U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGARET M. HOLDEN and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA

Docket No. 00-196; Submitted on the Record;
Issued March 19, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Office accepted appellant's claim for cervical strain and disc protrusion at C4-5 and C5-6.

By letter dated February 26, 1998, the Office scheduled appellant for an examination with Dr. Daniel Castellini on March 5, 1998. Appellant responded, stating that she was unable to attend the examination as she would be out of state visiting her daughter.

By letter dated March 12, 1998, the Office informed appellant that it had rescheduled the appointment with Dr. Castellini for April 24, 1998. If appellant were unable to make the appointment, she was instructed to reschedule with the physician and to notify the Office of any cancellation or change. Further, the Office advised appellant of its authority to schedule such examinations under the Federal Employees' Compensation Act[1] and to invoke sanctions for

[1] 5 U.S.C. § 8101 *et seq.*

noncooperation. Appellant was warned that if she failed to report for the examination on April 24, 1998, further action would be taken, in accordance with the Office's procedures.[2]

By letter dated March 29, 1998, appellant stated that she was currently out of state staying with her daughter and had informed Dr. Castellini's office that she could not make the April 24, 1998 appointment. She stated that Dr. Castellini's office was unable to change the scheduled date. Appellant asked the Office to advise her what to do next.

By letter dated April 17, 1998, the Office informed appellant that if she continued to refuse to attend the medical examination, her compensation would be suspended for the period of refusal or obstruction under the Act. The Office stated that she had failed to provide any temporary address or a date when she would return home.

Appellant did not attend the scheduled examination on April 24, 1998.

By letter dated April 28, 1998, the Office noted that despite its notice to appellant that her failure to attend the examination would be considered obstruction, she did not attend the April 24, 1998 examination. The Office reiterated the sanctions that follow obstruction of an examination and gave appellant 14 days to explain why she did not attend the examination.

By decision dated May 15, 1998, the Office found that appellant failed to provide good cause for not attending the April 24, 1998 examination and therefore was not entitled to compensation for the period of obstruction. The Office rejected appellant's arguments that the Office's prior notification letters gave incorrect information concerning rescheduling. The Office stated that the fact that appellant's physician would not reschedule the examination again without authorization from the Office did not excuse her from reporting for the examination. The Office also noted that appellant's initial examination had been rescheduled and the second examination was scheduled approximately six weeks after the notification letter allowing appellant ample time to make the necessary arrangements. The Office suspended appellant's compensation effective May 24, 1998.[3]

By letter dated May 13, 1999, appellant requested reconsideration of the Office's decision. Appellant stated that despite her March 29, 1998 request for advice on rescheduling the April 24, 1998 examination, it was not until June 29, 1998 that she was informed that only the Office had the authority to change the scheduled appointment. Appellant added that she was

[2] Section 8123(a) of the Act authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examination as it 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. Section 8123(d) of the Act provides that, "[i]f an employee refuses to submit to or obstructs an examination, his right to compensation ... is suspended until the refusal or obstruction stops." If an employee fails to appear for an examination, the Office must ask the employee to provide in writing an explanation for the failure within 14 days of the scheduled examination. If good cause is not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d) until the claimant reports for examination. *See Raymond C. Dickinson*, 48 ECAB 646-47 (1997); *Eva M. Morgan*, 47 ECAB 400, 403 (1996).

[3] Appellant's compensation payments were resumed as of July 7, 1998 when she underwent a schedule examination.

not told that she needed to inform the Office when she would return home until she received notification from the Office on April 17, 1998. She stated that her April 24, 1998 correspondence, certified delivered to the Office on May 5, 1998, stated that she would return to Amherst, New York, by May 8, 1998. The record contains a copy of a May 13, 1999 facsimile to the Office of a May 5, 1998 notice of delivery of certified mail. Appellant argued that she complied with the Office's requirements to the best of her ability and did not obstruct the medical examination.

By decision dated June 9, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of reconsideration was repetitious and insufficient to require merit review.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for further consideration.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[4] As appellant filed her appeal with the Board on September 15, 1999, the only decision before the Board is the Office's June 6, 1999 decision denying appellant's request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[5] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meet at least one of the standards described in section 10.606(b)(2).[6] If reconsideration is granted, the case is reopened and reviewed on the merits.[7]

In this case, appellant did not submit any new relevant evidence in support of her May 13, 1999 request for reconsideration of the Office's May 15, 1998 decision suspending her compensation for obstruction of a medical examination.[8] The facsimile of a notice of delivery that something was mailed to the Office does not constitute relevant evidence. Appellant's arguments regarding the Office's authority to reschedule examinations is irrelevant to the issue of providing a valid excuse for not attending the April 24, 1998 examination. Similarly, her

[4] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[5] 20 C.F.R. § 10.606(b)(2)(i-iii).

[6] 20 C.F.R. § 100.608(a).

[7] *Id.*

[8] Although appellant submitted a letter dated April 24, 1998 on appeal, which was certified and sent to the Office on May 5, 1998, showing that she responded to the Office's 14-day notice, that letter was not in the record prior to the Office's June 6, 1999 decision and therefore the Board is precluded from reviewing it. *See Robert D. Clark*, 48 ECAB 422, 428 (1997).

argument about her availability for examination does not constitute a new argument as a valid reason for her refusal.

Inasmuch as appellant has not shown that the Office erroneously applied or interpreted a specific point of law, advanced a relevant legal argument or submitted new and pertinent evidence not previously considered by the Office, the Office properly determined that she was not entitled to a review of her claim under section 8128(a).

The June 9, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 19, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member