United States Department of Labor
Employees' Compensation Appeals Board

SILAS PERKINS, Appellant	)	
and	)	**Docket No. 05-1084**
	)	**Issued: December 2, 2005**
U.S. POSTAL SERVICE, POST OFFICE, New Orleans, LA, Employer	)	

Appearances:
Silas Perkins, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 18, 2005 appellant filed an appeal of a February 17, 2004 decision of the Office of Workers' Compensation Programs denying modification of the suspension of his compensation benefits and an October 6, 2004 decision denying his request for further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly suspended appellant's compensation benefits effective October 6, 2004 under section 8123(d) of the Act as he failed to submit to a scheduled second opinion examination without showing good cause; and (2) whether the Office properly refused to reopen appellant's claim for a merit review.

FACTUAL HISTORY

This is the second appeal before the Board in this case. By decision dated June 27, 2003,[1] the Board found that the Office improperly suspended appellant's compensation benefits effective October 6, 2002 on the grounds that he failed to cooperate with vocational rehabilitation. The Board further found that the case was not in posture for a decision regarding appellant's claim for a schedule award and remanded the case for further development to determine the percentage of any work-related permanent impairment. The law and the facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.

Following brief periods of modified-duty work in October and November 2002, appellant received wage-loss compensation on the daily rolls from October 6, 2002 to October 4, 2003.[2] The Office placed his case on the periodic rolls effective October 5, 2003. Appellant submitted periodic notes from Dr. Sofjan Lamid, an attending Board-certified physiatrist, holding appellant off work intermittently from October 19, 2002 to May 14, 2003 due to cervical radiculopathy, left shoulder and upper extremity pain.[3]

In a September 18, 2003 letter, the Office referred appellant, a statement of accepted facts and the medical record of Dr. Stephen Kishner, a Board-certified physiatrist, for a second opinion examination regarding his schedule award claim. The examination was to take place on November 7, 2003 at 8:30 a.m. at a specified address. The Office informed appellant of his responsibility to attend the appointment and that, if he failed to do so without an acceptable reason, his compensation benefits could be suspended in accordance with section 8123(d) of the Federal Employees' Compensation Act.[4]

In a September 22, 2003 file memorandum, the Office noted that appellant telephoned that day from Indiana, explaining that he was out of state as his son had been murdered. Appellant would remain there for "some time to take care of his son's funeral." In a September 25, 2003 file memorandum, the Office noted that appellant telephoned that day and was informed about the second opinion referral. The record indicates that appellant telephoned

[1] Docket No. 03-380 (issued June 27, 2003).

[2] The Office initially denied appellant's claims for wage-loss compensation beginning October 5, 2002 by decision dated January 30, 2003. By decision dated June 26, 2003, the Office vacated the January 30, 2003 decision and authorized payment of wage-loss compensation retroactive to October 6, 2002. In a June 19, 2003 file memorandum, the Office noted that it had located an unspecified request for reconsideration. This request had been associated with another of appellant's claim files. The Office deemed the request as received on June 16, 2003 and that the Office "would honor the request for reconsideration." It is unclear from the record as to whether the Office took any action on appellant's request.

[3] In an August 20, 2002 report, Dr. Thomas S. Whitecloud, an attending Board-certified orthopedic surgeon, opined that appellant had overlapping symptom complexes from the combination of cervical disc disease and the herniated lumbar disc. In a February 5, 2003 progress note, Dr. Whitecloud opined that appellant was disabled for work due to cervical and L4-5 disc degeneration requiring surgery. In an October 25, 2002 report, Dr. Leon A. Weisberg, an attending Board-certified neurologist and psychiatrist, diagnosed osteoarthritis with lumbar and cervical spinal stenosis. He recommended cervical and lumbar surgery.

[4] 5 U.S.C. § 8123(d).

the Office on September 29, 2003. He submitted an October 1, 2003 letter asserting that the employing establishment behaved in an adversarial manner.

In a November 7, 2003 letter, a medical management company noted that appellant did not keep the scheduled appointed on November 7, 2003 at 8:30 a.m. for the medical evaluation with Dr. Kishner.

In a November 21, 2003 letter, the Office responded to appellant's November 20, 2003 telephone inquiry regarding the dates on which compensation was paid.

In a December 4, 2003 letter, the employing establishment noted that appellant rescheduled his second opinion evaluation to December 8, 2003.

By notice dated December 8, 2003, the Office advised appellant that it proposed to suspend his compensation under section 8123(d) of the Act as he failed to report for the November 7, 2003 appointment with Dr. Kishner. The Office noted that appellant stated that he had rescheduled his appointment with Dr. Kishner but failed to report for a second opinion appointment as directed. The Office advised appellant that refusal to cooperate with or attend a medical examination required by the Office would result in suspension of all compensation benefits. The Office afforded appellant 14 days to submit his reasons, with supporting evidence, for failing to attend the examination and that, if he did not show good cause, his compensation would be suspended under section 8123(d) until after he attended and fully cooperated with the examination.

In a December 10, 2003 email, the Office requested that the medical management company verify the change of appointment for appellant from November 7, 2003 at 8:30 a.m. to December 8, 2003 and describe appellant's reasons for rescheduling. The medical management company replied on December 12, 2003 that the "only appointment we had schedule[d] was on November 7, 2003. We have not heard from [appellant] and we did not reschedule [appellant] to December 8, 2003."

By decision dated December 23, 2003, the Office suspended appellant's compensation effective that day on the grounds that he failed to attend the scheduled November 7, 2003 appointment with Dr. Kishner and had not shown good cause for his refusal. The Office noted that appellant did not respond to the December 8, 2003 notice.

In a January 8, 2004 letter, the Office advised appellant that an appointment had been scheduled with Dr. Kishner on January 16, 2004 at 8:30 a.m. A January 16, 2004 letter from the medical services company noted that appellant did not attend this appointment.

In a letter dated February 3, 2004, appellant requested reconsideration. He asserted that his compensation benefits should not have been suspended as the scheduled second opinion examination concerned only the schedule award aspect of his claim and not the injury itself. Appellant stated that he was still grieving the death of his son in September 2003, did not return to New Orleans until November 2003 and was in distress through December 2003.

By decision dated February 17, 2004, the Office denied modification on the grounds that appellant's February 3, 2004 letter was insufficient to end the suspension. To reinstate his

compensation benefits, the Office noted that appellant must "advise the Office in writing" of his intent to attend appointments scheduled for him and keep that appointment.

In a September 20, 2004 letter, appellant requested reconsideration. Appellant asserted that he did not keep the first appointment as he was "out of town" following his son's death. He rescheduled the appointment, but did not appear due to grief and depression. Appellant alleged that he appeared for the January 16, 2004 appointment with Dr. Kishner but that Dr. Kishner left the office due to an emergency and did not examine him.

By decision dated October 6, 2004, the Office denied reconsideration on the grounds that his September 20, 2004 letter neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

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.[5] 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.[6] The Office's implementing regulation at section 10.320 provides 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.[7] Section 8123(d) of the Act and section 10.323 of the Office's regulation provide that, if an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction ceases.[8]

To invoke this provision of the law, the Office must ensure that the claimant has been properly notified of his or her responsibilities with respect to the medical examination scheduled. Either the claims examiner or the medical management assistant may contact the physician directly and make an appointment for examination. The claimant and representative, if any, must be notified in writing of the name and address of the physician to whom he or she is being referred as well as the date and time of the appointment. The notification of the appointment must contain a warning that benefits may be suspended under section 8123(d) of the Act for failure to report for examination. 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.[9] If good cause for

[5] 5 U.S.C. § 8123(a).

[6] *James C. Talbert*, 42 ECAB 974, 976 (1991).

[7] 20 C.F.R. § 10.320.

[8] 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

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

the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of the Act.[10]

ANALYSIS -- ISSUE 1

By letter dated September 18, 2003, the Office informed appellant that a second opinion evaluation was to be scheduled on November 7, 2003 at 8:30 a.m. at a specified medical office. The Office advised him that failure to attend the appointment without an acceptable reason could result in the suspension of his compensation benefits, in accordance with section 8123(d) of the Act. Appellant did not keep the appointment scheduled for November 7, 2003.

The record demonstrates that appellant had several contacts with the Office from September 22 to November 20, 2003. This interval is after the Office's September 18, 2003 letter advising of the November 7, 2003 appointment, a time when appellant could have informed the Office of any inability to attend. It also encompasses 13 of the 14 days after November 7, 2003, the period in which appellant had the opportunity to provide good cause for his failure to attend the scheduled second opinion examination. On September 22, 2003 appellant informed the Office that he was in Indiana to coordinate his son's funeral and would be there for "some time." In a September 25, 2003 telephone conversation, the Office advised appellant of the second opinion referral. Appellant telephoned the Office on September 29, 2003 and submitted an October 1, 2003 letter regarding the employing establishment. He contacted the Office on November 20, 2003 regarding the dates on which compensation was paid. The record does not indicate that appellant advised the Office prior to November 7, 2003 or within 14 days of the scheduled examination that he was unable to attend the scheduled examination due to his son's death or for any other reason.

In a December 4, 2003 letter, the employing establishment asserted that appellant rescheduled the November 7, 2003 appointment to December 8, 2003. However, the medical management company stated that the only appointment made was for November 7, 2003 and that it had not heard from appellant. Thus, the record does not demonstrate that the second opinion examination was rescheduled for December 8, 2003. Also, appellant did not respond to the notice of proposed termination dated December 8, 2003 prior to issuance of the December 23, 2003 decision suspending his compensation.

The Office appropriately directed appellant to report for a second opinion evaluation on November 7, 2003. He failed to appear for the examination on the scheduled date and did not provide adequate reasons for not complying. The Office properly determined that he refused to submit to a scheduled medical examination without good cause and suspended his right to compensation benefits effective December 23, 2003.[11]

[10] *Id.*

[11] 5 U.S.C. § 8123; *see Maura D. Fuller*, 54 ECAB ____ (Docket No. 02-625, issued January 28, 2003).

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[12] Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[13] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[14]

ANALYSIS -- ISSUE 2

In his September 20, 2004 letter, requesting reconsideration of the Office's February 17, 2004 decision, appellant asserted that grief over his son's death caused his failure to keep appointments with Dr. Kishner on November 7 and December 8, 2003. He also alleged that Dr. Kishner was unavailable at the time of the January 16, 2004 appointment. The Office denied appellant's request by decision dated October 6, 2004, finding that appellant's letter did not raise substantive legal questions or include new, relevant evidence.

The Board finds that appellant's remarks concerning his activities following the death of his son were repetitive of those made in his February 3, 2004 request for reconsideration. The submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening the case.[15] Appellant's remarks about December 8, 2003 and January 16, 2004 appointments are irrelevant to the issue of his failure to attend the November 7, 2003 examination and are thus insufficient to warrant a merit review.[16]

Appellant's statements are insufficient to demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[17] With respect to the third above-noted requirement under section 10.606(b)(2), although appellant

[12] 20 C.F.R. § 10.606(b)(2).

[13] 20 C.F.R. § 10.608(b).

[14] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

[15] *Denis M. Dupor*, 51 ECAB 482 (2000); *Howard A. Williams*, 45 ECAB 853 (1994); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

[16] *Ronald A. Eldridge*, 53 ECAB 218 (2001).

[17] 20 C.F.R. § 10.606(b)(2).

asserted he had additional evidence, he did not submit additional evidence with his reconsideration request. The Office, therefore, properly denied his request for a merit review.

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation effective October 6, 2004 as he failed to attend a scheduled second opinion examination without showing good cause for his refusal. The Board further finds that the Office properly denied appellant's request for a merit review.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 6 and February 17, 2004 are affirmed.

Issued: December 2, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board