

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

R.H., Appellant

and

**DEPARTMENT OF THE NAVY, Norfolk, VA,
Employer**

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**Docket No. 09-1195
Issued: February 25, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 2, 2009 appellant filed a timely appeal from a May 21, 2008 merit decision of the Office of Workers' Compensation Programs suspending his compensation. 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 under 5 U.S.C. § 8123(d) for failing to attend a scheduled medical examination.

FACTUAL HISTORY

The Office accepted that on April 16, 1985 appellant, then a 46-year-old firefighter, sustained a contusion of the right hip, a sprain of the S1 sacrum joint and a herniated disc at L4-5

when he slipped and fell on liquid. Appellant stopped work on April 20, 1985 and did not return.¹

On July 20, 2006 appellant informed the Office of an address change.

On February 22, 2007 the Office notified appellant that he was being referred for second opinion examinations with a psychiatrist and an orthopedic surgeon.² On March 6, 2007 it referred him for an appointment with Dr. Sanford Pomerantz, a Board-certified psychiatrist, on March 19, 2007 at 3:30 p.m. In a separate letter also dated March 6, 2007, the Office referred appellant for an appointment on March 23, 2007 at 10:00 a.m. with Dr. Joseph Huston, a Board-certified orthopedic surgeon. It sent the letters to his address of record.

On March 14, 2007 the Office received mail returned to sender because the forwarding time had expired.

Appellant did not attend the appointments scheduled with Dr. Pomerantz and Dr. Huston. On March 23, 2007 the Office advised him that it proposed to suspend his compensation for failing to report to the March 19, 2007 appointment scheduled with Dr. Pomerantz. On March 30, 2007 it notified him of its proposed suspension of compensation for failing to attend the appointment scheduled for March 23, 2007 for Dr. Huston. In both letters, the Office requested that he provide any reasons that he had for not attending the examination in writing within 14 days. It further informed appellant that if he did not show good cause for missing the examination his compensation would be suspended under section 8123(d) until he attended and cooperated with the examination.

By decision dated April 11, 2007, the Office suspended appellant's compensation effective that date under section 8123(d) for failing to attend the appointment with Dr. Pomerantz scheduled for March 19, 2007.³

On May 11, 2007 appellant telephoned the Office because he did not receive his compensation payment. He related that he had been visiting North Carolina for two or three months and did not have the money to return to Kansas. In another telephone call, appellant related that his son had received a letter meant for him and he indicated he would be back in Kansas next week. The claims examiner noted that she would reschedule his appointments.

On May 16, 2001 the Office referred appellant for a second opinion examination with Dr. Pomerantz on June 8, 2007 at 1:15 p.m. On May 17, 2001 it referred him for a second opinion examination with Dr. Huston on June 1, 2007 at 1:15 p.m.

¹ By decision dated August 28, 1995, the Office reduced appellant's compensation based on its finding that he had the capacity to work as a dispatcher. On April 19, 1996 an Office hearing representative reversed the August 28, 1995 decision and instructed the Office to retroactively reinstate compensation.

² It appears that the last medical evidence of record was from 1996.

³ On April 23, 2007 the Office received mail returned to sender.

Appellant did not attend the appointments scheduled with either Dr. Pomerantz or Dr. Huston. In a letter received June 13, 2007, he questioned why the Office stopped his compensation. Appellant asserted that he did not receive the referral letters even though he received other mail from the Office in North Carolina. He noted that he put in a change of address request at the post office.

By letter dated June 15, 2007, the Office informed appellant that his compensation remained suspended. It noted that it had been several years since it had received medical evidence.

On June 16, 2007 appellant changed his address to Virginia Beach, VA. On June 26, 2007 he requested reinstatement.

On August 3, 2007 appellant requested a review of the written record. In an undated letter received September 27, 2007, he related that his address had changed to another location in Junction City, KS.

By decision dated September 4, 2007, the Office denied appellant's request for a hearing under 5 U.S.C. § 8124 as it was untimely.

On October 5, 2007 the Office referred appellant for another second opinion examination. It mailed the referral to his Virginia Beach address. On October 15, 2007 appellant telephoned the Office and indicated that he could not attend the appointments because he had no money. He noted that he now lived in Junction City, KS.

On October 17, 2007 appellant again notified the Office that he had moved to Junction City, KS. On March 27, 2008 he requested reconsideration of his suspension of compensation.

On April 21, 2008 the Office referred appellant for a second opinion examination with Dr. Williams S. Logan, a Board-certified psychiatrist, on May 13, 2008 at 1:30 p.m. in Kansas City, KS. On April 23, 2008 it referred him to an appointment with Dr. Huston at 10:30 a.m. in Topeka, KS. The Office mailed the letters to appellant's address of record in Junction City, KS.

On April 30, 2008 appellant informed the Office that he did not want to attend the scheduled examinations. He related that he was "happy" receiving benefits from the Office of Personnel Management (OPM). On May 2, 2008 appellant informed the Office that he could not attend the appointments because he could not drive.

On May 5, 2008 appellant related that he wanted to withdraw his request for a second opinion examination and continue receiving benefits from OPM. In an undated letter received May 9, 2008, he related that he could not attend the scheduled appointments because he was unable to drive.

Appellant did not attend the scheduled appointments. By decision dated May 21, 2008, the Office denied modification of its prior merit decision.

On appeal appellant argues that the Office sent the letter referring him for second opinion examinations to the wrong address. He also contends that the Office should not have sent him

for a second opinion examination given his age and time receiving compensation benefits. Appellant asserts that he was unable to drive to the appointment and that the medical evidence shows that he is disabled from employment.

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.”⁴

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 for which compensation is payable to the employee.”⁵

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.”⁶

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.”⁷

⁴ 5 U.S.C. § 8123(a).

⁵ *Id.* at § 8123(d).

⁶ 20 C.F.R. § 10.323.

⁷ 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 April 11, 2007 under section 8123(d) of the Act on the grounds that he failed to attend scheduled medical examinations. 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. The only limitation on the Office's authority, with regard to instructing a claimant to undergo a medical examination, is that of reasonableness.⁸ The Board has interpreted the plain meaning of section 8123(d) to provide that compensation is not payable while a refusal or obstruction of an examination continues.⁹

The Board finds that the Office properly suspended compensation benefits. In letters dated March 19, 2007, the Office notified appellant of the second opinion examination scheduled with Dr. Pomerantz on March 19, 2007 and with Dr. Huston on March 23, 2007 at 10:00 a.m. The record contained no recent medical evidence. It sent the letters to his address of record. The Office advised appellant of his rights and responsibilities with respect to the scheduled examinations with Dr. Pomerantz and Dr. Huston. It warned him 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.

Appellant did not appear for the scheduled examinations with Dr. Pomerantz or Dr. Huston. On March 23, 2007 the Office advised him that it proposed to suspend his benefits for failing to attend the appointment scheduled with Dr. Pomerantz. On March 30, 2007 it notified appellant that it proposed to suspend his benefits for failing to attend the appointment scheduled with Dr. Huston. In both letters notifying him of the proposed suspension, the Office 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 evaluations scheduled with Dr. Pomerantz and Dr. Huston 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.¹⁰

On appeal appellant argues that he did not receive the Office's initial letters referring him for the appointments because he was no longer at the Kansas address. He did not, however, change his address with the Office. The Office sent the March 6, 2007 referral letters to appellant's address of record. The Board has found that it is a claimant's duty to inform the Office of a change of address.¹¹

Appellant requested reinstatement. After several attempts at scheduling, on April 21, 2008 the Office referred him for an evaluation with Dr. Logan on May 13, 2008 at 1:30 p.m. in

⁸ *Lynn C. Huber*, 54 ECAB 281 (2002).

⁹ *J.T.*, 59 ECAB ____ (Docket No. 07-1898, issued January 7, 2008).

¹⁰ 5 U.S.C. § 8123; *S.B.*, 58 ECAB 267 (2007).

¹¹ *Steven Rabern*, Docket No. 02-1363 (issued October 4, 2002); *Robin Melinda Taylor*, Docket No. 95-1890 (issued July 11, 1997).

Kansas City, KS. On April 23, 2008 the Office referred appellant to Dr. Huston for an examination at 10:30 a.m. in Topeka, KS. Appellant contacted the Office on April 30, 2008 and related that he did not want to attend the examinations because he wanted to continue to receive benefits from OPM. On May 5, 2008 he notified the Office that he wished to withdraw his request for a second opinion examination. On May 9, 2008 appellant asserted that he could not attend the appointments because he could not drive but submitted no medical evidence supporting his assertion or evidence showing that he was unable to get to the appointments using public transportation.

On appeal appellant argues that the Office should not have referred him for a second opinion examination given his age, the length of time he has been on compensation and as the medical evidence showed that he was disabled. The law, however, requires him to submit to an Office-directed examination. Appellant may not decide whether the circumstances warrant a second opinion examination. There is no discretion for him to exercise in this matter.¹²

Appellant also argues that he was unable to drive to the doctor's appointment; however, as discussed, it is his burden to submit evidence establishing his inability to drive or take public transportation.¹³

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation under 5 U.S.C. § 8123(d) for failing to attend a scheduled medical examination.

¹² See 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; *S.B.*, *supra* note 10.

¹³ Appellant submitted new medical evidence with his appeal. The Board has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 21, 2008 is affirmed.

Issued: February 25, 2010
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