

On January 23, 2006 appellant submitted a claim for compensation (Form CA-7) for the period September 15, 2004 to December 31, 2005. He explained that the Office of Personnel Management (OPM) had already paid him a disability retirement annuity for the claimed period, but that he wanted to elect wage-loss compensation in lieu of OPM benefits. Appellant further indicated that he wanted to continue receiving his OPM annuity after the claimed period ending on December 31, 2005.

The Office wrote to appellant on March 1, 2006 confirming his request to receive wage-loss compensation for the closed period of September 15, 2004 through December 31, 2005. The Office explained the process of electing wage-loss compensation in lieu of an OPM disability annuity and provided appellant the necessary forms. For comparison purposes, the Office advised appellant of the amount of monthly compensation he would be paid if he elected to receive Federal Employees' Compensation Act benefits. Appellant completed the election form and returned it to the Office.

On March 1, 2006 the Office wrote to appellant's treating physician, Dr. Federico Vizcaino, a Board-certified psychiatrist. The Office inquired whether appellant continued to have residuals of his work-related aggravation of major depressive disorder and, if so, the extent of any current disability. Dr. Vizcaino did not respond to the Office's request.

On May 8, 2006 the Office advised appellant that an appointment had been scheduled for May 30, 2006 with Dr. Harvey L. Nissman, a Board-certified psychiatrist. Appellant did not attend the scheduled examination on May 30, 2006. On June 1, 2006 the Office issued a notice of proposed denial and/or suspension of compensation. The Office explained that appellant's failure to attend the previously scheduled examination with Dr. Nissman could result in a suspension of compensation under 5 U.S.C. § 8123(d). Appellant was afforded 14 days within which to submit an explanation for his failure to attend the May 30, 2006 examination.

On June 8, 2006 appellant explained that he was scheduled to appear in court on May 30, 2006. Appellant also expressed reservations about being examined by Dr. Nissman because of the doctor's prior conviction for Medicare fraud. The Office subsequently vacated the June 1, 2006 notice of proposed suspension and agreed to schedule appellant for another examination with a different psychiatrist.

The Office notified appellant on June 12, 2006 that an examination had been scheduled for July 10, 2006 with Dr. Paul A. Mansheim, a Board-certified psychiatrist. Appellant did not appear for the July 10, 2006 examination.

By decision dated August 10, 2006, the Office suspended compensation effective immediately.

LEGAL PRECEDENT

The Act provides that 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.² If an

² 5 U.S.C. § 8123(a) (2000).

employee refuses to submit to or obstructs an examination, his right to compensation is suspended until the refusal or obstruction stops.³ Compensation is not payable while a refusal or obstruction continues and the period of refusal or obstruction is deducted from the period for which compensation is payable to the employee.⁴

When an employee fails to attend a scheduled examination, the Office, prior to suspension of benefits, should ask the employee in writing to provide an explanation within 14 days.⁵ If good cause is not established for the refusal or obstruction, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d) until the date on which the employee agrees to attend the examination.⁶

ANALYSIS

The Office provided appellant written notification on June 12, 2006 that he was scheduled to attend a second opinion examination with Dr. Mansheim on July 10, 2006. Appellant did not attend the July 10, 2006 examination. The Office suspended compensation effective August 10, 2006 without first providing appellant a written presuspension notification. While the Office previously advised appellant of the consequences under 5 U.S.C. § 8123(d) of refusing to submit to or obstructing an examination, the prior notification dated June 1, 2006 was vacated on July 3, 2006. This notice pertained to a May 30, 2006 examination that appellant did not attend, and which the Office subsequently excused his absence.

Based on the June 1, 2006 notice, appellant was aware of the potential consequences of his failure to attend the July 10, 2006 examination. However, the purpose of the presuspension notification is two-fold. It not only advises an employee of the potential consequences of his or her acts, but also provides the employee a prescribed timeframe (14 days) within which to explain his or her failure to appear. Assuming the employee responds in a timely fashion, the Office must then determine if good cause exists for the failure to appear. In the instant case, the Office did not write appellant and ask him to provide an explanation for his July 10, 2006 absence.⁷ Although presuspension notification is not specifically mandated by the Act or the regulations, the Office has committed to providing claimants certain procedural rights as outlined in its FECA Manual.⁸ Because of the Office's failure to abide by its own procedures, the Board

³ 5 U.S.C. § 8123(d).

⁴ *Id.* 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. 20 C.F.R. § 10.323 (2006).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000); see *Dorothy Dillard*, 53 ECAB 688, 691 (2002) (the Office's failure to provide presuspension notification constitutes reversible error).

⁶ *Id.*

⁷ The Director wrote appellant on July 11 and August 1, 2006 regarding letters he had written to the Secretary of Labor. Although the Director was aware appellant had not attended the July 10, 2006 examination, she did not solicit any further explanation for his failure to attend.

⁸ See *supra* note 5.

finds that the August 10, 2006 suspension of compensation under 5 U.S.C § 8123(d) was improper.

CONCLUSION

The Office failed to provide appellant with a presuspension notification and an opportunity to explain his failure to attend the July 10, 2006 scheduled examination. Because of this procedural defect, the Office inappropriately invoked the sanction provided under 5 U.S.C. § 8123(d).

ORDER

IT IS HEREBY ORDERED THAT the August 10, 2006 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 19, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board