



appellant's claim for cervical strain on January 18, 2001. The Office authorized a cervical laminectomy at C4-5 and C6 with foraminotomy and if necessary disc excision at C4-5 on the right side by letter dated February 26, 2001.

The Office entered appellant on the periodic rolls on February 26, 2001.

Appellant underwent surgery on March 6, 2001 including a decompressive cervical laminectomy C4-5 and C6 and foraminotomy C4-5 on the right side. On July 24, 2001 appellant underwent a magnetic resonance imaging scan which demonstrated surgical changes as well as enhancing collection within the posterior soft tissues of the cervical spine which was possible due to a small abscess.

In a report dated August 7, 2001, appellant's attending physician, Dr. Dhiraj K. Panda, a Board-certified neurosurgeon, noted that appellant continued to experience neck and right upper extremity pain. He diagnosed cervical spondylosis and found that he had reached maximum medical improvement. Dr. Panda's physical findings included abnormal motor examination in the right deltoid, four plus over five, as well as loss of both supinator, biceps reflex, triceps reflex one over four and loss of both ankles reflex. On August 27, 2001 Dr. Panda indicated that appellant could perform his date-of-injury position with no restrictions.

In a letter dated September 17, 2001, the Office proposed to terminate appellant's compensation and medical benefits.

Dr. Panda completed a report on January 18, 2002 and noted that appellant stated his pain was 60 percent better. He found normal higher functions, motor examination and sensory examination with both biceps and supinator reflexes absent. Dr. Panda stated that both triceps reflexes were one over four with the loss of both ankles reflex and no paracervical spasms. He diagnosed cervical spondylosis and stated that appellant could return to light and limited duties beginning January 21, 2002.

On February 6, 2002 the Office found that the employing establishment had made appellant an offer of suitable light-duty work. The Office allowed appellant 30 days to accept the position or offer his reasons for refusal. Appellant accepted a light-duty position on February 8, 2002.

The Office referred appellant for a second opinion evaluation with Dr. Howard Zeidman, a Board-certified orthopedic surgeon, on March 20, 2002. In his April 4, 2002 report, Dr. Zeidman noted appellant's history of injury and complaints of pain in the back of his neck with radiation into the lateral right arm down to the elbow as well as pain in his right shoulder with motion. On examination he found minimal abduction and external rotation deficiencies in the right shoulder range of motion as compared with the left. Appellant's sensory functions were intact with perhaps some inconstant diminution in the lateral right upper extremity as well as with absence of the biceps reflex on the upper extremities and minimal to trace triceps reflex and no supinator reflex. Dr. Zeidman found that appellant's right trapezius muscle had some tenderness with some minimal diminution and palpable bulk when compared to the left trapezius. X-rays of appellant's right shoulder revealed evidence of acromial joint arthritis and inferior spurring. He diagnosed residuals of the cervical surgery as well as degenerative spondylosis and

impingement syndrome in the right shoulder with spurring and some limitation of motion. Dr. Zeidman also found neurologic loss in the upper extremity.

Dr. David Weiss, an osteopath and a Board-certified orthopedic surgeon, examined appellant on April 8, 2002. He noted appellant's history of injury and continuing complaints of neck pain and stiffness as well as right upper extremity pain and numbness. Dr. Weiss found paravertebral muscle spasm and tenderness in the cervical spine as well as trapezius and splenius capitis muscle spasm and tenderness. He found no sensory deficits involving the upper extremities bilaterally with manual muscle testing of the supraspinatus musculature and biceps graded at four by five on the right. Dr. Weiss performed grip strength testing which demonstrated 24 kilograms with the right hand and 36 kilograms with the left. He noted that appellant's lower arm circumference measured 26 centimeters on the right versus 27½ centimeters on the left. Dr. Weiss diagnosed chronic post-traumatic cervical strain and sprain, herniated nucleus pulposus C4-5, cervical radiculopathy C6-7, and cervical stenosis C4-5 and C5-6. He found that appellant had 20 percent impairment due to loss of grip strength on the right, 4 percent impairment due to motor strength deficit of the right supraspinatus and 3 percent impairment due to pain for a total impairment rating of 31 percent of the right upper extremity. Dr. Weiss stated that appellant reached maximum medical improvement on April 8, 2002.

Appellant requested a schedule award on June 17, 2002.

The Office medical adviser reviewed this report on July 2, 2002 and found that appellant was entitled to 20 percent impairment due to loss of grip strength and 4 percent impairment for motor loss for an impairment rating of 24 percent. He stated that appellant was not entitled to an impairment rating for pain as this was too subjective and not well tested.

By decision dated July 16, 2002, the Office granted appellant a schedule award for 24 percent impairment to the right upper extremity. Appellant, through his attorney, requested his schedule award in a lump sum on July 19, 2002.

Appellant requested an oral hearing on July 22, 2002. By decision dated November 7, 2002, the hearing representative found the case not in posture for decision due to a conflict between Dr. Weiss and the Office medical adviser regarding appellant's permanent impairment due to pain. He remanded the case for referral to a referee examination by an appropriate Board-certified physician.

The Office referred appellant, a statement of accepted facts and a list of specific questions to Dr. Stanley Askin, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion evidence. On January 29, 2003 the Office informed appellant that his appointment was scheduled for February 14, 2003 at 10:15 a.m. at Dr. Askin's office located at 1113 Hospital Drive, Professional Building E, Willingboro, New Jersey. The Office informed appellant of the consequences of obstructing the examination.

Appellant telephoned the Office to determine if an appointment could be scheduled with a physician located closer to his home. The Office informed appellant that Dr. Askin's office was within 50 miles of his home. Appellant did not attend his February 14, 2003 appointment.

By letter dated February 19, 2003, the Office stated that appellant had 14 days to provide his explanation for failing to keep the appointment.

The record contains a computer printout providing the directions from appellant's address of record: 329 Princeton Avenue, Bellmawr, New Jersey, to Dr. Askin's office and indicating that the total distance was 24.46 miles.

By decision dated March 5, 2003, the Office found that appellant had obstructed the February 14, 2003 medical appointment. The Office stated, "It is further recommended that an additional schedule award, in excess of the previously awarded 24 percent permanent partial impairment of your right upper extremity be denied as you obstructed the medical examination process which would have resolved the conflict of the medical opinion evidence."

Appellant, through his attorney, requested an oral hearing on March 10, 2003. By letter dated March 12, 2003, appellant's attorney notified the Office that appellant had rescheduled an appointment with Dr. Askin for March 21, 2003. He stated that appellant was making a good faith effort to comply with the request for examination. On October 23, 2003 appellant altered his request for an oral hearing to a review of the written record. In a statement dated October 21, 2003, appellant stated that he "totally forgot" his February 14, 2003 appointment with Dr. Askin and apologized for the inconvenience. Appellant offered to attend another scheduled appointment.

By decision dated January 12, 2004, the hearing representative reviewed the written record and stated that the issues were whether appellant had obstructed the February 14, 2002 medical examination and whether he had more than a 24 percent permanent impairment of his right upper extremity for which he received a schedule award. The hearing representative affirmed the Office's decision finding both that appellant had obstructed the February 14, 2003 medical examination and that appellant was not entitled to an additional schedule award as a result. She noted that the Office had not suspended payment of appellant's previously granted schedule award for 24 percent permanent impairment which had expired on September 14, 2003. The hearing representative stated that, following return of the case file, the Office should again schedule a referee examination.<sup>1</sup>

### **LEGAL PRECEDENT**

Section 8123 of the Federal Employees' Compensation Act authorizes the Office to require an employee to undergo a physical examination as it deems necessary.<sup>2</sup> 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.<sup>3</sup> The Office's federal regulation at section 10.320 provides that a claimant must submit to

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<sup>1</sup> Following the Office's January 12, 2004 decision, the record contains additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

<sup>2</sup> 5 U.S.C. §§ 8101-8193, 8123(a).

<sup>3</sup> *James C. Talbert*, 42 ECAB 974, 976 (1991).

examination by a qualified physician as often and at such times and places as the Office considers reasonably necessary.<sup>4</sup> 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 of obstruction ceases.<sup>5</sup> 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.<sup>6</sup>

The Board has previously found that these sections of the Act and the regulation do not provide a basis for the rejection of a claim for compensation; rather it suspends the right of an employee to compensation during the period he refuses to submit to an examination.<sup>7</sup>

### ANALYSIS

In this case, the Office directed appellant to attend a referee medical evaluation with Dr. Askin, a Board-certified orthopedic surgeon, in accordance with a directive issued by the Office hearing representative on November 7, 2002. The hearing representative found a conflict of medical opinion evidence between Dr. Weiss, an osteopath and Board-certified orthopedic surgeon, and the Office medical adviser regarding the extent of appellant's permanent impairment for schedule award purposes. The Office referred appellant to Dr. Askin on January 29, 2003. The Office informed appellant that his appointment was scheduled for February 14, 2003 at 10:15 a.m. at Dr. Askin's office located at 1113 Hospital Drive, Professional Building E, Willingboro, New Jersey. The Office informed appellant of his obligation to attend the examination.

Appellant telephoned the Office and requested an appointment with a physician closer to his home. The claims examiner informed appellant that Dr. Askin's office was within an acceptable commuting area. Appellant did not attend the scheduled appointment. By letter dated February 19, 2003, the Office again informed appellant of the consequences of his refusal and allowed him 14 days to provide a written explanation offering good cause for his failure to attend. Appellant did not respond.

By decision dated March 5, 2003, the Office found that appellant had refused to attend the February 14, 2003 medical examination without good cause. The Office further denied appellant's request for an additional schedule award as he obstructed the medical examination process. The hearing representative affirmed this decision in its entirety on January 12, 2004.

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<sup>4</sup> 20 C.F.R. § 10.320.

<sup>5</sup> 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

<sup>7</sup> *Karen K. Cassel*, 35 ECAB 1053, 1059 (1984). The Board has also noted that when a claimant refuses or obstructs a medical examination while a claim is under development, the effect of such obstruction merely delays the development of the claim for the period of the obstruction. *Vicki L. McOmber*, Docket No. 03-1031 (issued August 19, 2003).

Following the March 5, 2003 decision, appellant stated that he did not refuse to attend the medical examination, but that he simply forgot that the appointment was scheduled. The Board finds that appellant's reason for failing to attend the referee examination does not establish good cause. The evidence of record establishes that appellant objected to the selection of Dr. Askin on the grounds of location and telephoned the Office to express this objection. His subsequent allegation that he simply forgot to attend this examination, provided almost eight months after his failure to appear for the scheduled examination, is scarcely credible and fails to rise to the level of good cause. If appellant's appointment had indeed slipped his mind, he had ample opportunity, 14 days, to reschedule the appointment with Dr. Askin, and demonstrate his willingness to cooperate with the development of the medical evidence in his case.

The Board finds that the Office did not have the authority to deny appellant's claim for a schedule award based on his obstruction of a scheduled medical examination. The Board has found that section 8123(d) of the Act does not provide a basis for the rejection of a claim for compensation.<sup>8</sup> The Office may only suspend the right of an employee to compensation during the period he refuses to submit to an examination.<sup>9</sup> Thus, the Office's denial of an additional schedule award, as opposed to suspension of his entitlement to compensation benefits, was improper.

### **CONCLUSION**

The Board finds that the Office improperly denied appellant's claim for a schedule award based on his obstruction of a medical examination as the Act only allows for a suspension of compensation benefits.<sup>10</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> In this case, the hearing representative noted that the Office did not suspend payment of appellant's schedule award which was ongoing during the period of the refusal.

<sup>10</sup> The Board has noted that neither the Office nor the Board has the authority to enlarge the terms of the Act. *Steven M. Gourley (Louise E. Gourley)*, 39 ECAB 413 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 12, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 3, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board