United States Department of Labor
Employees' Compensation Appeals Board

E.B., Appellant	)	
	)	
and	)	**Docket No. 07-1618**
	)	**Issued: January 8, 2008**
U.S. POSTAL SERVICE, OLD NATIONAL STATION, College Park, GA, Employer	)	

Appearances:
Appellant, 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 May 23, 2007 appellant filed a timely appeal from the January 24, 2007 merit decision of the Office of Workers' Compensation Programs, which suspended her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the suspension. The Board also has jurisdiction to review the Office's January 25, 2007 merit decision denying modification of an earlier suspension.

ISSUE

The issue is whether the Office properly suspended appellant's compensation under 5 U.S.C. § 8123(d) for refusing to submit to medical examinations.

FACTUAL HISTORY

On April 23, 2005 appellant, then a 40-year-old sales services distribution clerk, filed an occupational disease claim alleging that her stress and depression were a result of her federal employment. She attributed her condition to sexual harassment, a hostile work environment and

verbal abuse. The Office accepted her claim for major depressive disorder, single episode and paid compensation for temporary total disability on the periodic rolls.

On January 4, 2006 the Office informed appellant that a second opinion evaluation by a psychiatrist would be helpful in her case to determine the extent of her disability and to establish whether work restrictions were indicated. Explaining that her full cooperation in the examination was required, the Office notified appellant that her benefits may be suspended under 5 U.S.C. § 8123(d) for failure to report for examination. On January 18, 2006 the Office notified appellant that she had an appointment with Dr. Russell Prince, a psychiatrist, on February 3, 2006.

The Office confirmed that appellant did not show for the appointment and did not call. On February 6, 2006 the Office issued a notice of proposed suspension of compensation. The Office advised appellant that, if she believed she had a valid reason for failing to submit to or cooperate with the scheduled examination, she had 14 days to submit her reasons in writing with supporting evidence.

On February 18, 2006 appellant responded that she had previously written about the procedure and validity of being referred to a second opinion. "Based on what I have read," she stated, "there is no reason for me to see a psychiatrist as I stated in the letter written to you dated January 25, 2006 for which I have received no response…." Appellant stated that she had not refused to cooperate with any scheduled examinations. She noted that she already had an appointment with her physician for the time frame selected. Appellant added: "I will make a call to … the office of Russell Prince to make appointments to see the recommended persons. However I do want the record to state that I did not refuse to cooperate."

On February 27, 2006 the Office indicated that it was working to reschedule appellant's appointment. The Office telephoned appellant to emphasize that her compensation would be suspended if she did not show for this appointment. On March 1, 2006 the Office notified appellant that her appointment with Dr. Prince was rescheduled for March 17, 2006.

On March 6, 2006 appellant informed the Office by telephone that she could not make the appointment "because she already had something to do." The Office advised that second opinion examinations were not based on the injured worker's schedule. The Office further advised appellant that she was not to obstruct the scheduling of her second opinion examination. On March 13, 2006 the Office telephoned appellant to remind her that her appointment was set for March 17, 2006 and that "this would not be changed to meet her schedule." The Office advised appellant that if she did not keep the appointment, she would be considered to be obstructing the examination. Appellant informed the Office that her appointment was changed to March 31, 2006.[1]

On March 15, 2006 the Office notified appellant that her appointment with Dr. Prince was now scheduled for March 31, 2006. On March 17, 2006, however, the Office advised that

[1] The Office later learned that appellant personally contacted Dr. Prince's office to postpone the appointment.

Dr. Prince was now refusing to see her because of a letter appellant sent to him.[2] The Office informed appellant that her actions constituted an obstruction of the second opinion process.

In a decision dated March 22, 2006, the Office suspended appellant's compensation under 5 U.S.C. § 8123(d). The Office found three obstructions: appellant failed to show for her February 3, 2006 appointment without valid cause; she directly contacted the office of the second-opinion physician to postpone the appointment rescheduled for March 17, 2006, bypassing both the Office and the Office's medical scheduler; and her correspondence to the second-opinion physician made him so uncomfortable he refused to see her. The Office suspended appellant's compensation effective March 21, 2006. The Office advised that only after verification that appellant attended and fully cooperated with a future examination would her benefits be reinstated, effective the date of compliance.

The Office arranged a second-opinion examination with another psychiatrist, Dr. Brian Teliho, and again warned appellant that her benefits may be suspended under 5 U.S.C. § 8123(d) for failure to report. Appellant kept her appointment on May 18, 2006. In a supplemental report dated July 18, 2006, Dr. Teliho explained that although appellant exhibited several symptoms consistent with personality disorder, the time frame and prior history of good mental health made a personality disorder unlikely. He stated: "I do not feel it is necessary to order psychological testing at this time. However, should further evidence come to light that the claimant had a long-standing mental health history requiring psychiatric or psychological care, I reserve the right to change my opinion."

On August 17, 2006 the Office notified appellant that she had an appointment for psychological testing on September 5, 2006. She did not keep that appointment.

On September 12, 2006 the Office issued a notice of proposed suspension of compensation. The Office informed appellant that if she believed she had a valid reason for failing to submit to or cooperate with the scheduled examination, she had 14 days to submit her reasons in writing with supporting evidence.

Appellant submitted documentation to show that she did not receive timely notice of the appointment because the envelope was damaged by the U.S. Postal Service. On September 21, 2006 the Office informed appellant that she had submitted the proper documentation to confirm that she did not receive timely notification. The Office notified her that her appointment for psychological testing was rescheduled for October 3, 2006. The Office advised appellant that Dr. Teliho would review the test results. On September 22, 2006 the Office explained that she was being referred for psychological testing as a part of the second opinion evaluation process.

[2] In a letter dated March 16, 2006, appellant asked Dr. Prince for his licensure information, for the number of times the Office had asked him to evaluate cases in the past 12 months, for the percentage of cases decided in the Office's favor for which he provided a second opinion, what information his Office kept on file about claimants and whether a claimant had legal rights to request a copy of the files kept in his office. She asked for advance copies of the forms or documents that she would be required to complete, so she would have a sufficient amount of time to review them and have her questions answered. Appellant also provided Dr. Prince with a copy of the documents that she submitted to obtain help from her employer, a copy of a postal inspector's investigative report, a copy of a letter that she wrote to the Office claims examiner and a copy of the package she sent to the Office to support her claim. She asked Dr. Prince to review this information prior to her arrival.

The Office warned her once again that her benefits may be suspended under 5 U.S.C. § 8123(d) for refusing to report to or obstructing the examination.

Appellant did not keep the appointment. She did not call to reschedule or to advise that she could not attend.

On October 4, 2006 the Office issued a notice of proposed suspension of compensation. The Office informed appellant that, if she believed she had a valid reason for failing to submit to or cooperate with the scheduled examination, she had 14 days to submit her reasons in writing with supporting evidence. The Office explained that, if she did not show good cause, it would suspend her compensation until after she attended and fully cooperated with the examination.

On October 18, 2006 appellant offered six reasons for failing to keep her appointment: (1) the Office acted before the 14 days given her in the September 12, 2006 notice of proposed suspension of compensation; (2) the appointment was already scheduled when the Office spoke to her on September 21, 2006 and she had already clearly stated to the Office that it was not to schedule any appointments until she submitted her response to the Office's September 12, 2006 letter; (3) the Office provided no documentation that the testing was ordered by a doctor; (4) the Office provided no medical rationale or reason for the testing; (5) the Office did not give her timely notice, as the notice was postmarked September 28, 2006 and received on October 3, 2006, the same date as the appointment; and (6) the Office failed to provide a correct and truthful statement of accepted facts. Appellant indicated that she would cooperate under certain conditions, and she requested that her letters dated September 12 and 13, 2006 be addressed before she submitted to any testing.

On December 18, 2006 the Office notified appellant that she had an appointment for psychological testing on January 9, 2007. She did not keep this appointment. The Office medical scheduler advised that in addition to sending a letter to appellant advising of the testing date, she was called twice to confirm the appointment but appellant did not return the calls.

On January 18, 2007 appellant wrote the Office to advise that she received a letter dated January 12, 2007, which enclosed a letter dated December 18, 2006. She explained that January 12, 2007 was a Friday and January 15, 2007 was a holiday, so the earliest she could have received this letter was January 16, 2007 and she did receive it on January 17, 2007. "I am not going to open the letter," she stated, "so that in the event I need to go to a hearing someone will be able to see I did not tamper with the document." Appellant asserted that she would not be held accountable for any information in the letter dated January 12, 2007, since the information was not received in a timely fashion and she did not open the envelope. She then asked: "Please resubmit a copy of the letter enclosed with a more current date and please make an effort [to] mail the information on the date of the document."

On January 24, 2007 the Office called its medical scheduler to clarify the nature of the latest notice sent to appellant:

> "Ms. Tyler advised that the appointment letters sent by Baybrook are sent in an envelope labeled QTC Medical Services with their address so that any returned or refused letter will come back to their attention. She indicated that the letter I

described to her (dated December 18, 2006 in an envelope labeled U.S. Department of Labor) was not sent by her office. She advised that when our office receives a copy of the appointment letter, we send a duplicate copy to claimant. HOWEVER, SHE CONFIRMED THAT CLAIMANT WAS MAILED A LETTER DATED JANUARY 18, 2006 ON JANUARY 18, 2006 AND THIS APPOINTMENT LETTER WAS IN AN ENVELOPE MARKED QTC MEDICAL SERVICES WITH THEIR ADDRESS AS THE RETURN ADDRESS AND THE LETTER WAS NOT RETURNED. Therefore, the letter that claimant refused to open and returned to our office was not the letter that was used to notify her of the appointment but a duplicate letter that was sent by our office when our office received a copy of the letter from Baybrook Medical Services." (Emphasis in the original.)

In a decision dated January 24, 2007, the Office suspended appellant's compensation under 5 U.S.C. § 8123(d) effective that date. The Office found that appellant obstructed the examination for a third time: "You obstructed by not showing for your appointments on September 5 [and] October 3, 2006 and January 9, 2007 without valid cause."

In a decision dated January 25, 2007, the Office reviewed its March 22, 2006 decision suspending compensation and denied modification. Appellant had argued that the suspension could have been avoided if she had been provided with timely notices; if the Office had returned her several requests for a telephone call to address her concerns, instead of refusing contact; if the Office had made an effort to respond to written correspondence in a timely fashion to address her concerns; and had a particular claims examiner been the least bit professional, truthful and reasonable. The Office found, however, that appellant was duly informed of the examination and of the penalty for refusal or obstruction, that her appointment was rescheduled several times, and that she failed to attend any of the scheduled examinations and then obstructed the last examination by writing directly to the second opinion physician, resulting in the appointment's cancellation. The Office denied modification of its prior decision because the evidence still showed that appellant obstructed an Office-directed second opinion examination.

LEGAL PRECEDENT

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.[3] If an employee refuses to submit to or obstructs an examination, his or her right to compensation 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]

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

[3] 5 U.S.C. § 8123(a); 20 C.F.R. § 10.320 (1999).

[4] 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323 (1999).

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 5 U.S.C. § 8123(d) for failure to report for examination. The claimant must have a chance to present any objections to the Office's choice of physician, or any reasons for failure to appear for the examination, before the Office acts to suspend compensation.[5]

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. Such agreement may be expressed in writing or by telephone (documented on Form CA-110). When the claimant actually reports for examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made. The claimant's statement that he or she will not appear for an examination is not sufficient to invoke the penalty. Refusal to schedule an examination at the direction of the Office is also insufficient to invoke section 8123(d).[6] The action of the employee's representative is considered the action of the employee for the purpose of determining whether the employee refused to submit to or in any way obstructed an examination required by the Office.[7]

ANALYSIS

The Office properly notified appellant of her responsibilities with respect to the medical examination scheduled for February 3, 2006. The Office notified her in writing of the name and address of the physician to whom she was being referred, as well as the date and time of the appointment. The Office advised her that benefits could be suspended under 5 U.S.C. § 8123(d) for failure to report. When appellant did not report for examination, the Office gave her 14 days to explain in writing. She provided her reasons on February 18, 2006. The issue is whether she established good cause.

The Board finds that appellant did not show good cause for refusing to submit to the examination scheduled for February 3, 2006. She questioned the validity of the being referred to a second opinion physician and saw no reason she should see a psychiatrist, but this is not her decision to make. The law does not authorize her to administer the Act, to establish procedure or to set policy. To the contrary, the law states in mandatory language that appellant "shall submit to examination" by a physician designated or approved by the Secretary of Labor, after the injury

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

[6] *Id*.

[7] 20 C.F.R. § 10.323.

and "as frequently and at the times and places as may be reasonably required." This means as often and at such times and places as the Office, not appellant, considers reasonably necessary.[8]

Appellant stated that she already had an appointment with her own physician for the time frame selected. But that is beside the point. The Office determines the necessity for a second opinion.[9] It is not relevant whether appellant also had an appointment with her physician around the same "time frame." The law requires her to submit to an Office-directed examination as directed. Again, it is not for appellant to decide whether circumstances lend themselves to a second opinion. There is no discretion for her to exercise in this matter.

Appellant did not show good cause for refusing to submit to the February 3, 2006 examination. The Board therefore finds that the Office properly suspended her compensation pursuant to 5 U.S.C. § 8123(d). The Board need not review appellant's interventions in the March 17 and 31, 2006 appointments. Her refusal to submit to the February 3, 2006 examination is alone sufficient to invoke the statutory penalty. Although she wanted the record to show that she did not refuse to cooperate, she did, by her actions, forfeit her entitlement to compensation for the period of her refusal or obstruction.[10]

Appellant contends that the suspension could have been avoided if she had been provided with timely notices; if the Office had returned her several requests for a telephone call to address her concerns, instead of refusing contact; if the Office had made an effort to respond to written correspondence in a timely fashion to address her concerns; and had a particular claims examiner been the least bit professional, truthful and reasonable. The Office duly notified her of the examination and of the penalty for refusal or obstruction. Notwithstanding her various complaints with the Office, appellant is responsible for refusing to submit to the February 3, 2006 second opinion examination. The Board will affirm the Office's January 25, 2007 decision denying modification of the March 22, 2006 decision suspending compensation.

The Office also duly notified appellant of her responsibilities with respect to the psychological testing scheduled for October 3, 2006. The Office notified her in writing of the name and address of the physician to whom she was being referred, as well as the date and time of the appointment. The Office warned her that benefits may be suspended under 5 U.S.C. § 8123(d) for failure to report. When appellant did not report, the Office gave her 14 days to explain in writing. She provided her reasons on October 18, 2006. Again, the issue is whether she showed good cause.

The Board finds that appellant did not show good cause for refusing to submit to the testing scheduled on October 3, 2006. Appellant's arguments concerning the September 12, 2006 notice of proposed suspension of compensation, and the 14-day period for providing a written response, are misplaced. The Office accepted her reason for not keeping the September 5, 2006 appointment, so the September 12, 2006 notice was moot. It had no bearing

[8] *Id*. at § 10.320.

[9] *Id*.

[10] *Id*. at § 10.323.

on the appointment rescheduled for October 3, 2006. Appellant may have made clear to the Office that it was not to schedule any appointments until she submitted her response to the September 12, 2006 notice, but she may not place conditions on the Office's discretionary authority. Again, as a beneficiary under the Act, appellant has a statutory obligation to submit to examination as often and at such times and places as the Office considers reasonably necessary. When she refuses, the law provides a penalty.

A question arose whether psychological testing was reasonably required. On July 18, 2006 Dr. Teliho, the second opinion psychiatrist, reported that he did not feel it was necessary to order such testing because he thought a personality disorder was unlikely, but he did report that appellant exhibited several symptoms consistent with personality disorder, and the Office noted that he was relying on assumptions about appellant's history and previous relationships at work. Because testing would settle the matter objectively, the Office determined that Dr. Teliho should review such test results to complete his second opinion evaluation. This determination was within the Office's authority to develop and evaluate medical evidence.[11]

Appellant alleged but offered no proof that the Office did not give her timely notice. The record shows that the Office notified her on September 21, 2006. Appellant alleged that she received this notice on October 3, 2006, the same date as the appointment, but most likely she was speaking of the duplicate notice the Office sends after it receives a copy of the original appointment notice from its medical scheduler. She would later make the same claim with respect to her January 9, 2007 appointment.

Finally, appellant objected to the statement of accepted facts. But this is no excuse to refuse psychological testing.

Appellant did not show good cause for refusing to submit to the testing scheduled on October 3, 2006. The Board therefore finds that the Office properly suspended her compensation pursuant to 5 U.S.C. § 8123(d). The Board need not review appellant's failure to keep her January 9, 2007 appointment, as her refusal to submit to the October 3, 2006 testing is sufficient to invoke the statutory penalty. Appellant forfeits her compensation for the period of her refusal. The Board will affirm the Office's January 24, 2007 decision to suspend her compensation.

CONCLUSION

The Board finds that the Office properly suspended appellant's compensation under 5 U.S.C. § 8123(d) for refusing to submit to medical examinations.

[11] *See generally* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810 (April 1993).

ORDER

IT IS HEREBY ORDERED THAT the January 25 and 24, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 8, 2008
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