

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

---

**S.A., Appellant**

**and**

**DEPARTMENT OF THE ARMY, DEFENSE  
LANGUAGE INSTITUTE, Monterey, CA,  
Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 07-2283  
Issued: August 20, 2008**

*Appearances:*  
*Stephen J. Dunn, 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 September 10, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' hearing representative's June 11, 2007 decision, which affirmed the suspension of his compensation benefits and denied his request for a subpoena. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether the Office properly suspended appellant's compensation benefits for failing to report to an Office directed medical examination on August 30, 2006; and (2) whether the Office hearing representative properly denied appellant's request for a subpoena.

**FACTUAL HISTORY**

On April 8, 1979 appellant, then a 38-year-old foreign language instructor filed an occupational disease claim alleging stress caused or aggravated by work factors. He stopped work on March 23, 1979. The Office accepted the claim for a peptic ulcer, headaches,

adjustment disorder with mixed anxiety and depressed mood, anxiety and depression. Appellant was placed on the periodic compensation rolls.

By letter dated November 21, 2003, the Office notified appellant that medical reports should be submitted at least once a year from his treating physicians for his accepted conditions. It requested that appellant submit a report from his treating internist and treating psychiatrist/psychologist. The Office noted that the physicians should discuss findings, diagnoses, work limitations and explain how appellant's current conditions were related to the original injury.

In a September 10, 2003 report, Dr. John McCuskey, a Board-certified dermatologist, noted that appellant was being treated for "acute exacerbations of his more pressing upper respiratory problems and not for his long-standing medical disability." He reviewed appellant's medical history and opined that "after conducting a thorough review of his previous medical history, including clinical findings, he continues to be on total disability for anxiety and adjustment disorder." Dr. McCuskey explained that appellant's upper respiratory condition was exacerbated by a recent increase in anxiety symptoms and diagnosed chronic obstructive pulmonary disease (COPD) and panic attacks.

On January 6, 2004 the Office advised appellant that the accepted conditions included headaches, gastric ulcer and an emotional condition. Appellant was advised that treatment for COPD was not authorized. The Office again requested that appellant submit a current report from a treating psychiatrist/psychologist. No additional report was received. By letter dated July 7, 2006, the Office again requested that appellant submit a current report from his treating physicians. Appellant was advised that his physicians must submit a report which contained current findings, the diagnosis treated and a statement as to whether his condition continued to be related to the April 8, 1978 injury.

In a July 27, 2006 report, L. James Ghilardi, a marriage and family counselor, noted that appellant had been in "counseling therapy for approximately three years." He noted that appellant had been out of the workforce for a long time and advised that his condition remained the same.

By letter dated August 8, 2006, the Office advised appellant that the report from Mr. Ghilardi was insufficient as he was a marriage and family counselor and not a physician as defined under the Federal Employees' Compensation Act.<sup>1</sup> Appellant was asked to provide the name and address of the physicians who were treating his emotional and headache conditions and the date of his last visit. The Office asked that appellant submit medical reports from his treating physicians and whether he was still seeking treatment with Dr. McCuskey. In a separate letter of August 8, 2006, it requested that Dr. McCuskey provide an undated medical report.

On August 9, 2006 the Office referred appellant for a second opinion evaluation by Dr. Robert Hepps, a Board-certified psychiatrist, to determine if he had residuals of the employment-related injury. Appellant was advised that if he failed to keep the scheduled appointment, he must advise the Office in writing of the reason. He was also advised that only

---

<sup>1</sup> 5 U.S.C. §§ 8101(2).

“legitimate, documented emergencies” would be “deemed as adequate grounds for not keeping the appointment.” Appellant was advised that if he failed to provide an acceptable reason for not appearing for the examination or if he obstructed the examination, his benefits would be suspended in accordance with section 8123(d) of the Act. On August 14, 2006 the Office advised appellant that the appointment with Dr. Hepps was scheduled for August 30, 2006.

In a letter dated August 21, 2006, appellant contended that he had been submitting medical records since 1984. He refer to “[s]ection 8337 para[graph] (2) of FECA [the Act]” and alleged that he was only required to submit medical records until age 60. Appellant alleged that after 28 years of disability, he did not believe that what he was being asked to submit to was “reasonably required.”

On August 30, 2006 the Office was notified that appellant had failed to keep the scheduled appointment with Dr. Hepps.

On October 3, 2006 the Office notified appellant that it proposed to suspend his compensation under 5 U.S.C. § 8123(d) on the grounds that he did not keep the appointment schedule on August 20, 2006. It provided him 14 days to submit a written explanation showing good cause for his failure to attend the appointment or his benefits would be suspended. In a separate letter also dated October 3, 2006, the Office advised appellant that medical reports must be submitted periodically from a qualified physician to show that he continued to have residuals of the work-related conditions. It advised appellant that he was not being asked to prove his claim, only that an updated medical report be submitted. The Office also informed appellant that he was not to confuse his claim with disability retirement benefits and that the need for medical records was not based on age or the length of time that workers’ compensation benefits have been received.

In an October 10, 2006 report, Dr. McCuskey stated that appellant “suffers from anxious and depressive symptoms of a maladjustment disorder, as well as the physical symptoms of fatigue, insomnia, memory decline and headaches.” He advised that these conditions were all “incompatible with a functional eight hours workday.” Dr. McCuskey indicated that, due to appellant’s declining physical state, age and emotional distress, he did not believe that there were any vocational efforts that could accommodate his condition at this time.

By decision dated October 20, 2006, the Office suspended appellant’s compensation benefit effective October 29, 2006. It found that he did not attend the August 30, 2006 appointment with Dr. Hepps or provide a written explanation of his failure to attend or cooperate with the scheduled examination.

The Office received an October 16, 2006 report from Dr. Jon Peterson, a Board-certified psychiatrist, who advised that appellant was unable to work an eight-hour workday. Dr. Peterson noted that appellant had been on “total disability for a long time.” He indicated that appellant’s condition was permanent and that he “did not recover fully or partially from his accepted medical condition.”

On November 15, 2006 appellant requested a hearing, which was held on March 22, 2007. He submitted a brief at the hearing, contending that the statement of accepted

facts was improper because the Office omitted two of his accepted conditions. Appellant also alleged that Mr. Ghilardi's report should be considered by the Office despite the fact that he was a family counselor. He alleged that being required to attend a second opinion examination while he was waiting for his attending physician to complete a report was premature. Appellant contended that the Office abused its discretion in requiring him to attend the examination with Dr. Hepps.

On April 2, 2007 the Office hearing representative received a March 20, 2006 request for a subpoena from appellant, requesting his records from 1975 through 1979. Appellant alleged that these documents were necessary to show that the statement of accepted facts was incorrect. He also requested that the Office subpoena all of his records.

By decision dated June 11, 2007, the Office hearing representative affirmed the October 20, 2007 decision. She found that it was appropriate and reasonable for the Office to refer appellant for a second opinion examination with a psychiatrist to determine whether his continuing disability was causally related to his accepted condition. The Office hearing representative also found that appellant's contention that he would provide a report from his attending physicians did not change the fact that the second opinion examination was necessary. She noted that neither of appellant's physicians provided a detailed report or a reasoned opinion as to why his condition was causally related to employment factors that occurred nearly 20 years earlier. The hearing representative also found that appellant's arguments that the statement of accepted facts was incomplete, the Office did not allow his attending physician sufficient time to respond before referring him to a second opinion, and that the report of Mr. Ghilardi was not considered, did not establish good cause for not appearing at the examination.<sup>2</sup> She denied appellant's request for a subpoena. The Office hearing representative noted that appellant received a complete copy of his file on December 12, 2006 and that no records were of file subsequent to that date, other than those supplied by appellant.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8123(a) of the Act<sup>3</sup> authorizes the Office to require an employee who claims compensation as the result of an injury due to his or her federal employment to undergo such physical examinations as it deems necessary.<sup>4</sup> The determination of the need for an examination, the type of examination, the choice of the locale and the choice of medical examiners are matters within the discretion of the Office.<sup>5</sup> 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.<sup>6</sup> Office regulations

---

<sup>2</sup> The Office hearing representative did find that the Office had been inconsistent in listing accepted conditions and directed the Office to determine which conditions were accepted and to update its statement of accepted facts.

<sup>3</sup> 5 U.S.C. § 8123(a).

<sup>4</sup> *Id.*

<sup>5</sup> *Anthony H. Jackson*, 53 ECAB 529 (2002).

<sup>6</sup> *Maura D. Fuller (Judson H. Fuller)*, 54 ECAB 386 (2003).

provide that an employee must submit to examination by a qualified physician as often and at such times and places as the Office considers reasonably necessary.<sup>7</sup> The only limitation on this authority is that of reasonableness.<sup>8</sup> Section 8123(d) of the Act provides that, if an employee refuses to submit to or obstructs an examination, his or her right to compensation is suspended until the refusal or obstruction stops.<sup>9</sup> The Board has interpreted the plain meaning of section 8123(d) to provide that compensation is not payable while a refusal or obstruction of an examination continues.<sup>10</sup>

Office procedures provide that, 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 section 8123(d) until the date on which the claimant agrees to attend the examination. The agreement may be expressed in writing or by telephone. When the claimant actually reports for an examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made.<sup>11</sup>

### **ANALYSIS -- ISSUE 1**

The Office properly suspended appellant's compensation under section 8123(d) of the Act on the grounds that he failed to attend a medical examination as directed by the Office. On August 9, 2006 it informed appellant that he had been scheduled for a second opinion examination with Dr. Hepps, a Board-certified psychiatrist, to determine whether his continuing disability or residuals were due to his employment-related conditions. The Office properly informed appellant of the consequences of his failure to appear at this appointment. On August 14, 2006 appellant was notified of the time and date of the appointment, which was scheduled for August 30, 2006.

On August 21, 2006 appellant noted that he had been submitting medical records since 1984. He argued that under section 8337 of the Act he was not required to submit medical records after age 60.<sup>12</sup> Appellant also alleged that it was not reasonable to request that he attend the examination. On August 30, 2006 the Office was notified that appellant had failed to keep the scheduled appointment. On October 3, 2006 it provided appellant 14 days to submit a written explanation showing good cause for failing to attend the medical appointment.

Appellant did not provide good cause for his failure to appear at the August 30, 2006 scheduled examination. He asserted that he was not required to submit medical records after he

---

<sup>7</sup> 20 C.F.R. § 10.320.

<sup>8</sup> *Anthony H. Jackson, supra* note 5.

<sup>9</sup> 5 U.S.C. § 8123(d).

<sup>10</sup> *Alfred H. Anderson, 54 ECAB 179* (2002).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000); *see Anthony H. Jackson, supra* note 5.

<sup>12</sup> There is no section 8337 in the Act which is found at 5 U.S.C. §§ 8101-8193.

reached the age of 60 and that the Office abused its discretion by requiring him to do so. However, this does not establish good cause for his failure to attend the medical evaluation. Section 10.320 of the Office's regulation provides that the employee must submit to examination by a qualified physician as often and at such time as the Office considers reasonably necessary.<sup>13</sup> There is no time limit or expiration period with regard to when such examinations can be requested. The Office did not abuse its discretion by requiring him to submit to an examination by Dr. Hepps.

Appellant also contended that the reports from Drs. McCuskey and Peterson supported that he was unable to work and were good cause for not attending the medical examination with Dr. Hepps. However, the submission of these reports does not excuse his failure to appear for the examination or show that the Office abused its discretion by directing a second opinion examination. Additionally, appellant alleged that he should not have to attend the second opinion examination while he was waiting for his attending physician to complete a report. While he may have been waiting on a report from his attending physician, this has nothing to do with the Office's decision to schedule a second opinion examination and does not constitute good cause failing to appear at such examination. Although appellant questioned the validity of being referred to a second opinion physician, this was not his decision to make. The law does not authorize him to administer the Act, to establish procedure or to set policy. To the contrary, the law provides that a recipient of compensation "shall submit to examination" 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." This means as often and at such times and places as the Office, not appellant, considers reasonably necessary.<sup>14</sup>

Appellant's assertions that Mr. Ghilardi's reports should have been considered by the Office do not constitute good cause for not appearing at the scheduled examination since. As noted, it is for the Office to determine when an examination is reasonably necessary. Mr. Ghilardi's reports are not competent medical evidence as he is not a physician as defined under the Act. Section 8101(2) of the Act provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by the applicable state law. Only medical evidence from a physician as defined by the Act will be accorded probative value.<sup>15</sup>

Appellant also alleged that the statement of accepted facts was improper because two of his accepted conditions were omitted. However, the Board finds that this is not good cause for failing to appear for the scheduled examination.<sup>16</sup> While the hearing representative found that there were inconsistencies with regard to the listing of appellant's accepted conditions and requested that an updated statement of facts be completed, the record contains a history of all the accepted conditions. A claimant may not place conditions on the Office's discretionary

---

<sup>13</sup> See *supra* note 7.

<sup>14</sup> *E.B.*, 59 ECAB \_\_\_ (Docket No. 07-1618, issued January 8, 2008).

<sup>15</sup> See *Jane A. White*, 34 ECAB 515, 518 (1983).

<sup>16</sup> See *E.B.*, 59 ECAB \_\_\_ (Docket No. 07-1618, issued January 8, 2008) (an objection to a statement of accepted facts is no excuse to refuse directed testing).

authority. As a beneficiary under the Act, appellant has a statutory obligation to submit to examination as often and at such times and places as the Office considers reasonably necessary. When he refuses, the law provides a penalty.<sup>17</sup>

The Board finds that appellant did not provide good cause for failing to appear for the scheduled examination on August 30, 2006. The Office correctly determined that appellant failed to submit to a properly scheduled medical examination without good cause and suspended his right to compensation.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8126<sup>18</sup> of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas which will be issued for witnesses only where oral testimony is the best way to ascertain the facts.<sup>19</sup>

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method to obtain such evidence because there is no other means, by which the testimony could have been obtained.<sup>20</sup> Additionally, a subpoena request must be made within 60 days after the date of the original hearing request.<sup>21</sup>

The Office hearing representative retains discretion on whether to issue subpoenas. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonably exercise of judgment or action taken, which is clearly contrary to logic and probable deductions from established facts.<sup>22</sup>

### **ANALYSIS -- ISSUE 2**

On November 15, 2006 appellant requested a hearing and on April 2, 2007 the Office received a request for a subpoena dated March 20, 2006. He sought to subpoena various records. As the subpoena request was made more than 60 days after the hearing request, the subpoena request was not timely.<sup>23</sup> The Board also notes that the hearing representative advised that many of the records sought by appellant were in the Office claim file, a copy of which had recently

---

<sup>17</sup> *Id.*

<sup>18</sup> 5 U.S.C. § 8126.

<sup>19</sup> *See* 20 C.F.R. § 10.619.

<sup>20</sup> *Id.*

<sup>21</sup> 20 C.F.R. § 10.619(a)(1).

<sup>22</sup> *Daniel J. Perea*, 42 ECAB 214 (1990) (holding that abuse of 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 deductions from established facts). *See also Dorothy Bernard*, 37 ECAB 124 (1985).

<sup>23</sup> 20 C.F.R. § 10.619(a)(1).

been provided to appellant. The hearing representative noted that no additional records were in the file, other than those supplied by appellant.

Generally, an abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.<sup>24</sup> The mere showing that the evidence would support a contrary conclusion is insufficient to prove an abuse of discretion. As appellant did not timely request a subpoena, it was not an abuse of discretion for the Office to deny his request for a subpoena.

### **CONCLUSION**

The Board finds that the Office properly suspended appellant's compensation benefits under section 8123(d) of the Act. The Board also finds that the Office hearing representative properly denied appellant's request for a subpoena.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 11, 2007 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: August 20, 2008  
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

---

<sup>24</sup> V.T., 58 ECAB \_\_\_ (Docket No. 06-1347, issued October 19, 2006).