U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA L. WAGNER and U.S. POSTAL SERVICE,
POST OFFICE, Burnsville, MN

Docket No. 03-354; Submitted on the Record;
Issued June 5, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly suspended appellant's compensation because she obstructed a medical examination; and (2) whether the Office properly denied appellant's request for reconsideration.

Appellant's claims for injuries sustained on June 19 and December 1, 1987 and October 11, 1988 were accepted for a lumbosacral strain, herniated discs at L3-4 and L5-S1 and permanent aggravation of herniation at C5-6. She stopped work in October 1988. Subsequently, appellant accepted a limited-duty position as a supervisor and returned to part-time work on March 30, 1996. She stopped work on April 29, 1996 and filed a recurrence of disability claim on March 18, 1997.

On July 8, 1997 the Office referred appellant to Dr. Robert H.N. Fielden, a Board-certified orthopedic surgeon, for a second opinion evaluation. The Office informed appellant of the consequences of failing to undergo or obstructing such a medical examination. Based on Dr. Fielden's August 15, 1997 report, the Office issued a notice of proposed termination of compensation on February 25, 1998. On April 17, 1998 the Office terminated appellant's compensation effective April 26, 1998.

Appellant requested a hearing. On October 2, 1998 the hearing representative reversed the termination of compensation finding that Dr. Fielden's report was internally inconsistent and, therefore, insufficient to meet the Office's burden of proof. He instructed the Office to amend the statement of accepted facts and resolve a conflict in the medical opinion evidence between Dr. Fielden and appellant's treating physicians over whether appellant was partially or totally disabled and whether her work injuries contributed to her cervical condition. On remand the Office referred appellant to Dr. Paul Cederberg, a Board-certified orthopedic surgeon, but he declined to examine her. The Office then referred her to Dr. Michael Davis, a Board-certified orthopedic surgeon, but appellant canceled her appointment on December 16, 1998. On

January 5, 1999 the Office suspended appellant's compensation on the grounds that she had failed to make herself available for a medical examination.[1]

Appellant requested a hearing, which was held on September 22, 1999. On March 19, 2000 the hearing representative reversed the Office's suspension decision and reinstated her compensation retroactive to January 5, 1999. The hearing representative noted that the Office failed to inform appellant of the penalty for obstructing a medical examination and that she had not actually obstructed such an examination because none had been scheduled.

On remand the Office referred appellant to Dr. John Dowdle, a Board-certified orthopedic surgeon, for an impartial medical examination, which took place on August 30, 2000. Subsequently, he was injured in an airplane crash and was unable to complete his report. The Office rescheduled the impartial medical examination with Dr. Robert M. Barnett, Jr., also a Board-certified orthopedic surgeon, but that the November 6, 2000 appointment was canceled because appellant fell and hurt her right shoulder.

The appointment with Dr. Barnett was rescheduled for May 4, 2001, but was again canceled when appellant's representative, her husband, informed the Office that Dr. Barnett was appellant's family orthopedic surgeon. Accordingly, the Office referred her to Dr. Gary E. Wyard, a Board-certified orthopedic surgeon, for an appointment on July 18, 2001. This appointment was also canceled because appellant had previously seen a physician in the same medical group as Dr. Wyard.[2]

The Office then referred appellant to Dr. E. Harvey O'Phelan, a Board-certified orthopedic surgeon, for an evaluation on August 7, 2001. On July 31, 2001 appellant's representative notified the Office that he and his wife would be out of state caring for their daughter, who had been hospitalized and would not be available until after September 17, 2001. The August 7, 2001 appointment was canceled.[3]

The Office scheduled another appointment with Dr. Cederberg, who indicated his willingness to examine appellant. The appointment was set for September 19, 2001, but was also canceled. In a September 20, 2001 letter to the Office, Dr. Cederberg stated that he had decided not to examine appellant after reviewing her medical records and a September 2, 2001 letter from her representative, which he considered harassing and slanderous.

On October 3, 2001 the Office suspended appellant's compensation for obstruction of a medical examination. The Office reissued the decision on November 2, 2001 and included

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[1] Appellant's husband informed the Office that appellant was in Georgia with her daughter until the end of February, but left no forwarding address or telephone number. The Office informed appellant of the need to reschedule the examination and provided 15 days for a response, but none was received.

[2] On July 10, 2001 appellant's representative informed the Office that all correspondence was to be directed to him alone and that if the Office failed to comply, resulting in adverse action toward appellant, he would take legal action to remedy the situation.

[3] A July 25, 2001 Office memorandum stated that Dr. O'Phelan canceled the appointment because he received a three-page threatening letter from someone in appellant's family and was not comfortable doing the evaluation.

appeal rights. The Office found that appellant's representative had obstructed the last two medical examinations by sending threatening letters to the physicians involved.

Appellant's representative responded on October 12, 2001 that appellant was "willing and always has been willing and cooperative" regarding referrals for medical examinations and that the Office should reschedule. She also requested a hearing, which was held on April 23, 2002. At the hearing, representative testified that he had not received a notice that appellant's compensation benefits would be suspended as required.

On May 8, 2002 appellant's representative wrote a letter of apology to Dr. Cederberg, stating that he had not intended to offend or annoy the physician, that he was sorry for any misunderstanding and that appellant had "no problem" presenting herself for evaluation. The representative added that the "unfortunate experience" (with Dr. Fielden) necessitated that appellant be adequately represented in dealing with physicians.

On August 15, 2002 the hearing representative found that the Office appropriately suspended appellant's compensation for obstruction of a medical examination. The hearing representative stated that the September 2, 2001 letter of appellant's representative to Dr. Cederberg was inappropriate and the sole reason that the physician canceled the September 19, 2001 appointment, which would not have been necessary if appellant had kept the previous appointment on August 7, 2001. The hearing representative remanded the case for the Office to schedule another impartial medical examination to resolve the conflict.

Appellant requested reconsideration, which was denied on November 12, 2002 as insufficient to warrant merit review. The Office noted that appellant would be rescheduled for a medical examination with the appropriate specialist within the next few weeks.

The Board finds that the Office properly suspended appellant's compensation on the grounds that she obstructed a medical examination.

Section 8123 of the Federal Employees' Compensation Act,[4] which authorizes the Office to require an employee who claims benefits as a result of federal employment to undergo a physical examination as is deemed necessary, states:

> "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the period of refusal or obstruction is deducted from the period for which compensation is payable to the employee."[5]

The determination of the need for an examination, the type of examination, the choice of locale and the selection of medical examiners are matters within the province and discretion of the Office.[6] As the only limitation on the Office's authority is reasonableness, abuse of

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8123(d).

[6] *Donald E. Ewals*, 51 ECAB 428, 432 (2000).

discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[7]

Section 10.320, which implements section 8123 of the Act, (5 U.S.C. § 8123) provides that an injured employee "[must] submit to examination by a qualified physician as often and at such times and places as [the Office] considers reasonably necessary."[8]

In this case, appellant did not refuse to attend the medical examinations scheduled with either Dr. O'Phelan or Dr. Cederberg. The Office was properly informed that she would not be available for the August 7, 2001 appointment with Dr. O'Phelan and appellant informed the Office that she would be there for the September 19, 2001 appointment with Dr. Cederberg and did in fact appear. However, the Board finds that the Office acted within its discretion in determining that appellant obstructed a medical examination.[9]

The Office referred appellant to Dr. O'Phelan on July 17, 2001, setting the appointment for August 7, 2001. In a July 21, 2001 letter, appellant's representative introduced himself to Dr. O'Phelan and stated that he would be in attendance at the scheduled appointment.[10] The letter stated that the physician had "been hired" by the Office to determine whether appellant was totally or partially disabled due to any work injuries and asked whether he would receive any higher or special fees, a bonus or "any incentive of any sort" to return appellant to work. The letter continued:

> "Is appellant just another $$$ to you? If so, that is a direct 'conflict of interest' in addition to a conflict of the Hippocratic oath to which you have been sworn to uphold. I am only asking that the claimant receive a proper medical examination to the extent that you are able, generating a report that tells the truth. Anything else is considered to be a false report and will require prosecution."

Appellant's representative asked that Dr. O'Phelan review the report of Dr. Fielden, the Office's second opinion physician and "pay very close attention to the lack of professionalism, the false and conflicting statements, the incorrect facts and the incomplete information he reported as they relate to the complete and accurate records" of appellant's physicians who have been treating her for nearly 15 years. Appellant's representative added that Dr. Fielden was "facing charges under the false claims act for his part in this compensation case and the subsequent termination of [the] claimant's benefit package."

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[7] *Linda J. Reeves*, 48 ECAB 373, 377 (1997).

[8] 20 C.F.R. § 10.320.

[9] 20 C.F.R. § 10.323 provides that the actions of an employee's representative will be considered the actions of the employee for the purpose of determining whether a claimant refused to submit to or in any way obstructed an examination required by the Office.

[10] The Board has held that a claimant is not entitled to have anyone other than a qualified physician in attendance at a referral medical examination unless the Office decides that exceptional circumstances exist. *Anthony H. Jackson*, 53 ECAB ___ (Docket No. 00-2627, issued May 14, 2002). *See also* 20 C.F.R. § 10.320.

The letter went on to discuss the statement of accepted facts, stating that it was inaccurate and incomplete "with the sole intention to have an adverse report generated by the consulting physician." Appellant's representative asked the physician to consider the correct information in his letter and stated that Dr. O'Phelan was obliged to follow-up on any and all discrepancies to evaluate and report on appellant completely and accurately. The letter enclosed "more recent" medical reports that may not have been included in the Office's file.

A July 25, 2001 Office memorandum reveals that Dr. O'Phelan canceled the impartial medical examination because he received this three-page threatening letter and was not comfortable performing the evaluation.

A September 19, 2001 email in the file indicated that Dr. Cederberg declined to see appellant because of the letter her representative sent to him. The September 2, 2001 letter, addressed to "[D]r." Cederberg, introduced appellant's representative and noted that she had been referred to a neurologist the day before. The letter stated that Dr. Cederberg had declined to examine appellant in November 1998 and asked if he was "fully trained" in resolving this conflict, given that he was an orthopedist and appellant's orthopedic surgeons had referred her to a neurologist for further treatment at that time. The letter then repeated many of the questions and statements in the July 21, 2001 letter to Dr. O'Phelan.

Dr. Cederberg informed the Office on September 20, 2001 that he decided not to examine appellant as requested because he did "not have the patience" to withstand being harassed. He stated that he had not been "hired" by the Office and that he was not a "money-hungry hypocrite" who obtained higher fees for returning people to work. The physician added that he had no intention of falsifying any report, nor had he ever done so and that he did not appreciate, nor would he tolerate, any slanderous remarks. He concluded:

> "I am an orthopedic surgeon with an active practice and do not need this type of unfounded bias in my career now or ever. What I also cannot understand is why [appellant's representative] is allowed to continually harass professionals who are trying to do their jobs.... I certainly hope that you are able to find a doctor who is willing to tolerate [appellant's representative] in order to have your IME [impartial medical examination] performed."

Appellant's representative contended that he was merely trying, through his letters to Drs. O'Phelan and Cederberg, to ensure that appellant received a fair and impartial medical examination.[11] The record establishes that the tenor and content of his letters to two of the physicians selected to resolve the conflict in the medical opinion evidence had the effect of intimidating both of them professionally to the extent that they declined to examine appellant.[12] These letters constituted an implied threat to the reputations of the physicians and insinuated

[11] Appellant's representative sent a similar letter to Dr. Dowdle on August 25, 2000.

[12] *See Edward Burton Lee*, 53 ECAB ___ (Docket No. 00-1948, issued October 24, 2001) (finding that appellant's refusal to complete medical history forms at the physician's office constituted obstruction of a medical examination under section 8123).

clearly that if their opinions were not favorable to appellant, they would face adverse legal consequences.

The obvious purpose in telling these physicians that Dr. Fielden, who disagreed with appellant's treating physicians, was facing fraud charges, was to influence them to agree with appellant's physicians that she was still disabled due to her work injuries. The obvious purpose in asking both physicians if they received special fees or a bonus for returning patients to work was to suggest that they were both biased beforehand toward finding appellant not disabled. The obvious purpose behind the representative's recitation of selected "facts" was to influence the physicians to ignore the statement of accepted facts. The obvious purpose in statements implying a conflict of interest, breaking the Hippocratic oath and generating a false report was to suggest that any report from that physician would "tell the truth" only from appellant's position.

The Board finds that appellant's letters to the two physicians selected to resolve the conflict in the medical opinion evidence had the effect of obstructing these scheduled examinations. As the hearing representative noted, these letters were the "sole reason" that neither physician would consent to conduct an examination. The record supports the conclusion that these physicians declined to examine appellant because of the intimidating nature of the letters from appellant's representative. Therefore, the Office acted reasonably in suspending appellant's compensation because she had obstructed a medical examination pursuant to 5 U.S.C. § 8123.[13]

Appellant's representative has alleged that the suspension of benefits was not proper because appellant was not provided with prior notice of the proposed suspension and opportunity to respond. Before the Office suspends compensation benefits, the Office is required to provide the claimant opportunity to object to the Office's choice of physician, and opportunity to explain failure to appear for the examination.[14]

The opportunity to object to the Office's choice of physician is provided prior to the scheduled evaluation date, as of the notification of the scheduled evaluation.[15] In the present case, appellant has not alleged that she objected to the choice of Dr. Cederburg. Appellant's representative has stated in fact that appellant was always willing to be examined by Dr. Cederburg. Likewise, the Office's responsibility to obtain a written explanation from the claimant of the failure to appear for a medical examination is not at issue in this case. The Office's procedure manual states: "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.

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[13] *See Ida L. Townsen*, 45 ECAB 750, 757 (1994) (finding that interference by appellant's representative in insisting that he be present for a medical examination constituted obstruction under section 8123 and supported suspension of appellant's benefits).

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

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

section (d) until the date on which claimant agrees to attend the examination."[16] Appellant did not fail to appear for examination; therefore, this procedural requirement did not arise in this case. In this case, appellant obstructed the examination by intimidation of the physician prior to the examination. The Office was not required to request that appellant provide good cause for this obstructive act.

The Board also finds that the Office acted properly in refusing to reopen appellant's claim for merit review.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[17]

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[18] The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[19] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.[20]

In this case, appellant submitted no new evidence with her request for reconsideration. Therefore, she has not met the requirement of subsection (iii) of section 10.606(b)(2).[21]

Appellant's representative castigated the hearing representative's decision, stating that she did not do "justice" for appellant since the hearing began, that there may have been nepotism because her last name was the same as the district director's and that the hearing representative was unprofessional and biased in favor of the employing establishment and the Office. Appellant's representative added that Dr. Cederberg had no intention of doing the examination and simply used his September 2, 2001 letter as an excuse.

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

[17] 5 U.S.C. § 8128(a) ("[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[18] 20 C.F.R. § 10.608(a) (1999).

[19] 20 C.F.R. § 10.606(b)(1)-(2) (1999).

[20] 20 C.F.R. § 10.608(b) (1999).

[21] *See Eugene L. Turchin*, 48 ECAB 391, 397 (1997) (finding that appellant's failure to submit new and relevant evidence on reconsideration justified the Office's refusal to reopen his case for merit review).

These contentions are irrelevant to the issue of whether appellant obstructed a medical examination because they do not address the content of the September 2, 2001 letter sent to Dr. Cederberg, which was essentially the same as the July 21, 2001 letter sent to Dr. O'Phelan.[22] Also, appellant has presented no new legal argument. Nor has she shown that the Office misapplied the law. Inasmuch as appellant has failed to meet any of the requirements for reopening her claim for merit review, the Board finds that the Office acted in denying her request for reconsideration.[23]

The December 5 and August 15, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.[24]

Dated, Washington, DC
June 5, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[22] *See David E. Newman*, 48 ECAB 305, 307 (1997) (finding that the legal arguments raised by appellant regarding the selection of the impartial medical specialist were repetitious and did not, therefore, require merit review of the case by the Office).

[23] *See Khambandith Vorapanya*, 50 ECAB 490, 492 (1999).

[24] Appellant expressed her willingness to present herself for an impartial medical examination, in the October 12, 2001 letter, to the Office and her representative sent a May 8, 2002 letter of apology to Dr. Cederberg. However, appellant's willingness to appear at an examination is irrelevant to the issue in this case, which is obstruction of such an examination through intimidation.