United States Department of Labor
Employees' Compensation Appeals Board

K.G., Appellant	)	
and	)	**Docket No. 10-137**
	)	**Issued: August 6, 2010**
U.S. POSTAL SERVICE, CHESHIRE POST OFFICE, Cheshire, OH, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 19, 2009 appellant filed a timely appeal from the August 11 and September 24, 2009 merit decisions of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to suspend appellant's compensation benefits, pursuant to 5 U.S.C. § 8123(d), on the grounds that she refused to submit to a medical examination.

FACTUAL HISTORY

On January 21, 2003 appellant, then a 53-year-old postal clerk, sustained a lumbar strain while unloading mailbags in the performance of duty. On February 27, 2003 the Office accepted her claim for lumbar sprain/strain and sciatica. It entered appellant on the periodic rolls on August 28, 2003.

In a letter dated October 27, 2003, the Office noted that appellant had failed to keep a scheduled appointment with a medical specialist and advised her of the penalty provisions of the Act. It allowed appellant 15 days to offer an explanation and agree to attend the rescheduled appointment. In a decision dated November 12, 2003, the Office suspended appellant's compensation under section 8123(d) of the Act effective November 12, 2003. It noted that her benefits could be reinstated after verification that she attended and cooperated with the examination. Appellant requested reconsideration and submitted evidence that she had attempted to reschedule the appointment. On December 5, 2003 the Office found that appellant made a reasonable effort to reschedule the appointment. It further stated that there was sufficient error on the part of the scheduling contractor to support vacating the November 12, 2003 decision and reinstating her wage-loss compensation.

Appellant's attending physician, Dr. Stephen E. Popper, an osteopath, completed a note on August 24, 2005. He stated that he had reached the end of treatment modalities for appellant and that she needed vocational rehabilitation. Dr. Popper referred her for a functional capacity evaluation (FCE) and expected that she could perform sedentary work. In a report dated September 27, 2005, Brooke Sauer, the therapist, stated that appellant was unable to complete the FCE due to pain complaints and her refusal to continue with testing. On October 14, 2005 Dr. Popper stated that appellant had completed an FCE which showed a sedentary work profile. On January 11, 2006 he again advised that she could perform sedentary work, but that she might be limited in the amount of time that she could work per day. Dr. Popper suggested that appellant build up her endurance over time. He found that she was at maximum medical improvement on August 14, 2006. On December 20, 2006, January 19 and March 29, 2007 Dr. Popper stated that appellant could return to work but recommended an evaluation by a psychologist. In a report dated May 25, 2007, he stated that she had left leg numbness and decreased in strength due to her employment-injury. Dr. Popper noted that he had requested authorization for a psychological evaluation and found that appellant was not capable of working at the current time.

In a letter dated November 2, 2007, appellant stated that she was resigning from the employing establishment and no longer needed to receive compensation. She stated, "I have other health problems and too much stress in my life at this time. Effective November 1, 2007." However, on November 20, 2007 appellant elected to receive FECA benefits effective that date.

On April 4, 2008 the Office referred appellant for a second opinion evaluation scheduled for May 8, 2008. It advised her of her responsibility to attend the appointment and that, if she failed to do so without an acceptable reason, her compensation benefits could be suspended in accordance with section 5 U.S.C. § 8123(d). Appellant telephoned the Office on April 29, 2008 and stated that she needed the second opinion evaluation rescheduled. The Office agreed to reschedule the second opinion examination for a date after May 19, 2008 and informed her that she must attend the rescheduled examination. Appellant telephoned the Office on May 20, 2008 and stated that she did not attend the second opinion evaluation scheduled for that date. She stated that she contacted the physician and the scheduling service.

In a letter dated May 20, 2008, the Office notified appellant of the proposed suspension of her compensation benefits as she failed to report for the scheduled examination on May 20, 2008. It instructed her to provide reasons for failing to submit to the examination

within 14 days and informed her that, if she did not show good cause for her failure, her entitlement to compensation would be suspended under 5 U.S.C. § 8123(d) until after she attended and fully cooperated with the examination.

On May 23, 2008 the Office informed appellant that a second opinion evaluation was scheduled for June 10, 2008 with Dr. Luis A. Loimil, a Board-certified orthopedic surgeon.

In a statement dated May 28, 2008, appellant informed the Office that she had a precancerous growth removed from her back on May 19, 2008 and on May 20, 2008, was bleeding and experiencing a low grade temperature. She contended that she was physically unable to attend the May 20, 2008 appointment.

Appellant attended the June 10, 2008 appointment with Dr. Loimil and he recommended an FCE as appellant exhibited symptom magnification during his examination.

In a letter dated July 7, 2009, the Office's scheduling service instructed appellant to report to the Holzer Clinic in Gallipolis, Ohio for an FCE on July 22, 2009 at 1:00 pm. The service instructed appellant to wear comfortable clothing and tennis shoes for the examination. On July 21, 2009 the Office received a telephone call from the scheduling service that she would not attend the FCE because she was ill. It contacted appellant and left a message that she needed to attend the scheduled appointment or provide medical documentation to support her illness. The Office verbally informed her of the consequences of refusing to cooperate with a medical examination. Appellant rescheduled the FCE for July 30, 2009.

In a letter dated July 22, 2009, the Office notified appellant that it proposed to suspend her compensation because she failed to report for examination on July 22, 2009. It allowed her 14 days to provide a valid reason in writing for failing to submit to the examination and informed her that if she did not provide good cause her entitlement to compensation would be suspended. Appellant telephoned the Office on July 22, 2009 and stated that she could not attend the FCE due to chronic pain.

By letter dated July 22, 2009, the Office's scheduling service rescheduled the FCE for July 30, 2009 at 9:00 a.m. at the Holzer Clinic in Gallipolis, Ohio.

On July 27, 2009 appellant submitted a note dated March 3, 2009 from Dr. Earl L. Driggs, a podiatrist, indicating that he examined appellant on February 25, 2009 and that she underwent left foot surgery on November 17, 2008 and continued to experience chronic foot pain which rendered her totally disabled. She telephoned the Office on July 29, 2009 and stated that she would not attend the July 30, 2009 FCE as she was unable to wear tennis shoes and experienced chronic pain. The Office instructed appellant to attend. On July 30, 2009 appellant's husband telephoned the Office and stated that appellant had been hospitalized for blood clots in her legs and respiratory infection.

By decision dated August 11, 2009, the Office finalized the proposed suspension of appellant's compensation under 5 U.S.C. § 8123(d) effective that date due to her failure to submit to the scheduled FCE on July 22 and 30, 2009. It noted that appellant's benefits may be reinstated only after verification that she attended and fully cooperated with the examination and the reinstatement would be effective the date of compliance.

On August 18, 2009 appellant stated that she was unable to attend the evaluation due to chronic foot pain and that she was admitted to the hospital on July 29, 2009 with chest pain and pleurisy. Dr. M.C. Shah, a physician, completed a note on August 5, 2009 and stated that he admitted appellant to the hospital for observation on July 29, 1998 with a diagnosis of chest pain and pleurisy. Appellant requested reconsideration contending that her doctors supported that she could not be evaluated on July 22 and 30, 2009. In a report dated September 1, 2009, Dr. Driggs stated that appellant continued to experience left foot pain following surgery for chronic exostosis and nerve pain. Appellant had difficulty wearing shoes due to foot pain and sciatica. Dr. Diggs opined that appellant would have difficulty with a standing job due to her difficulty wearing shoes.

In a September 24, 2009 decision, the Office denied modification of the August 11, 2009 decision.[1]

LEGAL PRECEDENT

Section 8123(a) of the Act and section 10.320 of the Office's regulations authorized 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 Act further states in section 8123(d) that if the employee refused to or obstructs an examination his or her right to compensation is suspended until the refusal or obstruction stops and that the period of refusal or obstruction is deducted from the period for which compensation is payable.[4] The Board has held that a time must be set for a medical examination and the employee must fail to appear for the appointment, without an acceptable excuse or reason, before the Office can suspend or deny the employee's entitlement to compensation on the grounds that the employee failed to submit to or obstructed a medical examination.[5] The Office's procedure manual provides that, 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.[6] If good cause is not established, entitlement to compensation

[1] Although the Office's cover letter for the September 24, 2009 decision indicated that it had not reviewed the merits of appellant's claim, the Board finds that the enclosed memorandum reviewed the evidence and declined to modify the August 11, 2009 decision, rather than applying the nonmerit standard of review found in 20 C.F.R. §§ 10.606; 10.608.

[2] 5 U.S.C. § 8123(a); 20 C.F.R. § 10.320.

[3] *S.B.*, 58 ECAB 267 (2007).

[4] 5 U.S.C. § 8123(d).

[5] *Margaret M. Gilmore*, 47 ECAB 718 (1996).

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

should be suspended in accordance with 5 U.S.C. § 8123(d) until the claimant reports for examination.[7]

ANALYSIS

The Board finds that the Office did not properly suspend appellant's compensation because it did not follow established procedures. The Office scheduled FCEs on July 22 and 30, 2009 which appellant did not attend. On July 22, 2009 it proposed to suspend her wage-loss compensation for failure to attend the July 22, 2009 examination. As noted, the determination of the need for an examination lies within the discretion of the Office.[8] The Board has interpreted section 8123(d) to provide that compensation is not payable while a refusal or obstruction of an examination continues.[9] In this case, however, the Office rescheduled the evaluation to July 30, 2009. After appellant failed to appear for the July 30, 2009 examination, the Office finalized the suspension of wage-loss compensation based on her failure to appear at the July 22 and 30, 2009 examinations.

While the Office provided appellant notice that she had 14 days to provide reasons for failing to appear at the July 22, 2009 examination, it did not provide her with similar notice following the missed evaluation of July 30, 2009. Rather, it finalized the suspension effective August 11, 2009. Office procedures clearly state that, if a claimant does not report for a scheduled appointment, he or she should be asked to provide a written explanation within 14 days.[10] After missing the July 30, 2009 examination, appellant should have been provided proper notice and given 14 days to submit written reasons for her failure to appear. As this was not done, the Board finds that the Office erred in suspending her right to compensation benefits based on notice pertaining to the July 22, 2009 examination.[11]

CONCLUSION

The Board finds that the Office did not properly suspend appellant's right to compensation benefits beginning August 11, 2009.

[7] *Id.; see Scott R. Walsh*, 56 ECAB 353 (2005); *Raymond C. Dickinson*, 48 ECAB 646 (1997).

[8] *S.B., supra* note 3.

[9] 5 U.S.C. § 8123(d).

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

[11] *J.C.*, Docket No. 09-609 (issued January 5, 2010).

ORDER

IT IS HEREBY ORDERED THAT the September 24 and August 11, 2009 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: August 6, 2010
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