

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

VALERIE G. MORMAN, Appellant)	
)	
and)	Docket No. 05-460
)	Issued: July 5, 2005
DEPARTMENT OF DEFENSE, DEFENSE)	
COMMISSARY AGENCY, Fort Richardson, AK,)	
Employer)	
)	

Appearances:
Robert L. Morman, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On December 15, 2004 appellant, through her representative, filed a timely appeal from a September 8, 2004 merit decision of the Office of Workers' Compensation Programs denying modification of its suspension of her compensation under 5 U.S.C. § 8123(d) for failure to report for a medical examination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the decision suspending compensation.

ISSUE

The issue is whether the Office properly suspended appellant's compensation under 5 U.S.C. § 8123(d) for failure to report for a medical examination on June 19, 2002.

FACTUAL HISTORY

This case is before the Board for the second time. In the first appeal, the Board affirmed the Office's December 22, 1994 decision finding that appellant had not established an emotional

condition in the performance of duty.¹ The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

Appellant requested reconsideration of her claim on November 1, 1997. On January 16, 1998 the Office accepted her claim for major depression and panic disorder and paid her compensation beginning June 29, 1993.

In a report dated August 15, 1998, Dr. Robert Alberts, a psychiatrist and appellant's attending physician, diagnosed panic attacks, major depression and post-traumatic stress disorder. He opined that appellant was unable to return to her usual employment due to her accepted employment injury. In a report dated June 30, 1998, Dr. Robert D. Wald, a Board-certified psychiatrist and Office referral physician, found that appellant continued to have residuals of her employment injury. In a supplemental report dated August 31, 1998, Dr. Wald diagnosed panic disorder in remission and depression without psychotic symptoms. He attributed appellant's symptoms solely to the appeal of a February 21, 1997 decision of the employing establishment. The Office determined that a conflict in medical opinion existed between Dr. Alberts and Dr. Wald regarding whether appellant's current condition was employment related and referred her to a physician in Seattle, Washington for resolution of the conflict.

In an internal memorandum dated December 22, 2001, the Office noted that it had scheduled appellant for an impartial medical examination three years prior but had not pursued the referral as she was unable to travel to the appointment "due to a medical condition."²

By letter dated May 30, 2002, the Office referred appellant to Dr. Wandal Winn, a Board-certified psychiatrist in Anchorage, Alaska, for an impartial medical examination at 1:00 p.m. on June 19, 2002. The Office advised both Dr. Winn and appellant that the date of the appointment could not be changed unless another appointment could be scheduled within one week.

In an internal memorandum dated June 13, 2002, a claims examiner noted that the impartial medical examiner's office advised that appellant had cancelled the June 19, 2002 appointment. The claims examiner telephoned the impartial medical examiner and informed him not to cancel the appointment. The claims examiner also telephoned appellant's husband, her representative, who challenged the referral on the grounds that there was no conflict of opinion. The claims examiner stated:

“[Appellant's husband] stated that I did not know what his wife had going next week as to why she could not report for the appointment. She has prior engagements that can[not] be changed. I asked why she would not be available for the appointment. He was unwilling to give me the details over the telephone but would write a letter. I advised that we would not receive the letter prior to the

¹ *Valerie G. Morman*, Docket No. 95-1820 (issued September 23, 1997).

² On February 26, 2002 the Office referred appellant for an impartial medical examination in Seattle, Washington. Appellant, however, submitted evidence that she could not travel to Seattle.

date and time of the appointment. Therefore, we could not change the appointment.

“[Appellant’s husband] was advised that this conflict has been present for a number of years. We were unable to schedule an appointment with a physician in Anchorage and his wife has been unable to travel to Seattle for the [appointment] for a variety of reasons. We have now been able to schedule with a physician in Anchorage. It is important that his wife keep the appointment.”

Appellant did not attend the June 19, 2002 appointment with Dr. Winn.

On July 23, 2002 the Office notified appellant that it proposed to suspend her compensation under section 8123 on the grounds that she did not keep the appointment scheduled with the impartial medical examiner on June 19, 2002. The Office provided appellant 14 days to provide a written explanation showing good cause for her failure to attend the scheduled appointment.

In a letter dated August 5, 2002, appellant’s representative related that appellant had a conference on an unconfirmed date with an administrative law judge regarding her Merit Systems Protection Board (MSPB) claim. The representative stated:

“The claimant had many nervous episodes that required medication that would effect her overall presentation to Dr. Winn’s questions. The MSPB status conference did happen the week of June 24, 2002. The amount of time preparing for the status conference conflicted with the [m]edical [r]eferee [e]xamination appointment. Had the doctor been able to reschedule the claimant would have been medically able to attend both of these most important appointments.”

The representative further requested an explanation of the conflict between Dr. Wald and Dr. Alberts. He enclosed a letter to Dr. Winn dated June 17, 2002 requesting a “10-day extension of the appointment” with appellant “for personal reasons.”

By decision dated August 13, 2002, the Office suspended appellant’s compensation benefits under section 8123(d) on the grounds that she did not attend the June 19, 2002 scheduled appointment with Dr. Winn. The Office found that appellant had not shown good cause for failing to attend the appointment. The Office noted that, while appellant’s representative wrote to Dr. Winn requesting a 10-day extension, the physician did not “have the authority to grant the extension or change the appointment unless it was rescheduled within seven days of the appointment.”

On September 11, 2002 appellant, through her representative, requested an oral hearing. At the hearing, held on August 10, 2003, appellant’s representative argued that the record did not contain a conflict in opinion until Dr. Wald’s August 31, 1998 addendum responding to a question posed by the Office regarding whether appellant’s condition was due to the appeal of a February 21, 1997 employing establishment decision. He further argued that appellant had a MSPB hearing scheduled “within the same week and she was preparing for that MSPB hearing.”

By decision dated November 12, 2003, the hearing representative affirmed the Office's August 13, 2002 decision.

In a letter dated February 9, 2004, appellant's representative requested reconsideration. He again contended that appellant needed to reschedule the examination with Dr. Winn so that she could attend an MSPB hearing. The representative enclosed evidence that he argued "show[ed] that the on again off again of the MSPB hearing covered the time frame of the referee examination." He submitted notifications that he sent to an administrative law judge confirming a MSPB conference scheduled at various times for June 24, 26 and 27, 2002.

By decision dated September 8, 2004, the Office denied modification of the November 12, 2003 decision.

LEGAL PRECEDENT

Section 8123(a) 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.... If there is 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."³

Section 8123(d) of the Act states:

"If an employee refuses to submit to or obstructs an examination, [her] 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 the refusal or obstruction is deducted from the period for which compensation is payable to the employee."⁴

Section 10.323 of the Office's implementing federal regulations provides:

"If an employee refuses to submit to or in any way obstructs an examination required by [the Office], his or her right to compensation under the [Act] is suspended until such refusal or obstruction stops.... The employee will forfeit compensation otherwise paid or payable under the [Act] for the period of the refusal or obstruction and any compensation already paid for that period will be declared an overpayment and will be subject to recovery pursuant to 5 U.S.C. § 8129."⁵

³ 5 U.S.C. § 8123(a).

⁴ 5 U.S.C. § 8123(d).

⁵ 20 C.F.R. § 10.323.

The Office's Federal (FECA) Procedure Manual provides:

“Failure to Appear. 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. If good cause is not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d) until the date on which the claimant agrees to attend the examination.”⁶

ANALYSIS

The Board finds that the Office properly determined that a conflict in medical opinion existed between Dr. Alberts, appellant's attending physician, who diagnosed panic attacks and major depression and found that appellant was unable to return to her usual employment and Dr. Wald, an Office referral physician, who diagnosed panic disorder in remission and depression and found that appellant's symptoms did not result from a compensable employment factor.⁷ Based on this conflict, the Office referred appellant to Dr. Winn, a Board-certified psychiatrist, for an impartial medical examination.

By letter dated May 30, 2002, the Office advised appellant to attend a medical appointment with Dr. Winn at 1:00 p.m. on June 19, 2002. Appellant, however, attempted to cancel the appointment on June 13, 2002. An Office claims examiner advised appellant by telephone on that date that she should not cancel the appointment. The claims examiner noted that appellant's representative indicated that she could not attend the appointment due to prior engagements, which he refused to discuss on the telephone. The Board has held that if a claimant raised the issue of having difficulty attending a scheduled examination prior to the date of the examination and the Office failed to address those concerns, then the claimant would have grounds after the suspension for challenging the propriety of the suspension of compensation.⁸ The Board has found, however, that the claimant must properly raise his or her concern prior to the scheduled examination.⁹ In this case, appellant's representative refused to discuss the matter with the claims examiner in the June 13, 2002 telephone call and, consequently, the claims examiner had no basis to determine whether the appointment should be rescheduled. The claims examiner thus properly informed appellant's representative that she should attend the June 19, 2002 appointment with Dr. Winn. Appellant, however, did not attend the scheduled appointment.

The Board has held that a time must be set for a medical examination and the employee must fail to appear for the appointment, without an acceptable excuse or reason, before the

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Suspension of Benefits*, Chapter 2.810.14(d) (July 2000).

⁷ Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, and the opposing reports are of virtually equal weight, a third physician shall be appointed to make an examination to resolve the conflict. 5 U.S.C. § 8123(a); *Delphia Y. Jackson*, 55 ECAB ___ (Docket No. 04-165, issued March 10, 2004).

⁸ See *Gustavo H. Mazozn*, 49 ECAB 156 (1997).

⁹ *Id.*

Office can suspend or deny the employee's entitlement to compensation on the grounds that the employee failed to submit to or obstructed a medical examination.¹⁰ In this case, the Office set the time for the impartial medical examination by Dr. Winn and properly advised of the scheduled appointment. Appellant failed to appear for the examination on June 19, 2002. The only remaining issue is whether she presented a valid reason for her failure to appear.

The Office's procedures provide that if a claimant "does not report for a scheduled appointment, he or she should be asked in writing to provide a written explanation within 14 days." If good cause for the failure to appear is not established, compensation is then suspended under section 8123(d) of the Act until such date on which the claimant agrees to attend the examination.¹¹

Appellant's representative alleged that she could not attend the June 19, 2002 appointment because she had an MSPB conference scheduled around the same time. The record indicates, however, that the MSPB conference did not conflict with June 19, 2002 appointment. Appellant's representative also alleged that she required time to prepare for the conference but this allegation is not sufficient to show why she was unavailable for a medical appointment at 1:00 p.m. on June 19, 2002.

The representative further argued that appellant had "nervous episodes that required medication that would affect her overall presentation to Dr. Winn's questions." He did not, however, submit any medical evidence establishing that she was unable to attend the scheduled medical examination.¹²

Appellant's representative additionally contended that the record did not contain a conflict in medical opinion; however, as discussed previously, the record contained a conflict between Dr. Alberts and Dr. Wald regarding whether appellant had a continuing employment-related emotional condition. Appellant, consequently, has not presented a valid reason for her refusal to attend the scheduled impartial medical examination.

The Board concludes that appellant's failure to attend the impartial medical examination constituted a refusal to submit, without good cause, to a medical examination that was reasonably required. The Office thus properly invoked the penalty provision of section 8123(d) of the Act.

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation benefits under 5 U.S.C. § 8123(d) on the grounds that she failed to attend a scheduled medical examination.

¹⁰ *Maura D. Fuller (Judson H. Fuller)*, 54 ECAB ____ (Docket No. 02-625, issued January 28, 2003).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating the Medical Evidence*, Chapter 2.810.14(d) (July 2000).

¹² *See Iris Freedman*, 55 ECAB ____ (Docket No. 03-2057, issued January 16, 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 8, 2004 is affirmed.

Issued: July 5, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member