

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

R.C., Appellant

and

**DEPARTMENT OF AGRICULTURE,
NATIONAL FINANCE CENTER,
New Orleans, LA, Employer**

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**Docket No. 09-2328
Issued: July 12, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 21, 2009 appellant filed a timely appeal from the March 25, 2009 decision of the Office of Workers' Compensation Programs which suspended her compensation for failure to submit to a medical examination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction of the merits of the case.

ISSUE

The issue is whether the Office properly suspended appellant's compensation effective March 3, 2009 on the grounds that she failed to attend a directed medical examination.

FACTUAL HISTORY

This case was previously before the Board.¹ By order dated July 24, 2008, the Board set aside a November 28, 2007 Office decision and remanded the case for further development of

¹ See Docket No. 08-758 (Order Remanding Case, issued July 24, 2008); Docket No. 05-905 (Order Granting Motion to Remand, issued March 7, 2006).

the medical evidence. By order dated March 7, 2006, the Board granted a motion to remand by the Director of the Office and vacated a December 9, 2004 decision suspending appellant's compensation for failure to submit to a medical examination and denying her request for reconsideration of an overpayment decision.

On May 3, 2001 appellant, then a 38-year-old computer specialist, filed an occupational disease claim for respiratory conditions, including asthma and allergies due to exposure to office dust from copiers, printers and other equipment. The Office accepted her claim for aggravation of asthma. Effective May 2, 2001, appellant was placed on the periodic compensation rolls in receipt of compensation for temporary total disability.

By letter dated January 20, 2009, the Office referred appellant to Dr. Janine S. Parker, an internist specializing in pulmonary disease, for an evaluation of her accepted asthma condition and any current work restrictions.² Appellant was instructed to attend the examination with Dr. Parker scheduled for 1:30 p.m. on February 5, 2009 at her office address in Slidell, Louisiana. The Office advised appellant that, if she missed the scheduled examination without good cause, or obstructed the examination, her compensation could be suspended until the refusal or obstruction stopped.

By letter dated January 31, 2009, appellant advised the Office that she had moved from New Orleans, Louisiana to Florence, South Carolina.

By letter dated February 23, 2009, sent to appellant's South Carolina address, the Office notified her that it had scheduled an appointment with Dr. Keith M. Clance, a specialist in pulmonary disease. Appellant was instructed to attend the examination with Dr. Clance scheduled for 2:30 p.m. on March 9, 2009 at his office address in Greensboro, North Carolina. The Office advised appellant that, if she missed the scheduled examination without good cause, or obstructed the examination, her compensation would be suspended until the refusal or obstruction stopped.

In a telephone memorandum dated February 25, 2009, an Office claims examiner noted that appellant was visiting New Orleans because her father was ill and she had scheduled an appointment with Dr. Parker. The claims examiner advised appellant that a referral appointment had been scheduled in Greensboro, North Carolina for March 9, 2009. This was the nearest pulmonary specialist who would agree to perform a referral examination. The record reflects that the Office contacted 28 physicians before Dr. Clance. The claims examiner advised appellant that Dr. Parker could not act as a referral physician because she had previously been an attending physician.

By letter dated March 4, 2009, appellant advised the Office that she saw Dr. Parker on February 25, 2009. She provided a March 4, 2009 report and completed work capacity evaluation form from Dr. Parker.

² The record reflects that Dr. Parker had previously treated appellant in 1999 when she underwent pulmonary function studies and in 2007.

In a March 10, 2009 memorandum, the Office noted that appellant did not appear for the scheduled March 9, 2009 appointment with Dr. Clance.

By letter dated March 10, 2009, the Office advised appellant that it proposed to suspend her compensation benefits because she failed to report for the medical examination on March 9, 2009 as directed. Appellant was advised to submit her reasons for failing to attend the scheduled examination in writing within 14 days. On March 19, 2009 she indicated that she had complied with 5 U.S.C. § 8123(a) by seeing Dr. Parker to whom she was initially referred by the Office.

By decision dated March 25, 2009, the Office finalized the suspension of appellant's compensation effective March 9, 2009 because she did not provide good cause for refusing to submit to the examination scheduled with Dr. Clance on March 9, 2009.

LEGAL PRECEDENT

Section 8123 of the Federal Employees' Compensation Act authorizes the Office to require an employee, who claims disability as a result of federal employment, to undergo a physical examination as it deems necessary.³ 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.⁴ The Office's federal regulations at section 10.320 provides that a claimant must submit to examination by a qualified physician as often and at such times and places as the Office considers reasonably necessary.⁵ Section 8123(d) of the Act and section 10.323 of the Office's regulations provide that, if an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction ceases.⁶ Office procedures provide that before the Office may invoke these provisions, the employee is to be afforded a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.⁷ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of the Act.⁸

ANALYSIS

By letter dated February 23, 2009, the Office instructed appellant to attend a medical appointment with Dr. Clance at his office located in Greensboro, North Carolina on March 9, 2009 at 2:30 p.m. for an evaluation of whether she had any continuing disability or medical condition due to her accepted aggravation of asthma. Appellant did not attend the scheduled

³ 5 U.S.C. § 8123.

⁴ See *Lynn C. Huber*, 54 ECAB 281 (2002).

⁵ 20 C.F.R. § 10.320.

⁶ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; see *Alfred R. Anderson*, 54 ECAB 179 (2002).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

⁸ *Id.*

appointment with Dr. Clance and advised the Office that it should accept Dr. Parker's report instead. On March 25, 2009 the Office suspended her right to compensation for failure to provide good cause for her refusing to attend the scheduled March 9, 2009 appointment with Dr. Clance.

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.⁹ In this case, the time for the second opinion medical examination by Dr. Clance was set, appellant was duly advised of the scheduled appointment but failed to appear. The only remaining issue is whether appellant presented an acceptable excuse or reason for her failure to appear.

The record shows that the Office scheduled an appointment with Dr. Clance in Greensboro, North Carolina after contacting 28 other pulmonary specialists without finding a specialist who would agree to perform a referral examination. The Office must document its attempts to locate an appropriate specialist in the claimant's area.¹⁰ It met this requirement by providing a bypass history with the list of names of the 28 physicians contacted before Dr. Clance. Appellant refused to attend the appointment scheduled with Dr. Clance because she decided to see Dr. Parker while she was visiting New Orleans, Louisiana. The Office advised her of its error by initially referring her to Dr. Parker who had previously acted as an attending physician in this case. As noted, 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. Section 10.320 of the Office's regulations provide that a claimant must submit to examination by a qualified physician as often and at such times and places as the Office considers reasonably necessary. Because appellant was advised by the Office that Dr. Parker could not perform a referral examination, her refusal to see Dr. Clance on the grounds that she had been examined by Dr. Parker does not constitute good cause for failing to attend the scheduled appointment with Dr. Clance. Because appellant failed to attend the directed medical examination and did not provide good cause for the failure within 14 days of the Office's March 10, 2009 notice of proposed suspension, the Office properly suspended her compensation benefits.

On appeal appellant contends that it was unreasonable for the Office to send her to Dr. Clance after she had been examined by Dr. Parker. However, as noted, the Office explained to her that Dr. Parker could not perform a referral examination because she had previously been an attending physician in this case. Therefore, appellant's contention has no merit.

⁹ *Herbert L. Dazey*, 41 ECAB 271 (1989).

¹⁰ *Billie J. Gardner*, 53 ECAB 356 (2002) (the Board found that the referral of a claimant, who lived near Little Rock, Arkansas, for an examination in Oklahoma City, Oklahoma, was not reasonable).

CONCLUSION

The Board finds that the Office properly invoked the penalty provision of section 8123(d) of the Act in suspending appellant's compensation due to her failure to attend a required medical examination.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 25, 2009 is affirmed.

Issued: July 12, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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