

for refusing suitable work.¹ It found that the employing establishment should have considered employment opportunities near the area in which appellant currently resided, Flower Mound, Texas, prior to offering him a position in Tucson, Arizona. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On August 3, 2005 the employing establishment informed the Office that it had considered whether it had positions in appellant's geographical area prior to offering him the job in Tucson, Arizona. By decision dated August 3, 2005, the Office terminated his compensation benefits under section 8106 for refusing suitable work. Appellant requested an oral hearing. In a decision dated January 9, 2007, an Office hearing representative reversed the August 3, 2005 decision after finding that the Office failed to follow its established procedures for terminating compensation under section 8106.² The hearing representative advised the Office to reinstate compensation benefits retroactive to the termination of compensation. She further instructed the Office to consider whether a position within appellant's geographical location was currently available and, if not, whether the previously offered position in Tucson, Arizona remained available.

On January 19, 2007 the employing establishment informed the Office that it required updated medical evidence in order to consider reemployment possibilities. In letters dated March 14 and 15, 2007, the Office referred appellant to Dr. Robert M. Chouteau, an osteopath, for a second opinion examination. The examination was scheduled for 10:30 a.m. on April 10, 2007. The Office advised him of his responsibility to attend the appointment and that, if he failed to attend without any acceptable reason, his compensation benefits could be suspended under section 8123(d).

In a March 28, 2007 letter to the hearing representative, appellant noted that he was appealing the January 9, 2007 decision to the Board. He asserted that it was unclear why he was being referred for a second opinion examination and noted that he was not provided with the statement of accepted facts or the Office's questions for the referral physician.

Appellant did not attend the scheduled appointment. On April 17, 2007 the Office informed him of its proposed suspension of his compensation benefits for refusing to attend the medical examination. It requested that appellant submit any reasons he had for not attending the examination within 14 days. The Office advised that, if he did not show good cause for missing the examination appellant's compensation would be suspended under section 8123(d) until he attended and cooperated with the examination.

By decision dated May 2, 2007, the Office suspended appellant's compensation benefits effective that date after finding that he refused to submit to an examination with the second

¹ Docket No. 04-646 (issued June 14, 2005). The Office accepted that appellant sustained right knee strain and internal derangement due to a November 21, 1994 employment injury. He stopped work immediately after the injury and did not return.

² On March 27, 2007 appellant appealed the January 9, 2007 hearing representative's decision to the Board. The Board dismissed this appeal after finding that the January 9, 2007 decision was not adverse to appellant. Order Dismissing Appeal, Docket No. 07-1220 (issued September 4, 2007).

opinion physician. It found that appellant had not explained his failure to attend the examination.

LEGAL PRECEDENT

Section 8123(a) of the Federal Employees' Compensation Act provides:

“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

Section 8123(d) of the Act provides:

“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 which compensation is payable to the employee.”⁴

Section 10.323 of the Office's implementing federal 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.”⁵

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 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.”⁶

³ 5 U.S.C. § 8123(a).

⁴ 5 U.S.C. § 8123(d).

⁵ 20 C.F.R. § 10.323.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Suspension of Benefits*, Chapter 2.810.14(d) (July 2000).

ANALYSIS

The Office suspended appellant's compensation benefits effective May 2, 2007 under section 8123(d) of the Act on the grounds that he failed to attend a scheduled medical examination. The Board finds that the Office properly suspended compensation benefits.

In letters dated March 14 and 15, 2007, the Office notified appellant of the second opinion examination scheduled with Dr. Chouteau for 10:30 a.m. on April 10, 2007. It advised him of his rights and responsibilities with respect to the second opinion examination with Dr. Chouteau. The Office warned appellant that his benefits may be suspended under section 8123(d) of the Act if he failed to report for the examination without an acceptable reason.

On March 28, 2007 appellant informed the hearing representative that he was appealing the January 9, 2007 decision to the Board. In his appeal letter, appellant questioned the need for the referral for the second opinion examination and noted that he was not provided with the statement of accepted facts or questions for the second opinion examiner.

Appellant did not appear for the scheduled examination. On April 17, 2007 the Office advised him that it proposed to suspend his benefits and requested that he submit his reasons for failing to attend the examination within 14 days. Appellant did not provide a reason for refusing to cooperate with the second opinion evaluation with Dr. Chouteau within the allotted time. The Office thus properly determined that he refused to submit to a scheduled medical examination and properly suspended his right to compensation benefits.

On appeal, appellant contends that the Office did not explain why he was referred for a second opinion examination. 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.⁷ 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.⁸ The relevant Office regulations provides that an injured employee "must submit to examination by a qualified physician as often and at such times and places as the Office considers reasonably necessary."⁹ The only limitation on this authority is that of reasonableness.¹⁰ There is no evidence that the Office acted unreasonably in referring appellant for a second opinion examination with Dr. Chouteau to assess the nature and extent of his employment injury and to provide an opinion on the extent of any work restrictions.

Appellant further argued that the Office failed to provide him with its list of questions for the second opinion physician and the statement of accepted facts. There is no basis under the Act or in the Office regulations, however, for refusing to submit to an examination because the

⁷ 5 U.S.C. § 8123(d).

⁸ See *Dana D. Hudson*, 57 ECAB ____ (Docket No. 05-300, issued January 9, 2006).

⁹ 20 C.F.R. § 10.320.

¹⁰ See *Scott R. Walsh*, 56 ECAB ____ (Docket No. 04-1962, issued February 18, 2005).

Office does not provide this information. The Board finds that appellant has not shown good cause for his refusal to submit to the second opinion examination.¹¹

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation benefits under section 8123(d), effective May 2, 2007 as he refused to submit to a scheduled second opinion examination.¹²

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 2, 2007 is affirmed.

Issued: January 8, 2008
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

¹¹ The Board's affirmation of this decision should not be construed as approval of the Office's failure to reinstate appellant's compensation for the period December 16, 2002 through May 2, 2007.

¹² Appellant submitted additional evidence subsequent to the May 2, 2007 decision. The Board has no jurisdiction to review evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).