

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

M.W., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Decatur, GA, Employer)

Docket No. 07-1615
Issued: November 7, 2007

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 23, 2007 appellant filed a timely appeal of a February 1, 2007 merit decision of the Office of Workers' Compensation Programs suspending his compensation benefits. 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 effective February 1, 2007 pursuant to 5 U.S.C. § 8123(d), on the grounds that he failed to submit to a scheduled medical examination without showing good cause.

FACTUAL HISTORY

On September 26, 2005 appellant, then a 48-year-old program support assistant, filed a traumatic injury claim alleging that he sustained injuries to his back, right side and shoulder when he slipped and fell on a wet bathroom floor. The Office initially accepted his claim for bilateral elbow and right hip contusions and lumbar and cervical strains, and later amended the

accepted conditions to include aggravation of cervical spinal stenosis. Appellant was placed on the periodic rolls and received appropriate compensation benefits.

On December 7, 2006 the Office notified appellant that he was being referred for a second opinion medical evaluation to address the issues of continued residuals and work capacity. The Office advised him of his responsibility to attend the appointment and that, if he failed to do so without an acceptable reason, his compensation benefits could be suspended in accordance with section 8123(d). By letter dated December 7, 2006, QTC, a company that schedules medical examinations on behalf of the Office, advised appellant that he had an appointment on January 4, 2007 at 10:45 a.m. with Dr. Harold H. Alexander, a Board-certified orthopedic surgeon. Appellant was advised to contact the Office prior to that time if it was necessary to reschedule the appointment. The notice was properly addressed to appellant's address of record and included Dr. Alexander's address and telephone number.

On January 5, 2004 the Office was advised that appellant had not attended the scheduled medical examination with Dr. Alexander. By letter dated January 8, 2007, the Office proposed to suspend appellant's compensation benefits on the grounds that he failed to attend the medical examination scheduled for January 4, 2007. The Office afforded appellant 14 days to furnish his reasons in writing, with supporting evidence, for failing to attend the examination. The Office advised him that, if his reasons were deemed invalid, then he would be found to be in obstruction of a medical examination and his compensation benefits would be suspended under section 8123(d) of the Federal Employees' Compensation Act until the obstruction ceased.

On January 12, 2007 appellant informed the Office by telephone that the reason he did not attend the scheduled appointment was that his house had been vandalized. He was informed that the Office could not accept his explanation for failing to attend the scheduled medical examination by telephone and that he was required to provide his reasons in writing, along with supporting documentation.

Appellant submitted a letter dated January 4, 2007 from Detective Steve Fowler of the Covington Police Department Criminal Investigation Unit, indicating that he had received a copy of his report and had been assigned to appellant's case. In a partially legible statement dated January 25, 2007, he indicated that his home had been vandalized and that his truck and cell phone had been stolen. Appellant did not identify the date of the alleged burglary. The record contains a report of a January 29, 2007 telephone conversation between the Office and Detective Fowler, who confirmed that the last incident reported by appellant occurred on December 13, 2006. Detective Fowler stated that appellant did not report any incident of vandalism in January 2007.

By decision dated February 1, 2007, the Office suspended appellant's compensation benefits, effective that date. It found that he failed to attend the medical examination scheduled

for January 4, 2007 or to provide written evidence justifying his failure to attend the examination.¹

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.² 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.³ The Office's federal regulations, 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.⁴ 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 or obstruction ceases.⁵ 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.⁶ 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.⁷

ANALYSIS

Following appellant's failure to attend a scheduled medical examination on January 4, 2007, the Office suspended his compensation benefits, effective February 1, 2007, pursuant to section 8123(d) of the Act. The Board finds that the suspension of benefits was proper.

The Board notes that the Office determined that a second opinion examination was reasonably necessary to determine appellant's work capacity, and the extent and degree of any

¹ The Board notes that appellant submitted additional evidence after the Office rendered its February 1, 2007 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Therefore, this new evidence cannot be considered by the Board on appeal. Appellant may submit this evidence to the Office, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

² 5 U.S.C. § 8123(a).

³ *James C. Talbert*, 42 ECAB 974, 976 (1991).

⁴ 20 C.F.R. § 10.320.

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

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

⁷ *Id.*; see *Scott R. Walsh*, 56 ECAB ____ (Docket No. 04-1962, issued February 18, 2005); *Raymond C. Dickinson*, 48 ECAB 646 (1997).

employment-related residuals. Under section 8123 of the Act and its implementing regulations, appellant was required to attend the examination.⁸

On December 7, 2006 the Office notified appellant that he was being referred for a second opinion evaluation on the issues of continuing residuals and current work capacity. The Office informed him of his obligations to attend and cooperate. The notice clearly explained that appellant's compensation benefits could be terminated for failure to report to or obstruction of the examination. In a letter dated December 7, 2006, which was properly addressed to appellant at his address of record, QTC, for the Office, advised appellant of the date and time of his scheduled January 4, 2007 appointment with Dr. Alexander. Appellant was also provided with Dr. Alexander's address and telephone number. As noted, he did not appear for the appointment, nor did he attempt to reschedule the appointment prior to the designated time. Appellant's refusal to submit to the medical examination warrants suspension of compensation unless he can establish good cause for his failure to report at the scheduled time.⁹

The Board finds that appellant did not establish good cause for his failure to report to the scheduled examination with Dr. Alexander. The Office notified him on January 8, 2007 that it proposed suspension of his compensation benefits. Appellant was given 14 days to submit a valid reason for his failure to attend the scheduled medical appointment. The Board has held that, where a claimant raises the issue of having difficulty attending a scheduled examination prior to the date of the examination, and the Office fails to address those concerns, then the claimant has grounds after the suspension for challenging the propriety of the suspension of compensation.¹⁰ The Board has found, however, that the claimant must properly raise his concern prior to the scheduled examination.¹¹ In this case, appellant did not make any attempt prior to the scheduled examination to reschedule or explain why he was unable to attend.

The record reflects that on January 12, 2007 appellant informed the Office by telephone that the reason he did not attend the scheduled appointment was that his house had been vandalized. He was informed that the Office could not accept his explanation by telephone, and that he was required to provide his reasons and supporting documentation, for failing to attend the scheduled medical examination in writing. Thereafter, appellant submitted a letter dated January 4, 2007 from Detective Fowler of the Covington Police Department Criminal Investigation Unit, indicating that he had received a copy of his report and had been assigned to appellant's case. On January 25, 2007 he indicated that his home had been vandalized and that his truck and cell phone had been stolen. Appellant did not identify the date of the alleged burglary. On January 29, 2007 Detective Fowler informed the Office that the last incident reported by appellant occurred on December 13, 2006, and that no incident of vandalism had been reported in January 2007. The evidence submitted by appellant is insufficient to establish that his residence was vandalized on or about January 4, 2007, the date of the missed medical

⁸ 5 U.S.C. § 8123 (d); 20 C.F.R. § 10.320.

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

¹⁰ See *Gustavo H. Mazon*, 49 ECAB 156 (1997).

¹¹ *Id.*

appointment. He has not otherwise provided any evidence to explain why he was unable to attend the scheduled medical examination. The fact that appellant's residence may have been vandalized on December 13, 2006 is not a sufficient reason for his failure to attend a January 4, 2007 medical examination.

The Office, in its December 7, 2006 letter, appropriately directed appellant to report for a second opinion evaluation on January 4, 2007. He failed to appear for the examination on the scheduled date and did not provide adequate reasons for not complying with the Office's directive. The Office properly determined that appellant refused to submit to a scheduled medical examination without good cause and properly suspended his right to compensation benefits effective February 1, 2007.¹²

The Board finds that appellant received proper notice of his rights and responsibilities and proper notice of the scheduled examination with Dr. Alexander. The Office followed established procedures in suspending appellant's compensation under 5 U.S.C. § 8123(d). The Board will affirm the Office's February 1, 2007 decision suspending compensation effective that same date.

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation benefits effective February 1, 2007, as he failed to attend a scheduled medical examination without showing good cause for his refusal.

¹² 5 U.S.C. § 8123; *see Maura D. Fuller*, 54 ECAB 386 (2003).

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 7, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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