

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

---

C.S., Appellant )

and )

**DEPARTMENT OF HOMELAND SECURITY,** )  
**TRANSPORTATION SECURITY** )  
**ADMINISTRATION, Dallas, TX, Employer** )

---

**Docket No. 09-1597**  
**Issued: February 4, 2010**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 8, 2009 appellant filed a timely appeal from a February 17, 2009 merit decision of the Office of Workers' Compensation Programs suspending her 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 pursuant to 5 U.S.C. § 8123(d).

**FACTUAL HISTORY**

The case was before the Board on a prior appeal. By decision dated November 4, 2008, the Board affirmed a May 25, 2007 Office decision denying compensation for the periods

September 2 to 4, 2006 and September 14, 2006 to January 4, 2007.<sup>1</sup> The history of the case as provided in the Board's prior decision is incorporated herein by reference.

The Office referred appellant for examination by Dr. Donald Mauldin, an orthopedic surgeon, for a second opinion regarding her current medical condition and disability for work. In a report dated December 23, 2008, Dr. Mauldin indicated that appellant was examined on December 18, 2008 and he reported that a functional capacity evaluation (FCE) would be performed. Based on the results, he would complete an OWCP-5 work restriction evaluation form.

In a letter dated December 24, 2008, QTC Medical Services reported that, while Dr. Mauldin had recommended an FCE on December 18, 2008, appellant had cancelled because "her treating physician told her she cannot do it." On December 29, 2008 the Office received a December 18, 2008 report from Dr. Anthony Hicks, an attending physician who stated that an FCE was contraindicated because "no additional clinically useful (*i.e.*, new information) could be obtained" by such an examination. Dr. Hicks stated that there were significant risks associated with an FCE, including worsening of complaints and creation of new unrelated physical complaints. He stated that it was common practice to ask the treating physician if a recommended intervention should be completed and a willingness to act on other physician's recommendations was inappropriate.

By letter dated January 9, 2009, the Office advised appellant of a scheduled examination with Dr. William Osborne on January 21, 2009 for an FCE. Appellant did not attend the scheduled examination. In a letter dated January 30, 2009, the Office advised her that it proposed to suspend her compensation for her failure to attend the scheduled FCE examination. Appellant was provided 14 days to submit written reasons for her failure to attend and if good cause was not shown her compensation would be suspended pursuant to 5 U.S.C. § 8123(d). The record indicates that the Office also issued a January 30, 2009 letter to appellant notifying her the examination with Dr. Osborne had been rescheduled for February 10, 2009. Appellant did not attend the February 10, 2009 examination.

On February 11, 2009 appellant resubmitted the December 18, 2008 report from Dr. Hicks. In a February 5, 2009 letter, she reiterated that she did not attend the FCE on the advice of her physician.

By decision dated February 17, 2009, the Office suspended appellant's entitlement to compensation effective February 15, 2009.

### **LEGAL PRECEDENT**

Under the Federal Employees' Compensation Act at 5 U.S.C. § 8123(d), "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." With regard to physical examinations, 5 U.S.C. § 8123(a) provides that "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

---

<sup>1</sup> C.S., Docket No. 08-539 (issued November 4, 2008).

Labor, after the injury and as frequently and at the times and places as may be reasonably required.” The regulations governing the administration of the Act also provide that “the employee must submit to an examination by a qualified physician as often and at such times and places as [the Office] considers reasonably necessary.”<sup>2</sup>

To invoke 5 U.S.C. § 8123(d), the Office must ensure that the claimant has been properly notified of his or her 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 or she 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.<sup>3</sup>

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 is suspended in accordance with 5 U.S.C. § 8123(d) until the date on which the claimant agrees to attend the examination.<sup>4</sup>

### ANALYSIS

In this case, appellant was initially scheduled for an FCE on December 18, 2008, at the request of the second opinion physician who examined her that day. After she cancelled the appointment, the Office advised her that the FCE had been rescheduled for January 21, 2009. Appellant was properly notified of the scheduled examination with Dr. Osborne by letter dated January 9, 2009. When she did not appear for this scheduled examination, she was advised of the provisions of 5 U.S.C. § 8123(d) and offered 14 days to provide good cause for her failure to attend.<sup>5</sup> The Board finds the Office properly notified appellant of the scheduled examination, provided a warning that her benefits could be suspended and gave her an opportunity to respond.

The reason offered by appellant for her failure to attend the scheduled FCE was that her attending physician advised her not to attend. In a December 18, 2008 report, Dr. Hicks opined that no useful information could be obtained from the FCE. He does not, however, have the authority to make such a determination under the Act. It is well established that the need for an examination, the type of examination, choice of locale and choice of examiner are within the

---

<sup>2</sup> 20 C.F.R. § 10.320.

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

<sup>4</sup> *Id.*

<sup>5</sup> In addition, the Office offered appellant another opportunity to attend as it scheduled an appointment for February 10, 2009.

province and discretion of the Office.<sup>6</sup> The only limitation is one of reasonableness.<sup>7</sup> In this case, the medical issue involves appellant's current disability for work. Dr. Mauldin recommended that an FCE be obtained to properly determine appellant's work restrictions. Dr. Hicks' opinion that no useful information could be obtained by such testing is not well rationalized. There is no evidence to establish that the FCE recommended by Dr. Mauldin was unreasonable under the circumstances of the case.

Dr. Hicks also reported that an FCE was contraindicated because there were general risks in such an examination of aggravation or additional injury. The record indicates appellant had attended a prior FCE in 2006 and no evidence of any undue risk to her was presented. The purpose of an FCE is to determine functional capacity. Dr. Hicks provided no explanation as to why her capacity could not be evaluated in this case.<sup>8</sup>

The Board finds that appellant did not provide good cause for her refusal to submit to an FCE. Pursuant to 5 U.S.C. § 8123(d), her compensation is properly suspended.

### **CONCLUSION**

The Board finds the Office properly suspended compensation for refusal to submit to an examination.

---

<sup>6</sup> *Dana D. Hudson*, 57 ECAB 298, 304 (2006).

<sup>7</sup> *Scott R. Walsh*, 56 ECAB 353 (2005); *Donald E. Ewals*, 51 ECAB 428 (2000).

<sup>8</sup> The Board has held that the possibility of future injury does not form a basis for compensation. *See F.R.*, 58 ECAB 607 (2007); *Andy J. Paloukos*, 54 ECAB 712 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 17, 2009 is affirmed.

Issued: February 4, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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