." Dr. Virzi recommended partial hospitalization and determined that appellant was totally disabled. In a report dated December 15, 1995, he stated that she could do some work in some areas and that her disability was not so severe that she was incapable of doing anything.

In a report dated April 20, 1998, the second opinion physician, Dr. Eduardo A. Sanchez, a Board-certified psychiatrist and neurologist, indicated that appellant was not disabled from any psychiatric standpoint, that there was a great deal of manipulation and malingering and that he did not see any evidence of depression. He noted that she had a personality disorder not otherwise specified with dependent, obsessive and avoidant features and moderate psychosocial stressors.

To resolve the conflict between the opinions of Dr. Virzi and Dr. Sanchez, with regard to whether appellant was disabled due to her depressive neurosis, the Office referred her to Dr. Shah for an impartial medical examination. She failed to attend this appointment contending that Dr. Sanchez's opinion could not qualify as a second opinion because he only saw her for 23 minutes, performed no tests and had improper contact with the Office. The Office terminated appellant's compensation in a decision dated June 2, 1999 because she did not establish good cause for refusing to submit to or obstructing the examination with Dr. Shah.

Appellant did see Dr. Shah on June 14, 1999 and her benefits were reinstated. In a report he opined that she had dysthymia versus major depressive illness, chronic, noncompliance with treatment, work inhibition and ruled out malingering. Dr. Saleh suggested that appellant was totally disabled. By letter dated June 30, 1999, the Office asked that he respond to various questions with regard to his findings, including the psychological tests performed, whether her employment factors precipitated or aggravated an underlying condition, whether appellant met the criteria for a malingerer and whether she was capable of working. Dr. Shah did not respond

¹ Lynn C. Huber, 54 ECAB 281 (2002).

to the Office's questions. The Office determined that a new referral was necessary to resolve the conflict. On November 22, 1999 the Office referred appellant to an impartial medical specialist, Dr. Pruitt. The Office informed her that the appointment was scheduled for December 16, 1999.

In a letter to the Office dated December 27, 1999, appellant objected to Dr. Pruitt, contending that any conflict in medical opinion was resolved by the report of Dr. Shah. The Office responded to her by letter dated December 27, 1999 and explained that, as Dr. Shah did not respond to its request for further information, a second referee examination was necessary.

By note received by the Office on January 7, 2000, appellant advised that she was unable to attend her appointment with Dr. Pruitt due to another medical appointment and indicated that she rescheduled her appointment for January 14, 2000.

In a telephone report dated January 14, 2000, the Office stated that a medical assistant from Dr. Pruitt's office advised that appellant was unable to attend her appointment with Dr. Pruitt because she was sick with the flu. The Office called the medical assistant and rescheduled the appointment for January 24, 2000 and called appellant to inform her of the new date. By letter dated January 14, 2000, the Office also informed her in writing that the appointment with Dr. Pruitt was scheduled for January 24, 2000.

By letter dated January 20, 2000, appellant informed Dr. Pruitt that she was canceling the appointment as she was still recovering from the flu and there were remaining issues with the Office as to the legitimacy of her attending another impartial medical examination. She noted that she was not refusing the appointment and that a week should be enough time for the Office to address her concerns. In a letter of the same date to the Office, appellant reiterated her arguments about Dr. Sanchez and also contended that Dr. Shah had resolved the conflict in medical opinion. In a separate letter of the same date to Donald Bennett, a claims examiner, appellant indicated that he had told her in a January 14, 2000 telephone call that Dr. Pruitt was extremely angry at her for canceling her appointment. She noted that at that time she was very ill with the flu and still had not recovered.

On January 28, 2000 the Office issued a notice of proposed suspension of compensation. Appellant responded by letter dated February 7, 2000, stating that she was sick with the flu at the time of the scheduled appointment and also wanted various issues regarding the appropriateness of the appointment resolved.

By letter dated February 17, 2000, the Office rescheduled another appointment for appellant to see Dr. Pruitt on March 7, 2000 at 10:15 a.m. The Office attempted to deliver notice of the appointment by Federal Express on February 17, 2000 but the envelope was returned as undelivered on March 2, 2000.

In a report of a telephone call dated March 2, 2000, the claims examiner noted leaving a tape recorded message on appellant's answering machine (which was answered as "Lee" for a business) and informed her that the February 17, 2000 letter advising her of the March 7, 2000 appointment had been returned and that appellant should call the Office.

In a telephone memorandum between the Office and Dr. Pruitt's office dated March 10, 2000, the Office noted that appellant missed the March 7, 2000 appointment.

The proposed suspension of benefits was made final in a decision dated March 14, 2000 because appellant did not establish good cause for refusing to submit to or obstructing the examination with Dr. Pruitt. The suspension of benefits was upheld by an Office hearing representative in a decision dated March 8, 2001.

By decision dated December 31, 2002, the Board found that Dr. Sanchez's report could be counted as second opinion with regard to both the referral to Dr. Shah as well as the referral to Dr. Pruitt. The Board found that the Office properly suspended appellant's benefits as she refused to submit to the examination by Dr. Shah, but that, due to the fact that she was given inadequate notice, the Office improperly suspended her benefits for refusal to see Dr. Pruitt. Therefore, the Board found that her compensation benefits should be reinstated retroactive to March 14, 2000. On remand, the Office reinstated compensation benefits.²

By letter dated September 4, 2003, the Office again referred appellant to Dr. Pruitt to resolve the conflict between Dr. Saleh and Dr. Sanchez. In a letter of the same date, the Office informed her of the appointment and noted that, if she did not keep the appointment and failed to provide an acceptable reason, her benefits could be suspended pursuant to 5 U.S.C. § 8123(d). The appointment was scheduled for September 25, 2003. On September 22, 2003 Dr. Pruitt's office indicated that appellant cancelled her appointment.

On September 23, 2003 the Office issued a notice of proposed suspension of compensation for the reason that appellant cancelled the medical appointment with Dr. Pruitt without notifying it or providing reasons for the cancellation. On September 25, 2003 the Office received a note from her indicating that she was canceling her appointment with Dr. Pruitt as he had prior involvement with her claim. By letter dated October 3, 2003, appellant requested that any second opinion or referee examination be conducted by a "female specialist."

By decision dated November 7, 2003, the Office finalized the suspension of benefits.

On December 1, 2003 appellant requested an oral hearing. At the hearing, held on January 25, 2005, appellant testified that Dr. Pruitt could not serve as an impartial medical specialist as he had already reviewed her file and that he was biased in that she was told by the claim's examiner that Dr. Pruitt was furious that she had cancelled the appointment.

By decision dated April 20, 2005, the hearing representative affirmed the Office's suspension of benefits under section 8123 of the Federal Employees' Compensation Act.

² *Id.*

LEGAL PRECEDENT

Section 8123(a) of the Act states:

“An 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. If 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.”³

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist’s opinion requires clarification or elaboration, the Office must attempt to secure a supplemental report from the impartial medical specialist.⁴ If the impartial specialist is unable or unwilling to give a supplemental report, the Office should arrange for a second impartial evaluation.

Section 8123(d) of the Act states:

“If 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.”⁵

Section 10.323 of the Office’s implementing 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.”⁶

The Office’s Federal (FECA) Procedure Manual provides:

“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

³ 5 U.S.C. § 8123(a).

⁴ *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.0810(11)(c)(1)-(2) (April 1993).

⁵ 5 U.S.C. § 8123(d).

⁶ 20 C.F.R. § 10.323.

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 the claimant agrees to attend the examination.”⁷

ANALYSIS

Initially, the Board notes that appellant has raised numerous arguments concerning the validity of the report of the second opinion physician, Dr. Sanchez. As the Board already addressed appellant’s arguments, it is not necessary to again address them in this appeal.

The Board notes that, although appellant indicated that she preferred a female specialist, the Office is only required to provide a female specialist for the purpose of gynecological examinations.⁸ Accordingly, appellant is not entitled, as a matter of right to be examined by a female psychiatrist.

Appellant contends that the Office engaged in impermissible doctor shopping by seeking a second impartial medical opinion, arguing that the conflict in the medical evidence was already resolved by Dr. Shah. In accordance with Office procedure, by letter dated June 30, 1999, the Office asked him to respond to various questions that were pertinent to the resolution of appellant’s claim. He did not respond. If an impartial specialist does not respond to a request for a supplemental report, the Office can arrange for a second impartial examination. The Board notes that the Office raised valid concerns with regard to Dr. Shah’s report to which he did not respond. Accordingly, the Office properly referred appellant for another impartial medical examination.

Appellant contends that Dr. Pruitt may not serve as an impartial medical specialist as he was already familiar with her case. Her contention is without merit. Initially, appellant was scheduled to see Dr. Pruitt for an impartial medical examination on December 16, 1999. The appointment was rescheduled on numerous occasions. Appellant objected to seeing Dr. Pruitt and also stated other reasons that she did not keep her appointments, including conflict with another medical appointment and illness. Dr. Pruitt was provided her file in preparation for an appointment for an impartial medical examination. However, he never had a chance to offer an opinion on appellant’s case as she failed to keep any of the appointments and never performed any examination. Following the appeal to the Board, the Office again referred her to be examined by Dr. Pruitt. Once again, appellant cancelled the appointment. Pursuant to the regulations, an impartial medical examiner must have no prior connection with the case. Dr. Pruitt had no prior connection with this case until his appointment as an impartial medical examiner. He still has not had the opportunity to examine appellant or to write a report on her condition. There was no prior contact before the Office appointed Dr. Pruitt as the impartial medical examiner. Accordingly, appellant’s contention is without merit.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Suspension of Benefits*, Chapter 2.810.14(d) (July 2000).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical Examinations, *Referee Examinations*, Chapter 3.500 4(b)(4)(c).

Appellant also contends that Dr. Pruitt is biased. This argument is based on allegations that he was “furious” with her for canceling several appointments, one after he had already reviewed the medical chart, for which he was paid. The Board has held that mere allegations of bias are not sufficient to establish the fact. An impartial medical specialist properly selected under the Office’s rotation procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise.⁹ The Board finds that appellant has not submitted probative evidence to substantiate her allegation of bias and the record does not otherwise support such allegations. Dr. Pruitt was paid for the time that he spent reviewing her records and has never had any personal contact with appellant.

Accordingly, the Board finds that appellant failed to submit to a properly scheduled medical examination without good cause and the Office properly suspended her right to compensation.¹⁰

CONCLUSION

The Board finds that the Office properly suspended appellant’s compensation benefits because she failed to submit to an examination with an impartial medical specialist.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated April 20, 2005 is affirmed.

Issued: February 6, 2006
Washington, DC

David S. Gerson, Judge
Employees’ Compensation Appeals Board

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

⁹ *James F. Weikel*, 54 ECAB 660 (2003); *Geraldine Foster*, 54 ECAB 435 (2003).

¹⁰ 20 C.F.R. § 8123(d).