

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

D.D., Appellant)

and)

DEPARTMENT OF TRANSPORTATION,)
FEDERAL AVIATION ADMINISTRATION,)
Oklahoma City, Ok, Employer)

Docket No. 09-602
Issued: January 15, 2010

Appearances:

Gary L. Davis, III, Esq., for the appellant

No appearance, for the Director

Oral Argument October 14, 2009

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

COLLEEN DUFFY KIKO, Judge

JURISDICTION

On December 29, 2008 appellant filed a timely appeal of an October 3, 2008 decision of the Office of Workers' Compensation Programs, which denied appellant's request for reconsideration without conducting a merit review. Because more than one year has elapsed between the most recent merit decision dated September 26, 2003, and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office used the proper standard of review when it refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On August 13, 1998 appellant, then a 36-year-old legal instruments examiner, filed an occupational disease claim alleging that she sustained an emotional condition resulting from a hostile work environment while in the performance of duty. Appellant stopped work on February 22, 1996. The employing establishment indicated that appellant was removed from her job on September 26, 1997 because she was physically unable to perform the duties of her job. The Office accepted appellant's claim for post-traumatic stress disorder and depressive disorder and paid wage-loss compensation.

On July 22, 2003 the Office referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Amal Chakraborty, a Board-certified psychiatrist. On August 25, 2003 appellant was informed that her appointment with Dr. Chakraborty had been rescheduled to September 6, 2003. She was advised of the new time. The record reflects that the notice was mailed to appellant at her address of record.

On September 8, 2003 the Office was advised that appellant did not keep her appointment.

On September 11, 2003 the Office proposed to suspend appellant's compensation benefits on the grounds that she failed to appear for the examination scheduled for September 6, 2003 with Dr. Chakraborty. It allowed her 15 days to provide in writing good cause for her failure to appear and informed her of the penalty provision of section 8123(d) of the Federal Employees' Compensation Act.¹ The record reflects that the notice was again mailed to her address of record. Appellant did not respond.

By decision dated September 26, 2003, the Office suspended appellant's compensation effective October 5, 2003 because of her refusal to attend the scheduled examination.

On June 30, 2008 appellant requested reconsideration in person. She related that she did not receive the Office's letter and, therefore, she did not reschedule the appointment.²

In a decision dated October 3, 2008, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

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

¹ 5 U.S.C. §§ 8101-93. The Board notes that the Office made a typographical error, as it indicated section 8423(d) as opposed to section 8123(d). However, the Office properly explained the contents of section 8123(d).

² The Board also notes that the record contains a September 12, 2007 letter in which appellant advised the Office that she did not receive the correspondence of September 11, 2003, that she "did not refuse nor obstruct an examination" and requested that the Office resume her benefits. Additionally, the record contains May 7, 2008 correspondence in which appellant again requested that the Office resume her benefits.

and at the times and places as may be reasonably required.³ If an employee refuses to submit to or obstructs an examination, her 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.⁴

To invoke this provision of the law, the Office must ensure that the claimant has been properly notified of 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 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.⁵

If the claimant does not report for a scheduled appointment, 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. 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 she 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).⁶ 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.⁷

ANALYSIS

The Board finds that Office used the incorrect standard of review when it refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error. The record reflects that on September 26, 2003 the Office suspended her compensation effective October 5, 2003 on the grounds that her refusal to attend the scheduled examination resulted in an obstruction.

³ 5 U.S.C. § 8123(a).

⁴ *Id.* at § 8123(d).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (July 2000).

⁶ *Id.*

⁷ 20 C.F.R. § 10.323.

On June 30, 2008 appellant visited the Office to inquire into what she needed to do to resume her benefits. Although the Office characterized the visit and her inquiry as a request for reconsideration, the Board finds that the Office should have adjudicated her claim to determine whether her compensation benefits should continue to be suspended or reinstated.⁸ The Office should have ascertained whether appellant's appearance on June 30, 2008 would constitute her agreement to attend the Office medical examination. As noted above, when appellant actually reports for the examination, payment retroactive to the date on which she agreed to attend the examination may be made.⁹ Thus, the Office's treatment of her appearance on June 30, 2008 as a request for reconsideration was improper and shall be reversed. As the Office did not properly adjudicate this issue, the case will be remanded for an appropriate decision.

CONCLUSION

The Board finds that the Office applied the improper standard of review when it refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

⁸ See *Frank W. Manning*, Docket No. 97-1505 (issued August 4, 1999).

⁹ The Board also notes that appellant contacted the Office on September 12, 2007 and May 7, 2008 and requested that the Office resume her benefits.

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2008 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further action consistent with this decision.

Issued: January 15, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board