

anxiety. Appellant stopped work on the date of injury. The Office accepted the claim for thoracic and cervical sprains. On January 29, 2001 appellant returned to work at the employing establishment on a part-time basis as a telephone operator. She stopped work in June 2002.

By letter dated August 29, 2002, the Office accepted appellant's claim for recurrent major depressive disorder and post-traumatic stress disorder.

On December 2, 2003 the Office found a conflict in the medical opinion evidence between appellant's attending physicians, Dr. George Trahms, a Board-certified psychiatrist, and Dr. John J. Lavorgna, a Board-certified orthopedic surgeon, and an Office referral physician and Board-certified neurologist, Dr. Thomas Mampalam, as to whether appellant had any continuing residuals of her September 14, 2000 employment-related injuries. In reports dated March 7 and October 14, 2003, Dr. Trahms and Dr. Lavorgna opined that appellant had residuals of her preexisting degenerative cervical disease due to her September 14, 2000 employment injuries, respectively. In a June 10, 2003 report, Dr. Mampalam opined that appellant's preexisting degenerative cervical and lumbar spondylosis was temporarily aggravated by her September 14, 2000 employment injuries and that this condition had resolved based on his objective findings. He further opined that she could perform her regular work duties with restrictions.

By letter dated May 3, 2004, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Richard G. Dedo, a Board-certified orthopedic surgeon, for an impartial medical examination. Appellant did not attend the scheduled appointment. On May 3, 2004 the Office issued a notice of proposed suspension of compensation for appellant's refusal to attend the medical examination. By letter dated May 26, 2004, it rescheduled the medical examination with Dr. Dedo. In a June 28, 2004 letter, the Office advised appellant that her appointment with Dr. Dedo had been cancelled. It requested that she select an impartial medical examiner from a list of physicians it provided to her. On July 16, 2004 appellant refused to select an impartial medical specialist. By letter dated August 6, 2004, the Office referred her to Dr. Robert S. Ferretti, a Board-certified orthopedic surgeon. Appellant did not attend the scheduled examination with Dr. Ferretti. On August 27, 2004 the Office issued a notice of proposed suspension of compensation for refusing to attend the medical examination.¹

By decisions dated July 13, 2005, the Office denied appellant's request for payment of massage and chiropractic treatment. On August 9, 2005 appellant requested an oral hearing before an Office hearing representative. By letter dated June 18, 2006, she withdrew her request for a hearing. In a July 25, 2006 decision, an Office hearing representative vacated the July 13, 2005 decisions. The hearing representative found that the case was not in posture for decision because a conflict still existed in the medical opinion evidence as to whether appellant had any continuing residuals due to her September 14, 2000 employment-related injuries. On August 9, 2006 appellant requested that the Office declare the July 25, 2006 decision null and void as she had withdrawn her request for a hearing by letter dated June 18, 2006. In an August 30, 2006 decision, an Office hearing representative set aside the July 25, 2006 decision. He remanded the case to the Office to address the conflict in the medical opinion evidence.

¹ The case record does not contain a decision issued by the Office suspending appellant's compensation based on its August 27, 2004 notice.

By letter dated October 26, 2006, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. William C. Andrews, Jr., a Board-certified orthopedic surgeon, for an impartial medical examination. The examination was scheduled for 10:30 a.m. on November 1, 2006. On November 1, 2006 Dr. Andrews advised the Office that appellant did not attend the scheduled examination.

On November 1, 2006 the Office informed appellant of its proposed suspension of her compensation benefits for refusing to attend the medical examination with Dr. Andrews. It requested that she submit any reasons she had for not attending the examination within 14 days. The Office advised appellant that, if she did not show good cause for missing the examination her compensation would be suspended under section 8123(d) until she attended and cooperated with the examination. In a November 12, 2006 letter, appellant stated that she did not attend the scheduled appointment because she was advised by Dr. Andrews' office that it had not received her medical records, that she did not have an appointment scheduled for November 1, 2006 and that he was not going to be in the office on that date.

By letter dated November 22, 2006, the Office advised appellant that its November 1, 2006 notice of proposed suspension of her compensation was rescinded based on her November 12, 2006 letter. It further advised her that an impartial medical examination would be rescheduled to resolve the conflict in medical issues. Appellant was also advised that she would be further notified under separate cover as to the physician selected and time and place of the examination.

By letter dated November 22, 2006, the Office advised appellant that her impartial medical examination was rescheduled with Dr. Andrews. The examination was scheduled for 10:00 a.m. on December 13, 2006. The notice was properly addressed to appellant's address of record and included Dr. Andrews' address and telephone number. Appellant was advised to contact Dr. Andrews' office to confirm the appointment and to obtain instructions related to the examination. She was also advised that rescheduling of the appointment was strongly discouraged but that, if an emergency arose which prevented her from attending the scheduled appointment, she may reschedule only if she could receive an appointment within one week of the previously scheduled appointment. The Office then advised appellant of her responsibility to attend the appointment and that, if she failed to attend without any acceptable reason, her compensation benefits could be suspended under section 8123(d).

On December 12, 2006 Dr. Andrews advised the Office that appellant telephoned him and stated that she had another medical appointment scheduled on December 13, 2006. Appellant did not tell him whether she planned to attend the appointment with him. Dr. Andrews stated that he would examine her if she appeared at the scheduled appointment. On the scheduled examination date, he advised the Office that appellant did not appear.

On December 14, 2006 the Office received a December 8, 2006 letter in which appellant informed Dr. Andrews about her other medical appointment scheduled for December 13, 2006. In a December 12, 2006 letter, she advised him that he was not prepared to conduct an impartial medical examination because it was physically impossible for him to review her case record of over 2,000 pages the night before the scheduled examination. Appellant contended that the statement of accepted facts was not accurate as it was over two years old. She further contended

that Dr. Andrews was not impartial and that no conflict existed in the medical evidence because she did not have an attending physician and one had not been authorized for over three years.

By letter dated December 22, 2006, the Office informed appellant of its proposed suspension of her compensation benefits for refusing to attend the medical examination with Dr. Andrews. It requested that she submit any reasons she had for not attending the examination within 14 days. The Office advised that, if she did not show good cause for missing the examination her compensation would be suspended under section 8123(d) until she attended and cooperated with the examination.

In a January 1, 2007 letter,² appellant referred to her December 12, 2006 letter for the reasons why she failed to attend the December 13, 2006 medical examination.

By decision dated January 11, 2007, the Office suspended appellant's compensation benefits effective that date after finding that she refused to submit to an examination with Dr. Andrews. It found that her January 1, 2006 letter did not show good cause for her failure to attend the scheduled 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

² It appears that appellant inadvertently dated her letter January 1, 2006 rather than January 1, 2007 as it referenced the Office's December 22, 2006 notice of proposed suspension and it was received by the Office on January 4, 2007.

³ 5 U.S.C. § 8123(a).

⁴ *Id.* at § 8123(d).

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

ANALYSIS

The Office suspended appellant's compensation benefits effective January 11, 2007 under section 8123(d) of the Act on the grounds that she failed to attend a scheduled medical examination. The Board finds that the suspension of benefits was proper.

The Board finds that a conflict existed in medical opinion between appellant's attending physicians, Dr. Trahms and Dr. Lavorgna, and the Office referral physician, Dr. Mampalma, as to whether she had any continuing residuals causally related to her accepted September 14, 2000 employment injuries. Dr. Trahms and Dr. Lavorgna opined that appellant had residuals of her preexisting degenerative cervical disease due to her September 14, 2000 employment injuries, respectively. Dr. Mampalam opined that the aggravation of appellant's preexisting degenerative cervical and lumbar spondylosis by her September 14, 2000 employment injuries had resolved and that she could perform her regular work duties with restrictions. An impartial medical examination was reasonably necessary to determine whether appellant had any continuing employment-related residuals. Under section 8123 of the Act and its implementing regulations, she was required to attend the examination.⁷

By letter dated November 22, 2006, the Office notified appellant that she was being referred to Dr. Andrews for an impartial medical evaluation to resolve the conflict in the medical opinion evidence. It informed her of her obligations to attend and cooperate. The notice clearly explained that appellant's compensation benefits would be suspended for failure to report to or obstruction of the examination under section 8123(d) of the Act. The Office advised appellant that the examination was scheduled for 10:00 a.m. on December 13, 2006. Appellant was also

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).

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

provided with Dr. Andrews' address and telephone number. The Office advised her not to reschedule the appointment but stated that, if an emergency arose which prevented her from attending the appointment, she may reschedule only if she could receive an appointment within one week of the previously scheduled appointment. Appellant had already failed to attend three previously scheduled Office-directed examinations.

The Board finds that appellant did not establish good cause for her failure to report to the scheduled examination with Dr. Andrews. Notwithstanding the Office's directions on December 8, 2006 appellant informed Dr. Andrews that she had another medical appointment scheduled for December 13, 2006. On December 12, 2006, one day prior to the scheduled examination, appellant again informed Dr. Andrews about the conflicting medical appointment. She neither rescheduled the December 13, 2006 examination nor appeared for it as specifically directed by the Office's November 22, 2006 letter. The Board finds that the reasons appellant provided for not attending the December 13, 2006 appointment do not establish good cause. It is not sufficient that she may also have had another appointment with her physician around the same time frame. The law requires her to submit to an Office-directed examination. It is not for appellant to decide whether circumstances lend themselves to an impartial medical opinion. There is no discretion for her to exercise in this matter.⁸

On December 12, 2006 appellant provided further justification for her refusal to attend the scheduled examination with Dr. Andrews such as questioning his ability to conduct the examination and whether there was a reason to be referred to an impartial medical examination. She also contended that it was physically impossible for Dr. Andrews to review her case record of over 2,000 pages the night before the scheduled examination. These contentions are not persuasive as appellant submitted no evidence establishing that Dr. Andrews was not qualified to conduct the examination, nor that he was unable to adequately review the case record prior to the scheduled examination. Appellant further provided no basis for disputing the Office's referral to the examination.

Appellant objected as well to the statement of accepted facts because it was over two years old. However, the Board finds that this is no not a valid excuse to refuse to attend an impartial medical examination. Appellant is mandated to submit to medical examinations at such times and places as the Office and not appellant, considers necessary.⁹ Lastly, she contended that Dr. Andrews was not impartial and that no conflict existed in the medical evidence because she did not have an attending physician and one had not been authorized for over three years. The Board has reviewed the medical evidence of record and determined that a conflict existed regarding the extent of appellant's continuing employment-related residuals and that the referral to Dr. Andrews was necessary to resolve the conflict. Appellant submitted no evidence establishing a bias of Dr. Andrews.

The Office, in its November 22, 2006 letter, appropriately directed appellant to report for an impartial medical examination on December 13, 2006. Appellant failed to appear for the

⁸ *E.B.*, 59 ECAB ___ (Docket No. 07-1618, issued January 8, 2008). *See also id.* at note 7.

⁹ *See id;* *supra* note 3.

examination on the scheduled date and failed to show good cause for not complying with the Office's directive.

The Board finds that the Office provided appellant proper notice of her rights and responsibilities, proper notice of the scheduled examination with Dr. Andrews and followed established procedures in suspending her entitlement to compensation under 5 U.S.C. § 8123(d).

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation benefits under section 8123(d), effective January 11, 2007 for refusing to submit to a scheduled medical examination.¹⁰

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 10, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁰ 5 U.S.C. § 8123; *E.B.*, *supra* note 8.