United States Department of Labor
Employees' Compensation Appeals Board

K.M., Appellant **and** **U.S. POSTAL SERVICE, POST OFFICE, Jacksonville, FL, Employer**	)	**Docket Nos. 10-504 & 10-754** **Issued: November 26, 2010**

Appearances:
Ronald S. Webster, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 14, 2009 appellant filed a timely appeal from the September 15, 2009 merit decision of the Office of Workers' Compensation Programs suspending her compensation for obstructing a medical examination and the November 25, 2009 nonmerit decision of the Office denying her request for merit review. On January 27, 2010 she filed a timely appeal from the December 29, 2009 decision of the Office regarding the continuing suspension of her compensation for obstructing a medical examination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether the Office properly suspended appellant's right to compensation beginning February 15, 2009 for obstructing a medical examination; (2) whether the Office properly denied her October 2009 request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a); and (3) whether the Office properly continued the suspension of appellant's compensation for obstructing a medical examination scheduled for April 22, 2009.

FACTUAL HISTORY

The Office accepted that on December 24, 2005 appellant, then a 39-year-old rural carrier associate, sustained a cervical strain, displacement of intervertebral disc without myelopathy, thoracic sprain, lumbar sprain and bilateral disorder of bursae and tendons in the shoulders due to lifting a large package at work. On September 27, 2006 appellant underwent right shoulder arthrotomy, resection of the coracoacromion ligament, partial acromionectomy and chronic rotator cuff tear repair. The Office paid compensation for periods of disability.

In a November 7, 2008 letter, appellant was directed to report for a second opinion examination on December 12, 2008 with Dr. Homer Paschall, a Board-certified orthopedic surgeon. She indicated that she had another appointment on that date, so the second opinion examination was rescheduled for January 22, 2009 with Dr. Narinda Aujla, a Board-certified orthopedic surgeon. Appellant was advised of the consequences for failure to attend and fully cooperate with a scheduled examination. The Office indicated that, if she failed to provide an acceptable reason for not appearing for the examination, or if she obstructed the examination, her benefits would be suspended in accordance with section 8123(d) of the Federal Employees' Compensation Act. The section provided that, if an employee refused to submit to or obstructs an examination, her right to compensation would be suspended until the refusal or obstruction stopped.

Appellant arrived at Dr. Aujla's office on January 22, 2009 but the scheduled examination was not carried out. In a January 23, 2009 e-mail, an employee of Dr. Aujla stated that appellant showed up on January 22, 2009 but "refused to fill out forms and refused to be examined." Appellant then "left the office."

In a January 26, 2009 letter, the Office advised appellant that it proposed to suspend her compensation for obstructing the January 22, 2009 examination with Dr. Aujla. It stated, "You showed up for the exam[ination] that was rescheduled, at your request, on January 22, 2009 at 1:00 [p.m.] with Dr. Aujla but refused to fill out forms and refused to get to be examined. You then left the office." The Office advised that, when a claimant refuses to attend or cooperate with a medical examination required, all compensation benefits, including medical expenses, are suspended. It noted that benefits would not be payable from the effective date of the suspension through the date of full compliance. The Office informed appellant that, if she believed that she had a valid reason for failing to submit to or cooperate with the scheduled examination, she must submit her reasons in writing, with supporting evidence, within 14 days of the date of the letter. If appellant did not show good cause her entitlement to compensation would be suspended under 5 U.S.C. § 8123(d) until after she attended and fully cooperated with the examination.

In a January 26, 2009 letter, counsel indicated that, while appellant was at the second opinion examination, Dr. Aujla's staff wanted her to completely disrobe for the doctor to examine her. Appellant asked Dr. Aujla why she would have to completely disrobe and advised that no other doctor had ever required her to completely disrobe to examine her cervical area. Counsel indicated that appellant reported that Dr. Aujla "thereafter refused to see her." He indicated that appellant was willing to undergo a "reasonable" second opinion examination.

In a February 2, 2009 letter, Dr. Aujla provided a brief description of appellant's cervical, thoracic and lumbar symptoms, stating: "To do a thorough professional exam[ination], the patient is normally requested to disrobe so one can examine the areas concerned…. [T]he area of examination was of the cervical, thoracic and lumbar area[s] and it is normal practice for the patient to be in a gown to do a complete thorough examination."

In a February 4, 2009 letter, appellant advised that she appeared for the January 22, 2009 examination scheduled with Dr. Aujla. She stated that a nurse explained to her that she had to take off all her clothes and undergarments and put on a gown. Appellant stated to the nurse that there must have been a mistake as her injury was to her neck, shoulder and back, but the nurse insisted that Dr. Aujla wanted her to take her clothes off. Appellant indicated that she had been to many doctors concerning her injury and not one other doctor required her to remove her clothing. Dr. Aujla advised her that he could not do a proper physical examination without her removing all her clothes including her pants and undergarments. When she advised Dr. Aujla that she had never been asked to remove clothing by any other doctor, other than for surgery, he responded that he was sorry but that she must not have seen a good doctor up until this point. Dr. Aujla advised appellant that she must take off all her clothes and she started to get upset. Appellant advised Dr. Aujla that she had copies of medical records with her, but he responded that you can "only tell an injury from feeling the person." She stated that she told Dr. Aujla that she would take off her top if that would made things easier, but he stated that if she did not take off her pants he would refuse to examine her. Appellant noted that she agreed with Dr. Aujla that "he should not examine me."

In a February 10, 2009 decision, the Office suspended appellant's benefits effective February 15, 2009 for obstruction of the examination with Dr. Aujla. It indicated that it was common practice for a physician to request that a patient change into an examination gown for a thorough examination and noted that Dr. Aujla had explained, in a February 2, 2009 letter, the reasons for this practice.

At the June 11, 2009 hearing, appellant described her disagreement with the Office's decision to suspend her benefits. She reiterated that Dr. Aujla wanted her to remove all of her clothes. Appellant stated that if an examination was rescheduled she would cooperate with the examination.

In a September 15, 2009 decision, the Office hearing representative affirmed the Office's February 10, 2009 decision. She indicated that Dr. Aujla had reported that it was necessary for appellant to disrobe in order to carry out a thorough examination and stated that appellant did not present a reasonable explanation for her failure to keep or fully cooperate with the scheduled appointment.

In an October 9, 2009 letter, appellant, through counsel, requested reconsideration of her claim. Counsel argued that appellant had never been required to remove her undergarments in more than 50 examinations and indicated that Dr. Alyn Benezette, an attending osteopath, did not feel that it was necessary for her to remove her undergarments for an examination. Counsel contended that the Office did not comply with its procedures which provide that, in order to invoke suspension of compensation, a claimant must be properly notified of her responsibilities with respect to a scheduled medical examination.

Appellant submitted September 23 and October 16, 2009 reports in which Dr. Benezette evaluated her medical condition. In an October 8, 2009 letter, Dr. Benezette stated, "It is my opinion that [appellant] would not need to completely disrobe, that is remove all other clothing, including underwear, to undergo a complete evaluation as related to her on-the-job injuries sustained on December 24, 2005."

In a November 25, 2009 decision, the Office denied her request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Appellant expressed her willingness to appear for another second opinion medical examination and the Office scheduled an appointment on April 22, 2009 with Dr. Steven Lancaster, a Board-certified orthopedic surgeon. The Office again advised appellant that, if she failed to provide an acceptable reason for not appearing for the examination, or if she obstructed the examination, her benefits would be suspended in accordance with section 8123(d) of the Act.

In an April 22, 2009 report, Dr. Lancaster detailed his findings on examination and diagnosed cervical strain with herniated nucleus pulposus and degenerative disc disease, lumbar strain with herniated nucleus pulposus and degenerative disc disease, bilateral shoulder impingement, status post rotator cuff repair and subacromial decompression of the right shoulder and chronic pain syndrome. He indicated that upon request appellant showed an inability to flex her chin downward to any extent. However, upon distraction, during a portion of the evaluation when appellant was looking at her feet and she was asked to dorsiflex her feet, she was able to bend her neck fully down to look at her feet. She could not hyperextend more than 5 degrees to look at the ceiling and could not side rotate more than 30 degrees, but with further distraction through the course of the examination she was able to side rotate past this. With respect to her shoulders, appellant had pain, limitation of motion and a positive impingement sign as she would not allow full motion. Back examination showed her sitting comfortably at 90 degrees which she reported that she could not do for any period of time. However, through the course of this examination for 15 to 20 minutes, appellant sat comfortably with no problems at 90 degrees.

Dr. Lancaster advised that it was impossible to ascertain appellant's current condition with the degree of symptom magnification present, malingering and invalidity of her examination and functional capacity evaluation.[1] He indicated that appellant's prior functional capacity evaluation appeared to show only 10 pounds of lifting ability on an occasional basis, but these results were unreliable because of her symptom magnification. Dr. Lancaster stated that he would not recommend a repeat functional capacity evaluation as appellant probably would have the same degree of symptom magnification which would lead to unreliable and invalid results. He stated, "She is not going to be able to return to work the degree that she had previously, secondary to the severe amount of chronic narcotics that she is taking which affect her ability to function mentally." Dr. Lancaster filled out a work restriction form but indicated that it was difficult to provide such restrictions "because of her symptom magnification and poor validity on her previous functional capacity evaluation and this examination as well." He noted that appellant appeared to still have residuals of her work injuries and stated, "She is unable to work

[1] Appellant underwent a functional capacity evaluation in March 2006 that was deemed to show gross symptom magnification and submaximal effort.

to any capacity taking the degree of narcotics that she is currently doing due to mental status changes."

In a May 19, 2009 letter, the Office advised appellant that it proposed to suspend her compensation for obstructing the April 22, 2009 examination with Dr. Lancaster. It noted that appellant's compensation was presently suspended because she failed to cooperate with the January 22, 2009 second opinion medical examination and stated that because she indicated her willingness to cooperate a new second opinion examination was scheduled for April 22, 2009.[2] The Office noted that it had been advised that she obstructed the April 22, 2009 examination with Dr. Lancaster and detailed those portions of Dr. Lancaster's April 22, 2009 report in which he expressed his belief that appellant engaged in symptom magnification and malingering that rendered the findings invalid. It again advised that, when a claimant refuses to attend or cooperate with a medical examination required by it, all compensation benefits, including medical expenses, are suspended. The Office informed appellant that, if she believed that she had a valid reason for failing to submit to or cooperate with the scheduled examination, she must submit her reasons in writing, with supporting evidence, within 14 days of the date of the letter. If appellant did not show good cause her entitlement to compensation would be suspended under 5 U.S.C. § 8123(d) until after she attended and fully cooperated with the examination.

In a May 26, 2009 statement, appellant disagreed with the choice of questions Dr. Lancaster asked her. She also objected to Dr. Lancaster not viewing the diagnostic test findings she brought with her to the appointment. In June 2 and 8, 2009 letters, counsel pointed out that Dr. Lancaster found, regardless of the alleged symptom magnification, that appellant was totally disabled due to the amount of narcotic medication she was using. Appellant submitted a May 29, 2009 report in which Dr. Benezette described the treatment of her condition.

In a July 27, 2009 decision, the Office suspended appellant's compensation for obstructing the second opinion examination with Dr. Lancaster.[3] It found that the additional evidence submitted by appellant did not show that her actions during the April 22, 2009 examination were nonvolitional.

Appellant requested a hearing before an Office hearing representative. At the November 5, 2009 hearing, she testified that she fully cooperated during the April 22, 2009 examination. Counsel contended that the fact that symptom magnification was diagnosed did not necessarily show that appellant's actions were volitional.

In a December 29, 2009 decision, the Office hearing representative affirmed the July 27, 2009 decision. She found that the differing findings of more complete ranges of motion on

---

[2] It does not appear that appellant received compensation after February 14, 2009. Although the Office indicated that it proposed to suspend appellant's compensation, it effectively proposed to continue the suspension of her compensation that began February 15, 2009.

[3] The decision indicated that the suspension was "made final, effective July 27, 2009," but the decision effectively continued the suspension of compensation that began February 15, 2009.

distraction by Dr. Lancaster argued against the fact that appellant's symptom magnification and malingering were somehow nonvolitional and related to her condition.

LEGAL PRECEDENT -- ISSUE 1

Section 8123(a) of the Act[4] authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examinations as it deems necessary. The determination of the need for an examination, the type of examination, the choice of local and the choice of medical examiners are matters within the province and discretion of the Office. The only limitation on this authority is that of reasonableness.[5] Section 8123(d) of the Act provides that, "[i]f an employee refuses to submit to or obstructs an examination, his right to compensation is suspended until refusal or obstruction stops."[6]

ANALYSIS -- ISSUE 1

The Office accepted that on December 24, 2005 appellant sustained a cervical strain, displacement of intervertebral disc without myelopathy, thoracic sprain, lumbar sprain and bilateral disorder of bursae and tendons in the shoulders due to lifting a large package at work. Due to the need for additional assessment of appellant's medical condition, the Office properly scheduled a second opinion examination for January 22, 2009 with Dr. Aujla, a Board-certified orthopedic surgeon. Appellant was advised of the consequences for failure to attend and fully cooperate with a scheduled examination. The Office indicated that, if appellant failed to provide an acceptable reason for not appearing for the examination, or if she obstructed the examination, her benefits would be suspended in accordance with section 8123(d) of the Act.

The Board finds that appellant obstructed the second opinion examination scheduled with Dr. Aujla on January 22, 2009 and therefore the Office properly suspended her compensation effective February 15, 2009. Appellant appeared at Dr. Aujla's office on January 22, 2009 but an employee of Dr. Aujla's office indicated that appellant refused to fill out forms or to be examined and then left the office. She stated that Dr. Aujla asked her to completely disrobe, including removing underwear and change into an examination gown for the examination. Appellant indicated that she advised Dr. Aujla that no other physician had asked her to completely disrobe and change into a robe, but noted that Dr. Aujla insisted that it was necessary to do so in order to carry out the examination and that she left the office after Dr. Aujla would not change his position. The record contains a February 2, 2009 letter in which Dr. Aujla stated that in order to perform a thorough, professional examination, the patient is normally requested to disrobe and change into a gown so one can examine the areas concerned, which in appellant's case involved the cervical, thoracic and lumbar areas. The Board notes that given Dr. Aujla's expressed opinion that disrobing and changing into a gown was necessary to carry out a complete, thorough examination of appellant's multiple affected areas, it was unreasonable for

---

[4] 5 U.S.C. § 8123(a).

[5] *See Dorine Jenkins*, 32 ECAB 1502, 1505 (1981).

[6] 5 U.S.C. § 8123(d). *See* 20 C.F.R. § 10.323.

appellant to object to Dr. Aujla's request and leave the office. Therefore, her actions constituted obstruction of the January 22, 2009 examination.

On appeal counsel argued that the fact that other physicians who examined appellant did not require her to disrobe showed that Dr. Aujla's actions were unreasonable. He noted that Dr. Benezette, an attending osteopath, had indicated that it was not necessary for appellant to completely disrobe in order to undergo a complete examination. However, the actions of other physicians would not necessarily show that Dr. Aujla's method of examination was improper. Dr. Aujla noted that there was an extensive area to be examined and presented a reasonable opinion that changing into an examination gown, a common practice in examinations, was necessary for a proper examination.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[7] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[8] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[9] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[10] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[11] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[12] While a reopening of a case may be predicated solely on a legal premise not previously considered such reopening is not required where the legal contention does not have a reasonable color of validity.[13]

ANALYSIS -- ISSUE 2

In connection with her October 2009 reconsideration request, appellant, through counsel, argued that she had never been required to remove her undergarments before Dr. Aujla's request

---

[7] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.606(b)(2).

[9] *Id*. at § 10.607(a).

[10] *Id*. at § 10.608(b).

[11] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[12] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[13] *John F. Critz*, 44 ECAB 788, 794 (1993).

and indicated that her primary attending physician, Dr. Benezette, did not feel that it was necessary for her to remove her undergarments for an examination.

The submission of this argument would not require reopening of appellant's claim for merit review as appellant had already made such arguments and the Office had already considered and rejected them. Appellant resubmitted an October 8, 2009 letter in which Dr. Benezette indicated that she would not need to completely disrobe to undergo a complete evaluation. However, the Office had already considered this letter in rendering its prior decision.

Counsel alleged that the Office did not comply with its procedures which dictated that, in order to invoke suspension of compensation, a claimant must be properly notified of her responsibilities with respect to a scheduled medical examination. However, this argument does not have a color of validity as appellant was fully apprised of the consequences of refusing to submit to or obstructing an examination. Appellant submitted September 23 and October 16, 2009 reports in which Dr. Benezette evaluated her medical condition, but these reports bear no relevance to the main issue of the present case.

Appellant has not established that the Office improperly denied her request for further review of the merits of its September 15, 2009 decision under section 8128(a) of the Act, because the evidence and argument she submitted did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.

LEGAL PRECEDENT -- ISSUE 3

Section 8123(a) of the Act authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examinations as it deems necessary. The determination of the need for an examination, the type of examination, the choice of local and the choice of medical examiners are matters within the province and discretion of the Office. The only limitation on this authority is that of reasonableness. Section 8123(d) of the Act provides that, "[i]f an employee refuses to submit to or obstructs an examination, his right to compensation is suspended until refusal or obstruction stops."[14]

ANALYSIS -- ISSUE 3

After the Office suspended appellant's compensation effective February 15, 2009 for obstructing the second opinion examination scheduled with Dr. Aujla, appellant agreed to appear for another second opinion examination on April 22, 2009 with Dr. Lancaster, a Board-certified orthopedic surgeon. Appellant was advised of the consequences for failure to attend and fully cooperate with a scheduled examination.

[14] *See supra* notes 4 through 6.

The Board finds that appellant obstructed the April 22, 2009 examination with Dr. Lancaster and that therefore the Office properly continued to suspend her compensation.[15] Appellant appeared for the examination on April 22, 2009 but Dr. Lancaster concluded that it was impossible to ascertain her current condition given the degree of symptom magnification and malingering she exhibited at the examination. Dr. Lancaster found that these actions rendered the examination invalid.[16] He completed a work restriction form for appellant but indicated that it was difficult to provide such restriction "because of her symptom magnification and poor validity on her previous functional capacity evaluation and this examination as well." Dr. Lancaster described several instances when appellant indicated that she was not able to perform certain actions but was in fact able to perform them when she was distracted. For example, he stated that upon request appellant showed an inability to flex her chin downward to any extent, but upon distraction, during a portion of the evaluation when she asked to dorsiflex her feet, she was able to bend her neck fully down to look at her feet. Appellant claimed that she could not side rotate more than 30 degrees, but with further distraction through the course of the examination she was able to side rotate past this point. Dr. Lancaster indicated that appellant claimed that she could not sit comfortably with her back at 90 degrees for any period of time, but noted that through the course of the examination she was able to do so for 15 to 20 minutes. The Board finds that, given Dr. Lancaster's opinion that appellant's volitional actions rendered the April 22, 2009 examination invalid, the Office properly found that she had obstructed the examination.

On appeal counsel argued that appellant provided full cooperation at the April 22, 2009 examination with Dr. Lancaster and that the conflicting findings were not a result of volitional actions. He noted that Dr. Lancaster posited that appellant had limitations due to the narcotics she was taking and suggested that her use of narcotics resulted in conflicting findings that were nonvolitional. Counsel did not adequately explain how appellant's use of narcotics would be the cause of conflicting findings on examination. Dr. Lancaster provided no opinion that appellant's use of narcotics affected her actions at the April 22, 2009 examination, but rather found that her actions, which led to the invalidity of the findings, were volitional in nature.

CONCLUSION

The Board finds that the Office properly suspended appellant's right to compensation effective February 15, 2009 for obstructing a medical examination and finds that the Office properly denied appellant's request for further merit review regarding this matter. The Board further finds that the Office properly continued to suspend appellant's compensation for obstruction of a medical examination scheduled for April 22, 2009.

[15] It does not appear that the Office reinstated appellant's compensation at any point after the February 15, 2009 suspension.

[16] Dr. Lancaster also pointed out that at a functional capacity evaluation in March 2006 appellant exhibited gross symptom magnification and submaximal effort.

ORDER

IT IS HEREBY ORDERED THAT the December 29, November 25 and September 15, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 26, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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