

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

C.H., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Perry Point, MD, Employer)

Docket No. 11-1624
Issued: March 7, 2012

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 5, 2011 appellant filed a timely appeal from the June 16, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which suspended her compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this suspension case.

ISSUE

The issue is whether OWCP properly suspended appellant's compensation, pursuant to 5 U.S.C. § 8123(d), for failure to report for a scheduled medical examination.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 15, 1990 appellant, a 34-year-old recreation assistant, sustained an injury in the performance of duty when an archway she was decorating fell on her. OWCP accepted her claim for a fractured pelvis, back contusion and venous insufficiency of both legs with ulcer.

OWCP notified appellant and her representative in writing that it had made arrangements for her to be examined by a physician to clarify the cause and extent of her injury-related impairment. It provided the name and address of the physician, as well as the date and time of the appointment. OWCP advised appellant of her responsibilities and warned that her benefits might be suspended under 5 U.S.C. § 8123(d) for failure to report for the examination.

On June 1, 2011 OWCP notified appellant that it proposed to suspend her compensation for failing to attend the scheduled medical examination. It advised that, if she had a valid reason for failing to submit to the examination, she had 14 days to show cause.

Appellant responded on June 10, 2011. She stated that she was not made aware of the doctor's appointment by her representative. "I have no telephone or transportation of my own." Further, appellant stated that people in the post office diverted her mail to people in her hometown who had the same last name "apparently because I did not receive my yearly form to fill out, nor other essential mail such as my credit union newsletter, *etc.*" Appellant explained that she had no problem cooperating with a scheduled examination if she could be provided with transportation and notified by mail. OWCP received her response on June 15, 2011.

In a decision dated June 16, 2011, OWCP suspended appellant's compensation effective that date. It noted that it gave her 14 days to show cause but: "You have not provided an explanation of your failure to attend or cooperate."

On appeal, appellant submitted a copy of her June 10, 2011 response to the notice of proposed suspension.

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 and at the times and places as may be reasonably required.² 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.³

To invoke this provision of the law, OWCP must ensure that the claimant has been properly notified of her responsibilities with respect to the medical examination scheduled. The

² 5 U.S.C. § 8123(a).

³ *Id.* at § 8123(d).

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 OWCP's choice of physician, or argument for failure to appear for the examination, before OWCP acts to suspend compensation.⁴

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.⁵ 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 OWCP.⁶

ANALYSIS

When OWCP suspended appellant's compensation, it noted that she had 14 days to respond to the notice of proposed suspension but failed to provide an explanation for her failure to attend the scheduled medical examination. In fact, appellant did respond. OWCP received her June 10, 2011 response on June 15, 2011, but it did not acknowledge the response or address the reasons given for not attending the examination.

In the case of *William A. Couch*,⁷ OWCP did not review medical evidence received four days prior to the issuance of its final decision denying the claim. The Board set aside the final decision and remanded the case for OWCP to consider this evidence fully. The Board explained that its jurisdiction of a case was limited to reviewing the evidence that was before OWCP at the time of OWCP's final decision, and that Board decisions were final as to the subject matter appealed; therefore, it was critical that OWCP review all evidence relevant to that subject matter and received by OWCP prior to the issuance of its final decision.⁸

As OWCP did not address appellant's June 10, 2011 response when it suspended her compensation, the Board will set aside OWCP's June 16, 2011 decision and remand the case for proper consideration of the evidence submitted. Following such further action as might be

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (September 2010).

⁵ *Id.*

⁶ 20 C.F.R. § 10.323.

⁷ 41 ECAB 548 (1990).

⁸ *William A. Couch*, 41 ECAB 548, 553 (1990) (remanding the case to OWCP for full consideration of the evidence submitted prior to the date of OWCP's final decision).

necessary, OWCP shall issue an appropriate final decision on whether appellant showed good cause for failing to attend the scheduled examination.⁹

CONCLUSION

The Board finds that this case is not in posture for decision. OWCP must determine whether appellant's June 10, 2011 response shows good cause for failing to report for the scheduled examination.

ORDER

IT IS HEREBY ORDERED THAT the June 16, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: March 7, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁹ *Willie J. Everett*, Docket No. 03-991 (issued October 10, 2003) (where OWCP did not consider the claimant's August 26, 2002 response before suspending his compensation on August 30, 2002, the Board set aside the suspension and remanded the case for consideration of the evidence submitted, citing *Couch*).