

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

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**SHARON HANDY, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Chicago, IL, Employer**

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**Docket No. 06-51  
Issued: February 17, 2006**

*Appearances:*

*Jeffrey P. Zeelander, Esq., for the appellant  
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 October 11, 2005 appellant filed a timely appeal from the October 5, 2005 merit decision of the Office of Workers' Compensation Programs, which reinstated her compensation retroactive to January 7, 2005 following a suspension under 5 U.S.C. § 8123(d). Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the reinstatement issue.

**ISSUE**

The issue is whether the Office properly reinstated appellant's compensation retroactive to January 7, 2005 following a suspension under 5 U.S.C. § 8123(d).

**FACTUAL HISTORY**

On the prior appeal of this case,<sup>1</sup> the Board found that the Office properly suspended appellant's compensation, effective August 19, 2003, for failing to keep a medical appointment on July 14, 2003. The Board affirmed the June 8, 2004 decision of the Office hearing

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<sup>1</sup> Docket No. 04-1682 (issued January 7, 2005).

representative. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

On February 11, 2005 appellant's attorney informed the Office that appellant had agreed to cooperate in the medical referral process. He noted her testimony before the Office hearing representative on March 3, 2004:

“HEARING REPRESENTATIVE:

“Okay. Well I guess if we can do it -- and I'll have to look into this because I don't know exactly what -- procedurally how we want to go with this. But I think what you're saying, you'll go to any exam[ination]?”

“MS. HANDY:

“I will take any exam[ination]. That never was a problem....”

Appellant's attorney asked the Office to reinstate compensation and schedule the examination.<sup>2</sup>

On April 18, 2005 the Office notified appellant that she had an appointment on May 11, 2005 with Dr. Charles C. Wang, a neurologist. On May 25, 2005 the Office received a May 11, 2005 report from Dr. Wang concerning his examination of appellant that day.

The Office indicated that it would reinstate appellant's compensation to January 7, 2005, the date of the Board's most recent decision. Appellant's attorney objected that Office procedures required reinstatement retroactive to “the date on which claimant agrees to attend the examination.” The claims examiner noted that the Director of the Office had reviewed the file and was in agreement that compensation should be reinstated to January 7, 2005.

On August 2, 2005 the Office notified appellant that she was entitled to compensation retroactive to January 7, 2005. The Office indicated, however, that she was receiving, or might be entitled to receive, benefits provided by the Office of Personnel Management (OPM). Explaining that annuity benefits from OPM and benefits for wage loss were not payable for the same period of time, the Office provided appellant with an election form.

On August 4, 2005 appellant completed the election form and made her election effective January 7, 2005. Counsel noted that appellant wanted to receive compensation benefits in lieu of benefits from OPM. He requested a final decision on the issue of reinstatement. He again contended that Office procedures requiring reinstatement of compensation to the date appellant agreed to attend the examination.

In a decision dated October 5, 2005, the Office found that appellant's compensation benefits were suspended and reinstated only after verification that she attended and fully

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<sup>2</sup> He made similar requests on June 24 and October 13, 2004.

cooperated with the directed medical examination. “Such a reinstatement,” the Office stated, “would be effective the date of compliance.”

### **LEGAL PRECEDENT**

The Federal Employees’ Compensation Act provides that if an employee refuses to submit to or obstructs an examination, 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.<sup>3</sup> The plain meaning of this language is that compensation is forfeited for the period of the refusal or obstruction.<sup>4</sup>

Office procedures state that 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 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.<sup>5</sup>

A beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity. The beneficiary must elect the benefit that he or she wishes to receive, and the election, once made, is revocable.<sup>6</sup> The Board has held that the beneficiary must be given an opportunity to make an informed election.<sup>7</sup>

### **ANALYSIS**

After the Office suspended appellant’s compensation, effective August 19, 2003, for failing to keep a medical appointment on July 14, 2003, she requested an oral hearing before an Office hearing representative. That hearing was held on March 3, 2004,<sup>8</sup> at which appellant

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<sup>3</sup> 5 U.S.C. § 8123(d) (physical examinations).

<sup>4</sup> *William G. Saviolidis*, 37 ECAB 174 (1985). 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. 20 C.F.R. § 10.323 (1999) (the penalties for failing to report for or obstructing a second opinion or referee examination).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14.d (July 2000).

<sup>6</sup> 20 C.F.R. § 10.421(a) (1999); *see* 5 U.S.C. § 8116(a) (dual benefits).

<sup>7</sup> *Phillip W. Roddy*, 37 ECAB 505, 511 (1986).

<sup>8</sup> The first page of the hearing transcript is misdated March 3, 2003.

testified that she was willing “to take any exam[ination].”<sup>9</sup> The Board notes that she restated this willingness later in the hearing, as follows:

“HEARING REPRESENTATIVE:

“So your point is that you continue to be disabled, you did not intentionally miss the second opinion....

“MS. HANDY:

“No.

“HEARING REPRESENTATIVE:

“... and if you were rescheduled you would go again.

“MS. HANDY:

“I would go again.

“HEARING REPRESENTATIVE:

“Okay. Well what we’ll look into is getting you scheduled down here if we can. And you know, this is obviously a large enough area there is someone that you....

“MS. HANDY:

“Okay.

“HEARING REPRESENTATIVE:

“Yes. But that’s where we really have to go with this at this point.

“MS. HANDY:

“Okay.”<sup>10</sup>

And at the end of the hearing, appellant expressed her commitment to attend the examination required by the Office:

“MS. HANDY:

“But if I have to, I’ll go back to -- you’re talking about go see who?

“HEARING REPRESENTATIVE:

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<sup>9</sup> Transcript of Proceedings, OWCP File No. 10-0504073 at 20, line 23 (March 3, 2004).

<sup>10</sup> Transcript at 36, line 5.

“It wouldn’t necessarily be the same guy. It might -- it would be someone else.

“MS. HANDY:

“It might be someone else?

“HEARING REPRESENTATIVE:

“Yes. But just to complete the cycle of going through that exam[ination]. But....

“MS. HANDY:

“If they pay for it, I would definitely get there. I don’t have any other way to get there.”<sup>11</sup>

The Board finds that this evidence is sufficient to establish that on March 3, 2004 appellant agreed to attend the examination as required by the Office. The Board further finds that the March 3, 2004 transcript of the oral argument satisfies Office procedures requiring written documentation of the agreement. Appellant is therefore eligible to receive compensation retroactive to March 3, 2004.

Appellant elected to receive compensation benefits under the Act in lieu of OPM benefits, effective January 7, 2005, because the Office’s actions precluded appellant from selecting an earlier date. The Office advised, without explanation, that reinstatement could be made no earlier than the date of the Board’s last decision. The issue of reinstatement, however, was not before the Board on the prior appeal. The matter did not become an issue until appellant actually reported for examination on May 11, 2005, when she saw Dr. Wang. The Board’s prior decision affirming the suspension of appellant’s compensation effective August 19, 2003 did not preclude the Office from following its established procedures and reinstating compensation to March 3, 2004, the date on which she agreed to attend the directed medical examination. Appellant’s attorney argued the correct reinstatement procedures and objected to the January 7, 2005 election date. The Board finds that her election of benefits was not an informed one.

Appellant must be given an opportunity to make an informed election of benefits. The Board will set aside the Office’s October 5, 2005 decision reinstating compensation as of January 7, 2005 and remand the case for further development and an informed election in conformance with this decision.

### **CONCLUSION**

The Board finds that this case is not in posture for decision. The Office did not give appellant an opportunity to make an informed election of benefits. Further development is therefore warranted.

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<sup>11</sup> Transcript at 39, line 12. Later, when she requested reconsideration on June 24, 2004, appellant stated: “Also, I would also submit to another second opinion exam at anytime you’d want me to attend.”

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 5, 2005 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: February 17, 2006  
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