

Appellant received compensation for temporary total disability on the periodic rolls. He also received a schedule award for a 15 percent permanent impairment of his left upper extremity.

On September 10, 2008 the Office informed appellant that it was making an appointment for him to obtain a second-opinion psychiatric assessment to provide additional evidence of the nature of his condition, the extent of disability and appropriate treatment. It warned appellant that, if he failed to keep the appointment, he would have to advise the Office of the reason in writing within seven days. "Only legitimate, documented emergencies will be deemed as adequate grounds for not keeping the appointment." The Office notified appellant of the statutory penalty for refusing to submit to or obstructing an examination.

On October 8, 2008 the Office provided appellant with the name and address of the psychiatrist who would be evaluating him as well as the date and time of the appointment. Appellant's appointment was for October 28, 2008.

On October 27, 2008 it appears that appellant's sister telephoned the Office to advise that he was in the Woodridge Psychiatric Hospital in Johnson City, Tennessee, and she did not know when he would be released. On October 29, 2008 the Office learned that appellant did not keep his appointment.

On October 30, 2008 the Office issued appellant a notice of proposed suspension of compensation because he failed to report for the scheduled examination as directed. It again informed him of the penalty for obstruction and asked him, if he had any valid reason for failing to submit to or cooperate with the scheduled examination, to submit his reasons in writing "with supporting evidence" within 14 days.

On November 4, 2008 appellant wrote to the Office to explain the reason he did not keep his appointment:

"I have received your letter dated October 30, 2008 regarding my scheduled appointment with Dr. James Turnbull on October 28, 2008. This appointment was cancelled because I was in the hospital and unable to keep the appointment. I was in Woodridge Hospital in Johnson City, TN until October 28, when Woodridge transported me to Pavilion Hospital in Kingsport, TN. I am still in Pavilion Hospital. When I am discharged, I will reschedule appointment with Dr. Turnbull. As you requested, we have left message at 1-800-660-0338, ext. 3852, that I would reschedule the appointment. Thank you."

In a decision dated December 3, 2008, the Office finalized the suspension of appellant's compensation effective that date. It acknowledged appellant's November 4, 2008 letter, but found that he did not provide supporting evidence and, therefore, did not provide a sufficient explanation of his failure to attend or cooperate.

LEGAL PRECEDENT

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.¹ If an employee refuses to submit to or obstructs an examination, his right to compensation 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 for which compensation is payable to the employee.²

To invoke this provision of the law, the Office must ensure that the claimant has been properly notified of his responsibilities with respect to the medical examination scheduled. Either the claims examiner or the medical management assistant may contact the physician directly and make an appointment for examination. The claimant and representative, if any, must be notified in writing of the name and address of the physician to whom he is being referred as well as the date and time of the appointment. The notification of the appointment must contain a warning that benefits may be suspended under 5 U.S.C. § 8123(d) for failure to report for examination. The claimant must have a chance to present any objections to the Office's choice of physician, or any reasons for failure to appear for the examination, before the Office acts to suspend compensation.³

If the claimant does not report for a scheduled appointment, he 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 claimant agrees to attend the examination. Such agreement may be expressed in writing or by telephone (documented on Form CA-110). When the claimant actually reports for examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made. The claimant's statement that he will not appear for an examination is not sufficient to invoke the penalty. Refusal to schedule an examination at the direction of the Office is also insufficient to invoke section 8123(d).⁴ The action of the employee's representative is considered the action of the employee for the purpose of determining whether the employee refused to submit to or in any way obstructed an examination required by the Office.⁵

ANALYSIS

The Office properly notified appellant of his responsibilities with respect to the medical examination scheduled for October 28, 2008. It notified him in writing of the name and address of the physician as well as the date and time of the appointment. The Office also warned appellant that his benefits might be suspended under 5 U.S.C. § 8123(d) for failure to report for

¹ 5 U.S.C. § 8123(a).

² *Id.* at § 8123(d).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (July 2000).

⁴ *Id.*

⁵ 20 C.F.R. § 10.323 (1999).

the examination. Therefore, when he failed to report, the Office gave him a chance to present his reasons.

In addition to a telephone call from his sister the day before the scheduled appointment, appellant offered a written explanation on November 4, 2008. Nonetheless, the Office judged the reason insufficient because he did not provide supporting evidence. It had notified appellant on September 10, 2008 that only a legitimate “documented” emergency would be deemed adequate grounds for not keeping the appointment; however, in its October 30, 2008 notice of proposed suspension of compensation, the Office informed appellant that he would need to support his reason with evidence.

The Office requires written verification that appellant was unable to attend the October 28, 2008 appointment because he was an in-patient or was being transferred from a hospital in Johnson City to a hospital in Kingsport and was otherwise incapacitated. Without that supporting evidence, the Office properly found that appellant failed to show good cause and properly invoked the penalty of suspension under 5 U.S.C. § 8123(d). The Board will, therefore, affirm the Office’s December 3, 2008 decision.

On appeal, appellant’s representative argues that appellant was wholly incapacitated in a mental ward. Without documentation verifying his incapacity, the Office has nothing more than a bare allegation, an unsubstantiated excuse. The representative asserts that appellant provided letters from himself, his sister and the provider of his situation. However, the only information the Office received was appellant’s November 4, 2008 letter and the October 27, 2008 telephone call from his sister. The record contains no letter from the provider verifying appellant’s incapacity on October 28, 2008.

Appellant’s representative made clear in his appeal to the Board dated December 11, 2008, that appellant will immediately comply with the requested examination now that he is out of the hospital. However, appellant stated in his November 4, 2008 letter to the Office that he would reschedule the appointment when he was discharged. Therefore, until he submits to the Office written verification that he was incapacitated on October 28, 2008, his right to compensation will remain suspended. When appellant actually reports for examination, the Office may then pay compensation retroactive to the date on which he agreed to attend.

CONCLUSION

The Board finds that the Office properly suspended appellant’s right to compensation under 5 U.S.C. § 8123(d) for obstructing a medical examination.

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 10, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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