

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

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**S.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Phoenix, AZ, Employer**

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**Docket No. 08-2381  
Issued: April 9, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 2, 2008 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated July 14, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether the Office properly suspended appellant's right to compensation benefits on the grounds that she refused to submit to a medical examination.

**FACTUAL HISTORY**

On September 9, 2000 appellant, then a 48-year-old mark-up clerk, filed a Form CA-2, occupational disease claim alleging that work factors caused bilateral wrist and arm pain. After initially denying the claim, on March 15, 2001, the Office accepted that appellant sustained employment-related bilateral tenosynovitis of the hands and wrists and bilateral lateral epicondylitis. Appellant performed modified duty from April 30 to August 10, 2001 when she stopped work and was placed on the periodic rolls.

By letter dated May 20, 2008, the Office informed appellant that a second-opinion evaluation was needed. On May 3, 2008 it notified appellant of a June 20, 2008 appointment with Dr. Jon T. Abbott, Board-certified in orthopedic surgery. In a June 23, 2008 letter, the Office was informed that appellant did not keep the scheduled June 20, 2008 appointment.

On June 24, 2008 the Office proposed to suspend appellant's compensation benefits on the grounds that she failed to appear for the examination scheduled for June 20, 2008 with Dr. Abbott. It allowed appellant 14 days to provide in writing good cause for her failure to appear and informed her of the penalty provision of section 8123(d) of the Federal Employees' Compensation Act.<sup>1</sup> Appellant did not respond.

By decision dated July 14, 2008, the Office finalized the proposed suspension, effective August 3, 2008.

### **LEGAL PRECEDENT**

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.<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 regulations 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 it considers reasonably necessary.<sup>4</sup> Section 8123(d) of the Act and section 10.323 of its regulations 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.<sup>5</sup> Office procedures provide that, before the Office may invoke these provisions, the employee is to be provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.<sup>6</sup> If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of the Act.

### **ANALYSIS**

The Office scheduled a second-opinion examination on June 20, 2008 with Dr. Abbott. Appellant did not appear for the scheduled examination. The Office suspended her compensation benefits based on her failure to appear. The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Id.* at § 8123.

<sup>3</sup> *J.T.*, 59 ECAB \_\_\_\_ (Docket No. 07-1898, issued January 7, 2008).

<sup>4</sup> 20 C.F.R. § 10.320.

<sup>5</sup> 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; *Dana D. Hudson*, 57 ECAB 298 (2006).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000); *J.T.*, *supra* note 3.

are matters within the province and discretion of the Office. The only limitation on the Office's authority, with regard to instructing a claimant to undergo a medical examination, is that of reasonableness.<sup>7</sup> The Board has interpreted the "plain meaning" of section 8123(d) to provide that compensation is not payable while a refusal or obstruction of an examination continues.<sup>8</sup>

The most recent medical report of record was a March 23, 2005 report from Dr. Dean Earp, Board-certified in family medicine, discussing appellant's thyroid condition. The most recent report discussing her employment-related conditions is that of Dr. Jeffrey Steier, a Board-certified neurologist, dated March 28, 2003.<sup>9</sup> By letter dated December 21, 2007, the Office requested that appellant submit an undated medical report addressing her employment-related conditions. Appellant did not respond.<sup>10</sup> The Office did not abuse its discretion in scheduling a second-opinion evaluation on June 20, 2008.<sup>11</sup>

The Office referred appellant for a second-opinion evaluation with Dr. Abbott and advised her of the need for the examination, her obligation to attend, and the time and place for the scheduled appointment. Appellant did not attend. The Office subsequently allowed her 14 days to provide reasons for failing to appear. Again appellant did not respond. As she did not respond to the proposed suspension, appellant has not established good cause for refusing to undergo the June 20, 2008 examination. The Office properly suspended appellant's right to compensation benefits pursuant to section 8123 of the Act.<sup>12</sup>

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<sup>7</sup> *Lynn C. Huber*, 54 ECAB 281 (2002).

<sup>8</sup> *Supra* note 6.

<sup>9</sup> The record also includes an April 16, 2003 upper extremity electromyographic study, an April 17, 2003 upper extremity ultrasound study, an April 17, 2003 magnetic resonance imaging (MRI) scan of the cervical spine, an April 29, 2003 somatosensory examination, a June 11, 2003 MRI scan of the left shoulder, and an August 5, 2003 MRI scan of the left elbow.

<sup>10</sup> A telephone conference was held on May 15, 2008 in which appellant expressed her desire to change physicians.

<sup>11</sup> *Lynn C. Huber*, *supra* note 7.

<sup>12</sup> 5 U.S.C. § 8123; *S.B.*, 58 ECAB \_\_\_\_ (Docket No. 06-1838, issued January 11, 2007).

**CONCLUSION**

The Board finds that the Office properly suspended appellant's right to compensation benefits effective August 3, 2008 because she refused to attend a scheduled medical evaluation.<sup>13</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 14, 2008 be affirmed

Issued: April 9, 2009  
Washington, DC

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

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>13</sup> The Board notes that appellant filed her appeal with the Board on September 2, 2008 and simultaneously requested reconsideration and a hearing with the Branch of Hearings & Review. When appellate procedure is invoked by an appeal, the decision appealed from should not be changed before appellate body has had a chance to render its decision. This is an elementary proposition long recognized. Any other course would nullify the purpose of an appellate function and create constant confusion in the cases. Any action which disturbs the status of the case as appealed from must necessarily be regarded as a nullity; otherwise, orderly appeal process would break down. *D.S.*, 58 ECAB \_\_\_ (Docket Nos. 06-1408 & 06-2061, issued March 1, 2007). From September 2, 2008 the Board had jurisdiction over the issue of appellant's suspension of compensation. As the Office may not exercise concurrent jurisdiction over the same issue on appeal, the Office had no jurisdiction to issue decisions that could affect the issue before the Board. Its decisions dated September 19 and October 15, 2008 are therefore null and void. *Id.*