

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

STEVEN H. FOLETTA, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Francisco, CA, Employer**

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**Docket No. 05-1405
Issued: May 4, 2006**

Appearances:
Steven H. Foletta, pro se
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 June 21, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 25, 2005 affirming the suspension of his right to compensation for obstructing 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 suspended appellant's compensation benefits for the period April 1 to May 19, 2004 based on his obstruction of a medical examination.

FACTUAL HISTORY

On May 12, 2001 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim alleging that on May 3, 2001 he injured his back when lifting a package from a mail tub. His claim was accepted for lumbosacral sprain and lumbar disc herniation L4-5 and L5-S1. Appellant stopped work on May 4, 2001 and returned to a part-time light-duty position on

November 16, 2001, three days per week. On January 27, 2002 he stopped work completely and received compensation on the periodic rolls.¹

Appellant came under the treatment of Dr. Jeffrey Etemad, a Board-certified orthopedic surgeon, who, in reports dated May 9, 2001 to December 4, 2003, diagnosed acute lumbosacral sprain with associated somatic dysfunction in the thoracolumbar and lumbosacral regions, lumbar radiculopathy with preexisting lumbosacral disc degeneration. He advised that appellant returned to part-time light-duty work on November 16, 2001, subject to various restrictions and worked intermittently until January 27, 2002 when he stopped due to a worsening of his back condition. Dr. Etemad noted that a magnetic resonance imaging (MRI) scan performed on March 26, 2002 revealed an L4-5 disc bulge and L5-S1 moderate size right paracentral disc protrusion. In a report dated January 9, 2003, Dr. Etemad advised that appellant could work two 4-hour shifts per week with two days off between shifts subject to other lifting and carrying restrictions. Dr. George D. Karalis, a Board-certified psychiatrist, noted on February 12, 2003 that appellant had been under his care since March 31, 2000 for anxiety and a depressive disorder which was aggravated by chronic back pain.

In the course of developing the claim, the Office referred appellant to several second opinion physicians and also to impartial medical examiners to determine the extent of his work restrictions and capacity for employment.

Appellant came under the treatment of Dr. Quoc Vo, an osteopath, who, in a report dated October 27, 2003, diagnosed lumbosacral disc degeneration, lumbar disc displacement, sprain of the lumbosacral area, somatic, thoracic, lumbar and sacral dysfunction. In a report dated December 4, 2003, he discharged appellant from his care due to disrupting the clinic and being verbally abusive to his staff. In a subsequent report dated December 11, 2003, Dr. Vo provided a detailed history of appellant's condition and advised that he could work one to two hours every three to four days with stringent lifting restriction and could only sit or stand for 15 minutes at a time.

On December 16, 2003 the Office referred appellant, together with a statement of accepted facts and the case record, for a second opinion evaluation to obtain work limitations for his nonindustrial psychological condition. The Office advised appellant that the appointment was scheduled for January 13, 2004 at 3:00 p.m. with Dr. Robert Hepps, a Board-certified psychiatrist. Appellant was also scheduled for psychological testing on the same date at 1:30 p.m. with Dr. Melanie Moran, a clinical psychologist. The Office informed him of his responsibility to attend the appointments and that, if he failed to do so without an acceptable reason, his compensation benefits could be suspended in accordance with section 8123(d) of the Federal Employees' Compensation Act.²

In a letter dated December 23, 2003, appellant advised that he was canceling the appointment with Dr. Hepps on January 13, 2004 because the location was over one hour from

¹ The record reflects that appellant has nonindustrial preexisting conditions of lumbosacral disc degeneration and depression.

² 5 U.S.C. § 8123(d).

his residence and he was unable to physically and mentally travel to the appointment. He indicated that he had been totally disabled since January 28, 2002 and reinjured his back on November 28, 2003 in a nonwork-related incident. In separate letters of the same date, appellant requested a copy of his file and to switch medical care providers.

In a letter dated December 31, 2003, the Office proposed a travel plan for appellant, advising that he could take a taxi to the nearest commuter train station in San Francisco and take the train to Walnut Creek and then a cab to Dr. Hepps' office. The Office advised that appellant could lie down in the back seat of the taxi and on the train during the commute to the appointment. The Office noted that it would not authorize a change in physicians except for a compelling reason.

In a letter dated January 9, 2004, appellant asserted that he could not attend the medical examination on January 13, 2004, noting that he had been off work for two years and his chronic back problems had worsened since his injury on November 28, 2003. He advised that he would not travel by taxi or train to get to the appointment and indicated that traveling during peak commuting hours would be problematic.

On January 15, 2004 the Office referred appellant together with a statement of accepted facts and the case record, for a second opinion evaluation to obtain work limitations for his nonindustrial psychological condition. The Office advised appellant that the appointment was scheduled for February 5, 2004 at 11:30 a.m. with Dr. Hepps. The Office informed appellant of his responsibility to attend the appointments and that, if he failed to do so without an acceptable reason, his compensation benefits could be suspended in accordance with section 8123(d) of the Act.³

By letter dated January 23, 2004, the Office advised appellant that a copy of the case record was mailed to his representative. The Office further noted that it was unable to authorize a change in physicians because it was unable to confirm that he was discharged from Dr. Vo's care. The Office advised appellant that Dr. Vo submitted a report dated December 4, 2003 which indicated that he was discharged; however, appellant submitted a report dated December 11, 2003 which indicated that he was continuing treatment. With regard to appellant's failure to attend the January 13, 2004 second opinion examination and psychological testing, the Office advised appellant to take a taxi and train to the rescheduled medical appointment. The Office noted that appellant disagreed with the proposed travel plan and asserted that he was not medically able to travel. The Office advised that his reasons for attending the second opinion examination were not valid. The Office advised appellant to prepare a Form CA-915, travel reimbursement and submit the receipts from the taxi and train ride for reimbursement from the Office.

By letter dated January 23, 2004, mailed to appellant's address of record, the Office proposed to suspend his compensation benefits on the grounds that he failed to report for a medical examination scheduled for January 13, 2004. The Office allowed appellant 14 days to provide good cause for his failure to submit or cooperate with the second opinion examination and informed him of the penalty provision of section 8123(d) of the Act.

³ 5 U.S.C. § 8123(d).

In a letter dated January 29, 2004, appellant informed the Office that he would not attend the second opinion examination with Dr. Hepps because of chronic back pain which prevented him from traveling by taxi and train. He indicated that the commute was over one hour each way and he requested a 30-day extension to submit evidence supporting his inability to attend the scheduled appointment. In a letter dated February 1, 2004, appellant advised that Dr. Vo discharged him as a patient on December 4, 2003 and he was seeking another health care provider.

By letter dated February 5, 2004, Dr. Hepps advised the Office that appellant failed to keep the scheduled appointment on February 5, 2004 at 11:30 a.m.

By decision dated April 1, 2004, the Office finalized the proposed suspension of compensation since appellant failed to attend the medical examination scheduled for January 13, 2004 and did not establish good cause for refusing to submit to these examinations. The Office advised that there was an extremely limited number of psychiatrists in the San Francisco Bay area who perform second opinion examination and only one psychiatrist in San Francisco to whom appellant had previously been referred. Therefore, the Office determined that the next appropriate choice was Dr. Hepps. The suspension was effective February 5, 2004.

In a letter dated April 5, 2004, appellant responded to the decision suspending his compensation and advised that he was medically unable to travel to the examination site but would consent to rescheduling the appointment. He further indicated that he has not had a treating physician since December 4, 2003 and that the Office would not permit him to change providers, making it impossible for him to provide medical documentation supporting his inability to travel to the scheduled examinations.

In a letter dated April 16, 2004, the Office advised appellant that he would be referred for another second opinion psychiatric examination with Dr. Hepps and a second opinion examination with an orthopedic surgeon. The Office received clarification from Dr. Vo that appellant was discharged from his care and the Office authorized him to change physicians. The Office also advised that a copy of appellant's file was sent to his representative in February 2004.

On April 21, 2004 the Office referred appellant to Dr. Hepps for a second opinion evaluation to obtain work limitations for his nonindustrial psychological condition. The Office advised appellant that the appointment was rescheduled for May 19, 2004 at 3:00 p.m. On May 19, 2004 appellant attended the examination with Dr. Hepps, who subsequently provided reports based on examination and psychological testing.⁴

In a letters dated April 5 and June 9, 2004, appellant requested an oral hearing before an Office hearing representative. The hearing was held on February 1, 2005. Appellant asserted that his benefits were wrongfully suspended as he attended the second opinion examination on May 19, 2004. He submitted a report from Dr. Etemad dated January 28, 2005, who advised that

⁴ On April 21, 2004 the Office referred appellant for a second opinion evaluation with Dr. Randall Chu, a Board-certified orthopedist. In a report dated May 17, 2004, Dr. Chu noted findings, including that appellant was capable of sitting six hours per day.

he treated appellant until June 2003 and resumed treatment in March 2004. He indicated as of June 2003 appellant's functional abilities were severely limited with a sitting tolerance of 30 minutes per day and breaks lying down. Dr. Etemad opined that it was probable that appellant would have had great difficulty or might not have been able to perform the psychiatric examination in question on a given day if his symptoms were severely exacerbated. Also submitted was a map noting that the scheduled examination was 29.2 miles or 50 minutes from his residence.

In a March 25, 2005 decision, the hearing representative affirmed the Office decision dated April 1, 2004 which suspended appellant's compensation benefits on the grounds that he obstructed the second opinion examination scheduled for January 13, 2004; however, modified the period of the suspension from April 1 to May 19, 2004.

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.⁵ 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.⁶ 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.⁷ 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.⁸ 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.⁹ 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.¹⁰

⁵ 5 U.S.C. § 8123(a).

⁶ *James C. Talbert*, 42 ECAB 974, 976 (1991).

⁷ 20 C.F.R. § 10.320.

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

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

¹⁰ *Id.*; see *Scott R. Walsh*, 56 ECAB ____ (Docket No. 04-1962, issued February 18, 2005); *Raymond C. Dickinson*, 48 ECAB 646 (1997).

ANALYSIS

The Board has reviewed the evidence and finds that the record establishes that appellant obstructed the January 13, 2004 second opinion examination with Dr. Hepps within the meaning of section 8123 of the Act.¹¹

The Office directed appellant to attend a second opinion evaluation with Dr. Hepps, a Board-certified psychiatrist and Dr. Daly, a psychologist. The Office properly determined that it required an assessment of appellant's work limitations for his nonindustrial psychological condition. Accordingly, the Office, in its letter dated December 16, 2003, referred appellant to Dr. Hepps, a Board-certified psychiatrist and Dr. Daly, a licensed psychologist, for a second opinion evaluation. The Office advised him that the examination was scheduled for January 13, 2004 at 3:00 p.m. and instructed him to attend the examination. The Office further advised appellant that his compensation could be suspended if he refused or obstructed the examination.

In a December 23, 2003 letter, appellant advised that the doctor's office was over one hour from his house and that he was unable to physically and mentally travel to these appointments. He indicated that he had been totally disabled since January 28, 2002 and reinjured his back on November 28, 2003 in a nonwork-related incident. Appellant advised that he was canceling the appointment for medical reasons. In response to his travel concerns, on December 31, 2003 the Office proposed a travel plan advising appellant that he could take a taxi to the nearest commuter train station and take the train to Walnut Creek and take a cab to Dr. Hepps' office. The Office advised that appellant could lie down in the back seat of the taxi and train during the commute to the appointment. In a letter dated January 9, 2004, he asserted that he would not attend the medical examination due to worsening back symptoms. Appellant further advised that he would not travel by taxi or train during peak commuting hours and requested that the appointment be cancelled.

In a letter dated January 23, 2004, the Office afforded appellant 14 days to provide a good cause for his failure to cooperate with the second opinion examination.¹² In a letter dated January 29, 2004, appellant again asserted that he could not attend the second opinion examination which was one hour from his residence because chronic back pain prevented him from traveling by taxi and train. He requested a 30-day extension to submit evidence supporting his inability to attend the appointment.

¹¹ 5 U.S.C. § 8123(a).

¹² While the Office, on January 15, 2004, also scheduled a February 5, 2004 appointment for appellant with Dr. Hepps, which he also did not attend, the Board's action in the present appeal is based on his refusal to attend the scheduled January 13, 2004 examination with Dr. Hepps. The Board notes that this situation is different than the one presented in *Lynn C. Huber*, 54 ECAB 281 (2002). In *Huber*, appellant did not attend a scheduled medical examination. After the Office issued a notice of suspension of compensation for refusing to attend a medical examination, the Office rescheduled the appointment. The Board found that the rescheduling effectively forgave or excused appellant's failure to attend the examinations in question. In the present case, the Office did not issue the notice of proposed suspension until after it scheduled the second appointment such that the Office's action, in these circumstances, does not constitute excusing the refusal.

The Board has recognized the Office's responsibility in developing claims.¹³ Furthermore, as noted above, section 8123 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. 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. The only limitation on this authority is that of reasonableness.¹⁴ The referral to an appropriate specialist in appellant's area at the Office's expense cannot be considered unreasonable. Other than his lay and unsupported assertions, there is no evidence that the Office's referral was unreasonable. The Office clearly acted within its discretion in referring appellant for a second opinion examination to assess his work limitations for his nonindustrial psychological condition and his stated reasons for not cooperating with the examination do not establish good cause. With regard to his assertion that his chronic back pain prevented him from traveling by taxi and train, appellant did not submit any medical evidence establishing that he was unable to travel to the scheduled appointment or otherwise show how this assertion would rise to the level of good cause for failing to attend in the second opinion evaluation by Dr. Hepps.

The Board also finds that the record does not support appellant's allegation that the distance to the examination was unusual or unreasonable. The evidence indicates that the Office attempted to schedule an appointment with a physician in closer proximity to his residence but that there was an extremely limited number of psychiatrists in the San Francisco Bay area who would perform a second opinion examination. The record reflects that the Office proposed a travel plan for appellant advising him that he could take a taxi to the nearest commuter train station and take the train to Walnut Creek and take a cab to Dr. Hepps' office, which was approximately 29 miles or 50 minutes from appellant's residence. The Office further advised that he could lie down in the back seat of the taxi and train during the commute to the appointment. Appellant was provided with a travel voucher so that he could claim reimbursement for any travel expenses incurred in attending the examination. Although he indicated that the appointment was during the peak commuting time, he provided no evidence to substantiate how this precluded him from attending the examination. Also, the psychological testing was scheduled for 1:30 p.m. and the psychiatric examination was at 3:00 p.m. which would fall outside the morning and evening commuting hours.

After the Office's April 1, 2004 decision suspending appellant's right to compensation, in a letter dated April 5, 2004, he reiterated his contentions about his ability to travel. Appellant submitted medical evidence from Dr. Etemad dated January 28, 2005, who advised that he treated appellant up until June 2003. He opined that it was "probable that [he] would have had great difficulty or might not have been able to perform the psychiatric exam[ination] in question at all on a given day if his symptom exacerbation was sufficiently severe." However, the Board finds this opinion to be of little probative value as it is speculative and equivocal with regard to appellant's ability to attend the examination.¹⁵ Furthermore, Dr. Etemad was not treating

¹³ See *Scott R. Walsh*, *supra* note 10.

¹⁴ See *Id.*

¹⁵ See *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

appellant at the time of the January 13, 2004 scheduled examination and thus, had no actual knowledge of appellant's condition or his ability to travel to a scheduled examination on that date. Additionally, the Board notes that appellant was examined for a second opinion on May 17, 2004 by Dr. Chu, an orthopedist, who determined that appellant was capable of sitting six hours per day.

Appellant further asserted that the Office would not permit him to change providers in December 2003, making it impossible for him to provide medical documentation supporting his inability to travel to the scheduled examinations. The Board finds that this assertion is without merit. There is no evidence that appellant was ever denied appropriate treatment for his accepted conditions and, as noted above, there is no probative and unequivocal medical evidence supporting that appellant was unable to attend the scheduled examination with Dr. Hepps on January 13, 2004.

Consequently, appellant has not shown good cause for his failure to appear for the scheduled examination and the Office properly invoked the provisions of 5 U.S.C. § 8123, suspending his entitlement to compensation benefits until his obstruction ceased.¹⁶

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation benefits effective April 1 through May 19, 2004 based on his failure to attend the second opinion medical examination scheduled January 13, 2004.

¹⁶ The Board notes that the hearing representative, in the decision dated March 25, 2005, affirmed the Office decision dated April 1, 2004 suspending compensation benefits; however, he properly modified the effective date of suspension to the date of the Office's suspension decision, April 1, 2004. This is consistent with Office procedures as the effective date listed in the Office's April 1, 2004 decision, February 5, 2004, was less than 14 days after the Office's January 23, 2004 notice of proposed suspension, which allowed appellant 14 days to show "good cause" before a possible suspension of benefits. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 4, 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