U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of ALFRED R. ANDERSON and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

*Docket No. 02-1417; Submitted on the Record;*
*Issued November 5, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant's claim for a recurrence of disability is precluded under the suspension provision of section 8123(d) of the Federal Employees' Compensation Act.

This is appellant's third appeal to the Board. On July 28, 1990 appellant, then a 44-year-old letter carrier, sustained a low back injury while lifting a tub of flats. His claim was accepted for a lumbar strain and a herniated disc at L4-5. In a decision dated November 3, 1995, the Board found that the Office of Workers' Compensation Programs improperly terminated appellant's compensation on the grounds that he refused suitable work.[1] The Board noted that the Office did not address the issue of a recurrence of disability on or after August 15, 1992 and reversed the suitable work determination.

Appellant returned to work as a modified letter carrier in September 1996 working for six hours a day. He received compensation for partial disability. Appellant subsequently filed a claim for continuing compensation for the period July 28 to August 5, 1997, which was denied by the Office on October 7, 1997. On November 3, 1997 he filed another claim for disability for the period October 16 through 22, 1997 and again on October 27, 1997. In a November 25, 1997, decision the Office denied appellant's claim. Appellant filed a second appeal with the Board.[2] In a January 14, 2000 decision, the Board found that appellant was not entitled to compensation for the period July 28 through August 5, 1997 as he failed to submit sufficient medical evidence to establish his total disability for work. With regard to the period of disability claimed on and after October 16, 1997, the Board found a conflict in medical opinion as to whether appellant could work eight hours of light duty a day. The case was remanded to the Office for referral of appellant to an impartial medical specialist.

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[1] Docket No. 94-110 (issued November 3, 1995).

[2] Docket No. 98-531 (issued January 14, 2000).

By letter dated April 10, 2000, the Office referred appellant to Dr. John J. DeBender, a Board-certified orthopedic surgeon, selected as the impartial medical specialist in the case. Appellant did not keep his appointment, scheduled for April 27, 2000. By letter dated April 28, 2000, the Office notified appellant of the suspension provisions of section 8123(d) of the Act and provided 15 days for him to explain in writing his reasons for failing to keep the scheduled appointment. Appellant was advised that failure to reply or present acceptable reasons for failing to keep the appointment would result in the suspension of compensation. Appellant did not respond to the April 28, 2000 letter.

In a May 16, 2000 decision, the Office noted that appellant did not respond to the April 28, 2000 letter and found that his failure to attend the April 27, 2000 medical appointment with Dr. DeBender constituted a refusal to submit to examination under section 8123(d). Appellant was advised that his right to compensation was suspended.

On February 25, 2002 appellant filed a notice of recurrence of disability, claiming a recurrence of disability as of January 31, 2002, causally related to his July 28, 1990 employment injury. He did not stop working. Appellant noted back pain for which he took medication and that he continued under treatment of his physician, Dr. Rawle Andrews, a specialist in family practice, until the physician's death in August 2001. He requested treatment by Dr. J. Anthony Walter, an orthopedic specialist, noting "no treatment has been approved as of February 25, 2002 due to 'red tape.'"

By letter dated March 21, 2002, the Office advised appellant of the information required to establish his claim for compensation. In an April 24, 2002 memorandum of a telephone call with a representative of appellant's congressional office, the Office noted that acceptance of the claim for a lumbar strain and herniated disc but that compensation benefits were suspended May 16, 2000 based on appellant's refusal to submit for physical examination.

In an April 24, 2002 decision, the Office denied appellant's recurrence of disability claim on the grounds that the evidence was insufficient to establish that the claimed recurrence was causally related to the July 28, 1990 employment injury.

The Board finds that appellant's claim for a recurrence of disability as of January 31, 2002, is precluded under the suspension provision of section 8123(d).

Section 8123(a) of the Act provides:

> "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]

[3] 5 U.S.C. § 8123(a).

The record on appeal reflects that the Board found a conflict in medical opinion between appellant's physician, Dr. Andrews and an Office second opinion physician, Dr. Bernard Z. Albina, as to appellant's ability to perform work for eight hours a day as of October 16, 1997. The Board's January 14, 2000 decision remanded the case to the Office for further development of this issue.

The Office referred appellant to Dr. DeBender, selected as the impartial medical specialist in this case, and scheduled an appointment for appellant on April 27, 2000. The Office properly notified appellant of the appointment and need for examination. The April 10, 2000 referral letter advised appellant of the penalty for refusing to submit to the examination. Appellant, nonetheless, failed to keep his appointment.

Section 8123(d) of the Act, provides:

> "If an employee refuses to submit to or obstructs an examination, his 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]

Upon receiving information from Dr. DeBender's office that appellant failed to keep his appointment of April 27, 2000, the Office provided appellant the opportunity to present in writing his reasons for failing to keep the appointment scheduled. On appeal appellant acknowledges that he did refuse the Office's directive to undergo medical examination. Based on this refusal and the lack of any response from appellant to the April 28, 2000 notification letter, the Office suspended appellant's compensation benefits effective May 16, 2000.

The Board finds that the May 16, 2000 suspension of benefits continues in effect, as appellant has never advised the Office of his agreement to undergo the directed medical examination. 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.[6] For

[4] 5 U.S.C. § 8123(d).

[5] 20 C.F.R. § 10.323. The Office's prior regulations at 20 C.F.R. § 10.407(b) contained the same forfeiture provision.

[6] *William G. Saviolidis*, 37 ECAB 174-75 (1985).

this reason, section 8123(d) serves as a suspension of appellant's entitlement to further "compensation" arising out of the accepted employment injury.[7] In this case, appellant was provided notice of the suspension provision and the opportunity to report for examination by the impartial medical specialist. Appellant did not report for the examination and did not attempt to demonstrate or provide any reason for his failure to attend the scheduled medical appointment. For this reason, his refusal to submit to the directed medical examination has suspended his right to further compensation until such refusal stops. In this regard, section 8123(d) serves as a penalty provision.[8] For this reason, the Office's denial of appellant's recurrence of disability claim will be affirmed, as modified to reflect the suspension under section 8123(d).

The April 24, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed, as modified.

Dated, Washington, DC
November 5, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] *See Stephen R. Lubin*, 43 ECAB 564 (1992), in which the Board noted that the penalty provision of section 8106(c) may serve as a bar to compensation for a schedule award under section 8107. The Board contrasted the language of section 8123(d), noting congress provided for the suspension of compensation should an injured federal employee improperly refuse to submit to or obstruct a medical examination. *Id.* at 572. In turn, section 8101(12) of the Act defines "compensation" as "the money allowance payable to an employee or his dependents and any other benefits paid for from the Employees' Compensation Fund."

[8] *See Margaret M. Gilmore*, 47 ECAB 718 (1996).