



stopped work that day. Appellant underwent lumbar spine surgery on July 23, 1999 and was placed on the periodic rolls. The claim was accepted for lumbar sprain, displacement of lumbar vertebral, lumbar degeneration, postlaminectomy syndrome, lumbar spinal stenosis and other psychogenic pain. Appellant returned to part-time light duty on November 1, 1999 and to full-time light duty in March 2001. On April 3, 2002 he sustained a recurrence of disability and was returned to the periodic rolls.

In July 2007 the Office referred appellant for a second opinion evaluation with Dr. James F. Hood, a Board-certified orthopedic surgeon, scheduled for August 7, 2007. Appellant called the Office that day to report that his car had broken down on his way to the appointment. The appointment was rescheduled for September 11, 2007. Appellant did not keep the second scheduled evaluation.

On September 12, 2007 the Office proposed to suspend appellant's compensation benefits on the grounds that he failed to appear for the examination scheduled for September 11, 2007 with Dr. Hood. It allowed him 14 days to provide in writing good cause for his failure to appear and informed him of the penalty provision of section 8123(d) of the Federal Employees' Compensation Act.<sup>1</sup> Appellant called the Office on September 14, 2007, advising that his wife had seriously cut her finger and requested that the second opinion evaluation be rescheduled. On September 12, 2007 a notice that a third appointment was scheduled at 12:30 p.m. on October 2, 2007 was mailed to appellant at his address of record. In a September 18, 2007 letter, appellant further explained why he missed the appointment scheduled for September 11, 2007, stating that his wife was seriously injured on September 8, 2007 when she fell from her horse and partially amputated her left thumb. Appellant's wife had surgery on September 12, 2007. Appellant requested that the Office reschedule the appointment. On October 3, 2007 the Office was informed that he did not keep the October 2, 2007 appointment.

By decision dated October 3, 2007, the Office finalized the proposed suspension, effective October 2, 2007. It noted that appellant had missed three scheduled appointments before the suspension was finalized.

On October 19, 2007 appellant requested a hearing, stating that he did not receive notice of the scheduled October 2, 2007 appointment and advising that he would submit to a rescheduled examination. An appointment with Dr. Hood was rescheduled for November 27, 2007, which appellant attended.<sup>2</sup> Appellant was returned to the periodic rolls, effective November 27, 2007 and on September 29, 2008 was paid wage-loss compensation for the period October 7 through November 26, 2007. On September 30, 2008 appellant's attorney requested that the Office proceed with a review of the written record.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> By report dated December 3, 2007, Dr. Hood advised that appellant was permanently totally disabled.

By decision dated December 12, 2008, an Office hearing representative affirmed the October 3, 2007 decision suspending appellant's wage-loss compensation for his failure to attend an examination scheduled for October 2, 2007.<sup>3</sup>

### **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>4</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>5</sup> The Office's 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 the Office considers reasonably necessary.<sup>6</sup> Section 8123(d) of the Act and section 10.323 of the Office's 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>7</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>8</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.<sup>9</sup>

### **ANALYSIS**

The Board finds that the Office did not properly suspend appellant's compensation because it did not follow established procedures. The Office scheduled second opinion examinations on August 7 and September 11, 2007 with Dr. Hood which appellant did not attend. On September 12, 2007 it proposed to suspend his wage-loss compensation for failure to attend the September 11, 2007 examination. As noted, the determination of the need for an examination lies within the discretion of the Office and the Board has interpreted section 8123(d) to provide that compensation is not payable while a refusal or obstruction of an examination continues.<sup>10</sup> In this case, however, the Office rescheduled a second opinion evaluation with Dr. Hood for October 2, 2007. After appellant failed to appear for the October 2, 2007

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<sup>3</sup> The Board notes that the hearing representative stated that appellant missed the third scheduled examination, that of October 2, 2007, because he had car trouble. This, however, is the reason appellant gave for missing the first scheduled examination, that of August 7, 2007.

<sup>4</sup> 5 U.S.C. § 8123.

<sup>5</sup> *J.T.*, 59 ECAB \_\_\_\_ (Docket No. 07-1898, issued January 7, 2008).

<sup>6</sup> 20 C.F.R. § 10.320.

<sup>7</sup> 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; *Dana D. Hudson*, 57 ECAB 298 (2006).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000); *J.T.*, *supra* note 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Supra* note 7.

examination, on October 3, 2007 the Office finalized the suspension of wage-loss compensation based on appellant failing to appear at the October 2, 2007 examination.

While the Office provided appellant notice that he had 14 days to provide reasons for failing to appear at the September 11, 2007 examination, it did not provide him with similar rights following the missed examination on October 2, 2007. Rather, the Office finalized the suspension effective October 2, 2007. Office procedures clearly state that if a claimant does not report for a scheduled appointment, he or she should be asked to provide a written explanation within 14 days.<sup>11</sup> After missing the October 2, 2007 examination, appellant should have been provided proper notice and given 14 days to submit written reasons for his failure to appear. The Office erred in suspending his right to compensation benefits based on notice pertaining to the September 11, 2007 examination.<sup>12</sup>

### **CONCLUSION**

The Board finds that the Office did not properly suspended appellant's right to compensation benefits from October 2 to 7, 2007.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 12, 2008 be reversed.

Issued: January 5, 2010  
Washington, DC

Colleen Duffy Kiko, 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>11</sup> *Supra* note 8; see *Lynn C. Huber*, 54 ECAB 281 (2002).

<sup>12</sup> Based on the Board's finding, it need not address appellant's arguments on appeal.