



## **FACTUAL HISTORY**

The Office accepted that on March 5, 2007 appellant, then a 32-year-old nursing assistant, sustained displacement of L4-5 and L5-S1 with myelopathy due to attempting to lift a patient. Appellant received compensation from the Office for periods of disability.

In early 2008, appellant requested that the Office authorize spinal fusion surgery at L4-5 and L5-S1 as necessitated by residuals of her March 5, 2007 work injury. In several reports dated between January and March 2008, Dr. Steven S. Mahnke, an attending Board-certified family practitioner, indicated that he needed two-level spinal fusion surgery due to residuals of her work injury.<sup>2</sup> In April 11 and 25, 2008 reports, Dr. John S. Treves, an attending Board-certified neurologist, recommended spinal fusion surgery at L4-5 and L5-S1.

The Office determined that the opinions of appellant's attending physicians were insufficient regarding his need for surgery and referred the case to Dr. Daniel D. Zimmerman, a Board-certified internist serving as an Office medical adviser, for further evaluation of this matter. In a July 18, 2008 letter, Dr. Zimmerman determined that the two-level fusion surgery requested by appellant was not warranted by residuals of the March 5, 2007 work injury. He indicated that the work incident on March 5, 2007 was too minor to cause a condition which would necessitate such surgery. Dr. Zimmerman indicated that appellant's findings on diagnostic testing might be seen in many asymptomatic persons who were in their early 30s and were moderately obese. He indicated that the limited leg range of motion findings seen in examination on March 14, 2008 were not supported by appellant's observed physical activities, thereafter, which included accompanying an emergency call as an emergency medical technician and attending emergency medical technician training.<sup>3</sup>

The Office determined that there was a conflict in the medical evidence between Dr. Zimmerman and appellant's attending physicians, Drs. Mahnke and Treves as to whether appellant's need for surgery was work related. In an August 21, 2008 letter, the Office advised appellant that, in order to resolve the conflict, it was referring her to Dr. Ernest Hansen, a Board certified orthopedic surgeon, for an impartial medical examination on September 11, 2008 at a specific time and place.<sup>4</sup> It advised appellant that, if she failed to keep the scheduled appointment, she needed to advise the Office in writing of the reason within seven days. Only legitimate, documented emergencies would be deemed as adequate grounds for not keeping the appointment. The Office noted that, if appellant failed to provide an acceptable reason for not appearing for the examination, or if she obstructed the examination, her benefits would be suspended in accordance with section 8123(d) of the Federal Employees' Compensation Act. It advised that she could claim reimbursement for any reasonable and necessary expenses incurred

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<sup>2</sup> The record contains a March 14, 2008 report in which Dr. Mahnke noted appellant's limited leg motion.

<sup>3</sup> The record contains a witness statement which describes appellant assisting in an emergency medical call on April 4, 2008. Appellant also attended emergency medical technician training between May 16 and 18, 2008. She later asserted that she did not perform any notable physical activities while working and training as an emergency medical technician.

<sup>4</sup> The examination was to take place in Overland Park, KS which was about a five-hour drive from appellant's home.

in obtaining the examination by submitting the enclosed Form OWCP-957 along with receipts documenting her expenses.

In several letters dated in late August 2008, appellant's attorney, Thomas J. Watson, expressed concern about the distance of Dr. Hansen's office from appellant's home. In an August 29, 2008 letter, an Office claims examiner advised Mr. Watson that she was authorizing payment for lodging and a meal for September 10, 2008, the day prior to the scheduled September 11, 2008 examination. In a September 2, 2008 telephone call, an Office claims examiner advised Mr. Watson that no appropriate medical specialist was available whose office was geographically closer to appellant's home. In a September 3, 2008 letter, Mr. Watson asserted that there was no conflict in the medical evidence regarding the need for the requested surgery.<sup>5</sup>

Appellant submitted an August 28, 2008 report in which Dr. Mahnke indicated that her back condition would make it very difficult for her to tolerate the ride to Dr. Hansen's office. Dr. Mahnke indicated that it would be preferable if appellant could get a closer medical appointment, unless the Office would pay for an airplane flight to the appointment.

Appellant did not attend the impartial medical examination scheduled with Dr. Hansen on September 11, 2008.

In a September 12, 2008 letter, the Office advised appellant that, under section 8123(d) of the Federal Employees' Compensation Act, it proposed to suspend her compensation because she failed to report for examination on September 11, 2008 with Dr. Hansen as directed by the Office in an August 21, 2008 letter.<sup>6</sup> It indicated that Mr. Watson was notified by voice mail and letter dated August 29, 2008 that lodging was authorized for September 10, 2008. It further advised appellant that, when a claimant refuses to attend or cooperate with a medical examination required by the Office, all compensation benefits, including medical expenses, are suspended. The Office informed appellant that, if she believed that she had a valid reason for failing to submit to or cooperate with the scheduled examination, she must submit her reasons, in writing with supporting evidence, within 14 days of the date of the letter. If appellant did not show good cause, her entitlement to compensation would be suspended under 5 U.S.C. § 8123(d) until after she attended and fully cooperated with the examination.

In a September 25, 2008 letter, Mr. Watson stated that one reason that appellant did not attend was because she was not able to make child care arrangements for the two days that she would be away for the medical appointment with Dr. Hansen. He asserted that the main reason that appellant did not attend the impartial medical examination was because he did not believe that there was in fact a conflict in the medical evidence regarding the need for the requested surgery.

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<sup>5</sup> Mr. Watson also asserted that the need for such surgery was supported by the opinion of Dr. Dennis McGowan, a Board-certified orthopedic surgeon who served as an Office referral physician. The Board notes that Dr. McGowan's November 30, 2007 report does not provide a clear opinion that surgery was recommended for appellant's back. The Office was unsuccessful in its attempts to obtain a clarifying report from Dr. McGowan.

<sup>6</sup> The Office attached a copy of the August 21, 2008 letter which directed appellant to report for examination by Dr. Hansen on September 11, 2008 and which advised her consequences for not doing so.

In an October 10, 2008 decision, the Office suspended appellant's right to compensation effective October 10, 2008 for failing to attend a medical examination as directed by the Office. It noted that Mr. Watson, in a letter dated September 25, 2008, discussed issues relating to the Office medical adviser's July 18, 2008 medical report. However, the letter did not address why appellant failed to attend the appointment with Dr. Hansen. The Office noted that Mr. Watson stated that appellant's reasons for not attending the appointment involved distance; transportation and child care issues, but found that these reasons were not sufficient to establish good cause for not attending the medical appointment with Dr. Hansen on September 11, 2008. It indicated that it had enclosed travel vouchers in its notification of the examination for claiming reimbursement of travel expenses and that Mr. Watson was notified on September 2, 2008 that the appointment with Dr. Hansen was the closest available medical appointment. The Office further advised that appellant's compensation could be reinstated only after verification that she attended and fully cooperated with the examination.<sup>7</sup>

### **LEGAL PRECEDENT**

Section 8123(a) of the Act<sup>8</sup> authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examinations as it deems necessary. The determination of the need for an examination, the type of examination, the choice of local and the choice of medical examiners are matters within the province and discretion of the Office. The only limitation on this authority is that of reasonableness.<sup>9</sup> Section 8123(d) of the Act provides that, "[i]f an employee refuses to submit to or obstructs an examination, his right to compensation is suspended until refusal or obstruction stops."<sup>10</sup> If an employee fails to appear for an examination, the Office must ask the employee to provide in writing an explanation for the failure within 14 days of the scheduled examination.<sup>11</sup>

The Office claims examiner seeks advice from the Office medical adviser to proceed with developing and weighing the medical evidence where the report from the attending physician, second opinion or referee specialist is not clear and well rationalized and the Office medical adviser provides written opinions on medical questions posed by members of the Office claims staff.<sup>12</sup> Section 8123(a) of the Act provides in pertinent part: "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."<sup>13</sup> When there are

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<sup>7</sup> The Office also addressed Mr. Watson's arguments in a letter dated October 8, 2008.

<sup>8</sup> 5 U.S.C. § 8123(a).

<sup>9</sup> See *Dorine Jenkins*, 32 ECAB 1502, 1505 (1981).

<sup>10</sup> 5 U.S.C. § 8123(d). See 20 C.F.R. § 10.323.

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (April 1993).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Functions of the Medical Unit*, Chapter 3.200.4(b) (October 1990).

<sup>13</sup> 5 U.S.C. § 8123(a).

opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.<sup>14</sup>

### ANALYSIS

The Office accepted that on March 5, 2007 appellant sustained displacement of L4-5 and L5-S1 with myelopathy due to attempting to lift a patient. In early 2008, appellant requested that the Office authorize spinal fusion surgery at L4-5 and L5-S1 as necessitated by residuals of her March 5, 2007 work injury. In support of this request, she submitted reports of Dr. Mahnke, an attending Board-certified family practitioner, and Dr. Treves, an attending Board-certified neurologist. The Office determined that the opinions of appellant's attending physicians were insufficient regarding appellant's need for surgery and referred the case to Dr. Zimmerman, a Board-certified internist serving as an Office medical adviser, for further evaluation of this matter. Dr. Zimmerman determined that the two-level fusion surgery requested by appellant was not warranted by residuals of the March 5, 2007 work injury.

The Office determined that there was a conflict in the medical evidence regarding whether appellant's need for surgery was work related between Dr. Zimmerman and her attending physicians, Dr. Mahnke and Dr. Treves. In an August 21, 2008 letter, the Office advised appellant that, in order to resolve the conflict, it was referring her to Dr. Hansen, a Board certified orthopedic surgeon, for an impartial medical examination on September 11, 2008 at a specific time and place. Appellant did not appear for the examination scheduled for September 11, 2008. Prior to suspending her compensation effective October 10, 2008 for this failure to appear, the Office provided her an opportunity to explain her nonappearance at the examination scheduled for September 11, 2008 with Dr. Hansen.

The Board has reviewed the evidence of record and notes that the record contains sufficient evidence to establish that appellant failed to appear for a medical examination such that this nonappearance justified suspension of her compensation under section 8123 of the Act. Prior to the suspension of appellant's compensation and on appeal, of the case to the Board, her attorney, Mr. Watson, argued that the case should not have been referred to Dr. Zimmerman, the Office medical adviser. Mr. Watson asserted that, according to Office procedure, additional clarification of appellant's condition should have been obtained from her attending physicians prior to referral to Dr. Zimmerman.<sup>15</sup> He further argued that because the referral to Dr. Zimmerman was improper there was no conflict in the medical evidence regarding appellant's need for surgery. The Board has reviewed the medical evidence of record, including the reports of appellant's attending physicians, and notes that the Office's development of the medical aspects of appellant's case, including the referral of her to Dr. Zimmerman, the finding of a conflict in the medical evidence and the referral to the impartial medical specialist, Dr. Hansen, were appropriate under the circumstances of the case.<sup>16</sup> Moreover, neither Mr. Watson nor appellant has explained why a

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<sup>14</sup> *William C. Bush*, 40 ECAB 1064, 1975 (1989).

<sup>15</sup> *See supra* note 12 and accompanying text.

<sup>16</sup> In their multiple reports, Dr. Mahnke and Dr. Treves provided little explanation of their opinions that the requested surgery was necessitated by work-related residuals rather than an underlying nonwork-related process.

mere disagreement with the Office's development of a given case would justify a failure to attend an examination scheduled by the Office.

Mr. Watson also argued that appellant did not attend the examination scheduled for September 11, 2008 due to the expenses of traveling to Dr. Hansen's office and problems with arranging for child care while she was away at the examination. However, the Office advised appellant at the time of the referral that she could claim reimbursement for any reasonable and necessary expenses incurred while obtaining the examination by submitting a Form OWCP-957 (enclosed with the referral notice) along with receipts documenting her expenses. On August 29, 2008 an Office claims examiner advised Mr. Watson that she was authorizing payment for lodging and a meal for September 10, 2008, the day prior to the scheduled September 11, 2008 examination. With respect to child care matters, neither Mr. Watson nor appellant provided any detailed description of attempts to secure child care in connection with the scheduled examination. Moreover, the Board notes that, although the distance between appellant's home and Dr. Hansen's was considerable, the Office had determined that no appropriate medical specialist was available whose office was geographically closer to her home. Appellant also suggested that she was physically unable to make the drive to Dr. Hansen's office, but she did not submit sufficient medical evidence to support this argument.<sup>17</sup>

The Office notified appellant prior to the medical referral to Dr. Hansen of the penalty for refusing or obstructing an examination required by the Office. After appellant's nonappearance at the examination scheduled for September 11, 2008, the Office provided her an opportunity to explain her nonappearance. For the reasons detailed above, the Office properly suspended her compensation under section 8123(a) of the Act.

### **CONCLUSION**

The Board finds that the Office properly suspended appellant's right to compensation effective October 10, 2008 for failing to appear for a medical examination.

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<sup>17</sup> In an August 28, 2008 report, Dr. Mahnke indicated that appellant's back condition would make it very difficult for her to tolerate the ride to Dr. Hansen's office. However, he did not provide a rationalized medical report indicating that this trip was medically contradicted.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' October 10, 2008 decision is affirmed.

Issued: November 5, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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