

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REMIGIO I. AGUSTIN and DEPARTMENT OF THE NAVY,
NAVAL AVIATION DEPOT, Alameda, Calif.

*Docket No. 96-311; Submitted on the Record;
Issued March 9, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits effective January 23, 1995 based upon his obstruction of and refusal to undergo directed medical examinations.

By decision dated June 2, 1994, the Office determined that appellant had no residual disability beyond April 25, 1994, causally related to his December 14, 1993 accepted lumbar contusion and lumbar and cervical strain injuries. However, this decision was vacated by an Office hearing representative on December 6, 1994, who found that a conflict in medical opinion evidence existed which required referral to an impartial medical specialist for resolution.

The Office scheduled impartial medical examinations and consultations in neurology, psychiatry and orthopedics for January 23, 24 and 25, 1995, and appellant was advised by a January 10, 1995 appointment letter of the appointments, and of the provisions of 5 U.S.C. § 8123(d) governing refusal to submit to, or obstruction of a scheduled medical examination. He was also advised of the specific reason for the scheduled examinations.

By letter dated January 13, 1995, appellant identified the scheduled impartial medical specialists' appointments, requested that these and all other examinations be put on hold, claimed that he had not been notified in writing of the purpose of each required examination, accused the Office of opinion shopping, claimed that the examinations were not reasonable or necessary, alleged due process violations, and claimed that the physicians would be biased because they were from the same clinic. He disagreed that there was a conflict in medical opinion evidence, claimed equal protection violations, claimed that a second opinion physician was racially biased against him, argued the "benefit of the doubt" doctrine, and claimed that he had suffered a head injury at the time of his incident accepted as causing cervical and lumbar strain and lumbar contusion. Appellant claimed that he was harassed and discriminated against because of his Filipino background, claimed that the adjudication of his claim was adversarial, and argued why he felt various medical reports and decisions should be struck from the record.

By letter dated January 18, 1995, appellant was advised that one of his impartial medical examinations had been rescheduled for January 23, 1995, and it addressed his concern about the physicians' impartiality and his desire to participate in an impartial medical examiner selection, noting that the physicians were properly chosen using the rotational system, the fact that the physicians used the same referral service did not jeopardize their impartiality, and that his reasons for wanting to participate in the impartial medical examiner selection were found not to be acceptable.

Prior to each examination appellant also telephoned the Office stating that he was willing to attend the scheduled examinations but that he was unable to do so because he was too sick to attend. He explained that "too sick" meant that he was depressed, was having headaches, was wheelchair bound, and was feeling weak. He also alleged that he could not attend the scheduled examinations because he did not have anyone to drive him to the appointments.

On January 20, 1995 appellant telephoned the impartial medical examiner's office stating that he would not go to the rescheduled examination on January 23, 1995 because he had not received a letter from the Office regarding this examination. On January 23, 1995 appellant again telephoned the impartial medical examiner's office stating that he was not coming to the examination, but was not rescheduling the examination.

By letter dated January 24, 1995, appellant was advised that he would have to provide a medical report to establish that he was too sick to attend the scheduled examinations, and that a travel voucher had been provided to cover transportation expenses, including expenses for transporting the disabled. Appellant was given 14 days within which to provide a written explanation for his refusal to undergo the scheduled examinations. He was advised that the appointment had been rescheduled and he was reminded of the provisions of 5 U.S.C. § 8123(d). By second letter dated January 26, 1995, appellant was given 14 days within which to submit an explanation for his missing all 3 scheduled examinations, and the appointments were rescheduled. Appellant was again notified of the rescheduled appointments by letter dated February 2, 1995. No response was forthcoming.

By decision dated February 10, 1995, the Office suspended appellant's compensation benefits finding that he refused to submit to examinations directed by the Office. The Office found that the reasons appellant indicated in his telephone call for refusing to undergo the scheduled medical examinations were not good cause, as a travel voucher was provided to appellant to cover any necessary expenses, such that transportation problems could not be good cause, and as the Office received a January 26, 1995 report from appellant's treating physician, Dr. Dilbagh S. Chatta, a neurologist, which indicated that appellant had been seen on January 23, 1995, the same day as his first scheduled impartial medical examination which he failed to attend. Dr. Chatta's appointment had been scheduled for 1 hour and 45 minutes after the scheduled time of appellant's first impartial medical examination, yet the Office noted that appellant had not been too sick to attend that examination and had no transportation difficulty getting to that examination. Appellant's treating physician recommended that appellant undergo a magnetic resonance imaging as soon as possible, which the Office found confirmed that appellant was able to attend multiple further medical examinations.

The Office also found that appellant's actions prior to the scheduled examinations argued against his reasons of being too sick and of not having transportation to attend the scheduled examinations. In a January 13, 1995 twenty-three-page letter, appellant argued that the impartial medical examinations were not reasonable or necessary, that there was no conflict in medical opinion evidence, that the Office was opinion shopping, that this was an unwarranted and unnecessary violation of or deprivation of appellant's constitutional right to due process and a deprivation of his right to nonadversarial adjudication. Appellant further alleged that, the fact that the specialists were from a clinic that was previously used in this case created a problem with impartiality.

The Office further noted that on January 18, 1995 one of the scheduled impartial examiner's office's contacted appellant and advised him of a schedule change for one of his examinations. At that time appellant stated that he would not attend the scheduled examination because there was a "legal problem."

By letter dated January 18, 1995, the Office advised appellant that the examinations had been determined to be reasonable and necessary and that his reason for requesting participation in the impartial medical examiner selection was not acceptable. The Office further advised that, as per FECA Bulletin 95-1, the fact that the connection between two physicians was a listing in the same medical broker does not lessen the impartiality. The Office noted that this administrative connection was confirmed by the broker as the sole connection between these physicians, and noted that appellant was so informed via telephone on January 18 and 20, 1995, as well as being informed that there was no legal problem. He was also again advised of the appointment change.

The Office found that appellant repeatedly refused to attend the scheduled examinations for various reasons, which differed between the earlier proffered reasons and the reasons given on the day of examination. The Office determined that appellant's history demonstrated his unwillingness to attend the scheduled examinations, and that he had failed to demonstrate good cause for his failure to attend the scheduled examinations. The Office suspended appellant's entitlement to compensation pursuant to 5 U.S.C. § 8123(d) effective January 23, 1995, the date of the first examination he refused to attend.

The Board finds that the Office properly suspended appellant's entitlement to compensation benefits effective January 23, 1995 based upon his refusal to attend, and his obstruction of, required medical examinations.

Section 8123 of the Federal Employees Compensation Act states: "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." In this case, the Office reasonably required appellant to submit to scheduled impartial medical examinations by several different specialists to resolve an existing conflict in medical opinion evidence.

Paragraph (d) of section 8123 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.”¹

Further, the Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: “If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.” In this case the Office hearing representative found that there was a conflict in medical opinion evidence requiring appellant’s referral to a panel of impartial medical specialists for resolution, and the Office properly required that appellant attend these scheduled examinations. However, appellant failed to attend and failed to reschedule the examinations and further failed to present good cause for his nonattendance.

Appellant proffered a variety of reasons at different times for his nonattendance at the scheduled examinations which conflicted with each other, and which were contradicted by his successful attendance at an appointment with his own physician on the same day and 1 hour and 45 minutes later than the first scheduled examination. The fact that appellant was able to attend an appointment with his treating physician 1 hour and 45 minutes after his scheduled impartial medical examination belies the validity of any of the excuses he thereafter gave the Office for his nonattendance. Therefore, the Board finds that appellant has shown no good cause for his refusal to attend the required medical examinations and that the Office properly suspended his compensation benefits effective the date of his first refusal.

¹ See also 20 C.F.R. § 10.407(b).

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 10, 1995 is hereby affirmed.

Dated, Washington, D.C.
March 9, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member