

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

T.L., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Omaha, NE, Employer**

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**Docket No. 10-246
Issued: August 9, 2010**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
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 November 2, 2009 appellant filed a timely appeal from the September 29, 2009 merit decision of the Office of the Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly suspended appellant's compensation benefits effective April 9, 2009 based on her obstruction of a medical examination.

FACTUAL HISTORY

This case has previously been before the Board. On February 25, 2008 the Board set aside Office decisions dated June 28 and February 9, 2007 and remanded the claim for further medical development. The Board instructed the Office to secure a medical opinion on the issue of whether appellant's left wrist carpal tunnel syndrome and tendinitis of the left elbow was

caused or aggravated by her work duties.¹ The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.

On March 11, 2008 the Office advised that it would not refer appellant for a second opinion examination as its review of the evidence warranted the acceptance of appellant's claim for the conditions of left carpal tunnel syndrome and left elbow tendinitis. On April 10, 2008 it accepted appellant's claim for carpal tunnel syndrome and left sprain of the elbow and forearm. On December 1, 2008 appellant filed a claim for a schedule award.

On December 16, 2008 the Office requested that appellant submit a report from her treating physician addressing the extent of any permanent impairment in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² She did not respond.

On February 26, 2009 the Office referred appellant together with a statement of accepted facts and the case record, for a second opinion evaluation to determine whether she sustained any permanent impairment of her left arm. It advised appellant that the appointment was scheduled for March 12, 2009 at 9:00 a.m. with Dr. Andrew Lee, a Board-certified physiatrist. The Office informed appellant of her responsibility to attend the appointment and, if she failed to do so without an acceptable reason, her compensation benefits could be suspended in accordance with section 8123(d) of the Federal Employees' Compensation Act.³ This correspondence was also sent to appellant's attorney of record.

In a letter and e-mail dated March 13, 2009, the company that schedules medical examinations, QTC Medical Services, informed the Office that appellant failed to keep the scheduled appointment with Dr. Lee on March 12, 2009 at 9:00 a.m. In an e-mail of the same date, the Office advised that the appointment was not to be rescheduled, but the referral was to remain open.

On March 17, 2009 appellant contacted the Office stating that she received the appointment letter for the medical evaluation, but she missed the appointment. It instructed appellant to send in a written statement explaining why she missed the appointment and to indicate that she was willing to attend a rescheduled appointment. Appellant inquired as to whether this had anything to do with her disability benefits through the Office of Personnel Management. She also inquired as to whether she had to attend the appointment and was

¹ Docket No. 07-1878 (issued February 25, 2008). Appellant filed a separate claim for a traumatic injury sustained on November 30, 2005, file number xxxxxx259, that was accepted for right superior labrum tear. In file number xxxxxx330, appellant filed an occupational disease claim on September 13, 2006 for a low back injury. The Office accepted the claim for temporary aggravation of spinal stenosis of the lumbar region. In a May 18, 2009 decision, the Board found that the Office met its burden of proof to terminate benefits, effective June 14, 2007, for the accepted lumbar condition. Docket No. 09-86 (issued May 18, 2009). These cases were consolidated with the current claim before the Board.

² A.M.A., *Guides* (5th ed. 2001).

³ 5 U.S.C. § 8123(d).

advised that she did not have to attend the examination; however, if she chose not to attend she would jeopardize her claim for a schedule award.

By letter dated March 23, 2009, the Office proposed to suspend appellant's compensation benefits on the grounds that she failed to report for a medical examination scheduled for March 12, 2009. It allowed her 14 days to provide good cause for her failure to submit or cooperate with the second opinion examination and informed him of the penalty provision of section 8123(d) of the Act. This correspondence was also sent to appellant's attorney. Thereafter, appellant submitted magnetic resonance imaging (MRI) scans of the left elbow and lumbar spine.

In an e-mail dated April 16, 2009, the Office advised QTC Medical Services that the appointment would not be rescheduled and the referral would be closed. A copy of the e-mail was sent to appellant's attorney.

In an April 16, 2009 decision, the Office finalized the proposed suspension of compensation, finding that appellant failed to attend the medical examination scheduled for March 12, 2009 and did not establish good cause for refusing to submit to the examination. It noted that on February 26, 2009 appellant was directed to report for examination by Dr. Lee on March 12, 2009 but failed to attend the appointment. The Office noted that, by letter dated March 23, 2009, appellant was provided with 14 days to provide written evidence justifying her failure to attend the examination, but she did not respond. The suspension was effective April 9, 2009.

On April 20, 2009 appellant's attorney advised that she was in the hospital when she was supposed to attend the scheduled examination and provided a doctor's note. In a prescription note dated April 8, 2009, Dr. Aly Hassan, a Board-certified psychiatrist, noted that appellant was hospitalized on March 28, 2009 and her discharge date had not been determined.

On April 22, 2009 appellant requested a telephonic hearing which was held on August 4, 2009. She testified that she was hospitalized for depression, but was unsure of the date of admission and indicated that she had problems prior to admission. The hearing representative inquired as to why counsel did not contact the Office regarding her failure to attend the examination. Appellant's attorney noted that he had contact with her on March 17, 2009 and March 31, 2009. He was advised by appellant's sister on April 8, 2009 that she was in the hospital. The hearing representative requested that appellant submit evidence documenting the initial date of her hospitalization. No additional evidence was received to the record.

In a September 29, 2009 decision, the hearing representative affirmed the April 16, 2009 decision.

LEGAL PRECEDENT

Section 8123 of the 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.⁴ The determination of the need for an examination, the type of examination, the

⁴ 5 U.S.C. § 8123(a).

choice of locale and the choice of medical examiners are matters within the province and discretion of the Office.⁵ The Office's federal regulations at section 10.320 provide that a claimant must submit to examination by a qualified physician as often and at such time and places as the Office considers reasonably necessary.⁶ 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 compensation is suspended until the refusal or obstruction ceases.⁷ However, before the Office may invoke these provisions, the employee is provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.⁸ 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.⁹

ANALYSIS

The Board finds that appellant refused to submit to the March 12, 2009 second opinion examination with Dr. Lee within the meaning of section 8123 of the Act.

The Office directed appellant to attend a second opinion evaluation with Dr. Lee, a Board-certified physiatrist. It properly determined that it required an assessment of any permanent impairment in order to determine whether she was eligible for a schedule award. The Office had previously requested that appellant provide a report from her physician evaluating her permanent impairment. However, no evidence was submitted. On February 26, 2009 the Office referred appellant to Dr. Lee for a second opinion evaluation. It advised her that the examination was scheduled for March 12, 2009 at 9:00 a.m. and instructed her to attend the examination. The Office advised appellant that her compensation could be suspended if she refused or obstructed the examination. A copy of this letter was sent to appellant's attorney.

On March 23, 2009 the Office afforded appellant 14 days to provide good cause for her failure to attend the March 12, 2009 examination and further advised her of the penalty provision of section 8123(d) of the Act for failure to attend such an examination. A copy of this correspondence was also sent to appellant's attorney. She did not contact the Office or submit any evidence addressing why she did not appear for the scheduled March 12, 2009 examination.

The Board has recognized the Office's responsibility in developing claims.¹⁰ Section 8123 authorizes it to require an employee, who claims disability as a result of federal

⁵ *James C. Talbert*, 42 ECAB 974, 976 (1991).

⁶ 20 C.F.R. § 10.320.

⁷ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

⁹ *Id.*; see *Scott R. Walsh*, 56 ECAB 353 (2005); *Raymond C. Dickinson*, 48 ECAB 646 (1997).

¹⁰ *Walsh, id.*

employment, to undergo a physical examination as the Office deems necessary. 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. The only limitation on this authority is that of reasonableness.¹¹ The referral to an appropriate specialist in appellant's area at the Office's expense cannot be considered unreasonable. It clearly acted within its discretion by referring appellant for a second opinion examination to assess any impairment related to her left upper extremity conditions after she failed to provide an impairment evaluation from an attending physician. Neither appellant nor her attorney responded to the notice of proposed suspension or otherwise provided reasons for not attending the examination. Appellant failed to establish good cause.

After the Office's April 16, 2009 decision suspending appellant's right to compensation, she advised the Office that she was hospitalized at the time she was supposed to attend the scheduled examination. Appellant submitted an April 8, 2009 prescription note from Dr. Hassan. He noted that she was hospitalized on March 28, 2009 and her discharge date had not been determined. However, the Board finds this evidence is insufficient to establish that appellant was unable to attend the March 12, 2009 examination. Dr. Hassan stated that her hospitalization began 16 days after the scheduled examination. It does not otherwise address or establish her inability to attend the examination on March 12, 2009.

Appellant testified at her hearing that she was hospitalized for depression. She was unsure of the exact date of admission and generally indicated that she was having problems prior to admission. The hearing representative requested that appellant submit documentation concerning her hospitalization, but no responsive evidence was received prior to issuance of the hearing representative's decision.

The Board finds that appellant did not establish good cause for her failure to appear for the March 12, 2009 examination. The Office properly invoked 5 U.S.C. § 8123(d) and suspended her entitlement to compensation benefits.¹²

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation benefits based on her failure to attend the second opinion medical examination scheduled for March 12, 2009.

¹¹ *See Id.*

¹² After issuance of the Office's September 29, 2009 decision, appellant submitted additional evidence. The Board may not consider this new evidence on appeal as its review of a case is limited to the evidence in the case record that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the September 29, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 9, 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