United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 09-1928**
	)	**Issued: January 14, 2010**
DEPARTMENT OF THE NAVY, AIR SYSTEMS COMMAND, Patuxent River, MD, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 22, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 23, 2009, suspending his compensation under 5 U.S.C. § 8123(d). Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the March 23, 2009 decision.

ISSUE

The issue is whether the Office properly suspended appellant's compensation under 5 U.S.C. § 8123(d).

FACTUAL HISTORY

The case was before the Board on a prior appeal. In a decision dated September 2, 2005, the Board reversed an August 24, 2004 Office decision terminating appellant's compensation on

the grounds that he refused an offer of suitable work.[1] The history of the case is provided in the Board's prior decision and is incorporated herein by reference.

Appellant underwent vocational rehabilitation services and a rehabilitation plan was developed. In a letter dated February 5, 2009 from Medical Consultants Network (MCN), he was advised that the Office had requested a second opinion examination with Dr. William Dinenberg, an orthopedic surgeon. Appellant was advised that the appointment was scheduled for March 3, 2009 at 9:00 a.m., and he was advised of the provisions of 5 U.S.C. § 8123(d) for refusal or obstruction of the examination.

On March 3, 2009 the Office received a February 25, 2009 letter from appellant discussing a January 23, 2009 letter from the Office.[2] Appellant indicated his disagreement with any proposed wage-earning capacity determination. He noted also that he had received a notice to appear for examination and requested this be delayed until the Office had "made a determination on my case." Appellant further stated that, if the Office still required that he appear, they should advise him in writing. The record contains a March 3, 2009 memorandum of telephone call indicating that appellant had advised MCN that he would not attend the scheduled examination. Appellant did not appear for the examination with Dr. Dinenberg.

By letter dated March 3, 2009, the Office advised appellant that it proposed to suspend his compensation under 5 U.S.C. § 8123(d) for failure to appear for the scheduled examination. It stated that appellant should submit his reasons for not attending within 14 days, and if good cause was not shown, his compensation would suspended.

In a letter dated March 10, 2009 and received on March 19, 2009, appellant stated that he must have an answer to his challenge of Dr. Jeffrey Oettinger[3] before "we can go forward" and it was inappropriate to require him to appear for examinations.

By decision dated March 23, 2009, the Office suspended compensation effective April 12, 2009 pursuant to 5 U.S.C. § 8123(d).

LEGAL PRECEDENT

Section 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 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 Federal Employees' Compensation Act also

[1] Docket No. 05-232 (issued September 2, 2005).

[2] In the January 23, 2009 letter, the Office noted the rehabilitation plan was for appellant to return to work as a bookkeeper and indicated that the Office intended to reduce compensation after 90 days based on the ability to earn wages.

[3] Appellant was seen for a second opinion examination by Dr. Oettinger on March 20, 2008.

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."[4]

To invoke this provision of the law, 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) or 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, 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.[6]

ANALYSIS

The Board notes that the only final decision over which the Board has jurisdiction is the March 23, 2009 Office decision. On appeal, appellant discusses a number of different issues that are not before the Board. While he refers to a January 23, 2009 wage-earning capacity determination, there is no final decision regarding wage-earning capacity. The Office issued a January 23, 2009 letter that discussed a reduction of compensation after 90 days, but a wage-earning capacity determination under 5 U.S.C. § 8115 is made in accord with well-established procedures that require a preliminary determination and a final decision after notice and an opportunity to respond.[7] It did not issue a final decision on wage-earning capacity; the only final decision is the March 23, 2009 suspension of compensation.

Appellant was properly notified of a scheduled second opinion examination on March 3, 2009 and he was advised of the provisions of 5 U.S.C. § 8123(d). He did not appear for the examination. The Office provided appellant an opportunity to show good cause for his failure to appear, in accord with established procedures. In this case, he failed to establish good cause. A February 25, 2009 letter indicated his desire to delay the examination until after another issue was resolved, but as noted above the Office may require a current medical examination "as

[4] 20 C.F.R. § 10.320.

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

[6] *See* 20 C.F.R. § 10.323; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

[7] *See John D. Jackson*, 55 ECAB 465 (2204).

frequently and at the times and places as may be reasonably required."[8] The Office required a second opinion examination as part of the development of the medical evidence and the determination of current work restrictions. Appellant did not establish good cause for his failure to appear for the March 3, 2009 examination. Pursuant to 5 U.S.C. § 8123(d), the Office may suspend compensation "until the refusal or obstruction stops."

CONCLUSION

The Board finds the Office followed its procedures and properly suspended entitlement to compensation effective April 12, 2009 under 5 U.S.C. § 8123(d).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 23, 2009 is affirmed.

Issued: January 14, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[8] 5 U.S.C. § 8123(a).