

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

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**G.M., Appellant**

**and**

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

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**Docket No. 09-1835  
Issued: June 21, 2010**

*Appearances:*

*Alan J. Shapiro, 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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 13, 2009 appellant filed a timely appeal from the May 4, 2009 merit decision of the Office of Workers' Compensation Programs suspending appellant's compensation. 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 compensation under 5 U.S.C. § 8123(d) for failing to attend a scheduled medical examination.

On appeal, appellant contends, *inter alia*, that the May 4, 2009 decision was untimely. She argued that the Office did not properly address the medical evidence, ignored other evidence and that the Office did not conduct the evaluation of her claim in a nonadversarial manner. Appellant also contends that the opinion of her physician should be entitled to decisive weight.

**FACTUAL HISTORY**

On August 5, 2008 appellant, then a 42-year-old letter carrier, filed an occupational disease claim alleging that, as a result of her federal duties in casing and pulling mail, she

suffered from lumbar radiculopathy, pain in her right leg and right foot possibly secondary to sympathetic hyperactivity; and facet joint arthropathy on the right side at level L4 and L5. The Office accepted appellant's claim for lumbar radiculopathy and L5-S1 herniated disc and paid compensation and medical benefits.<sup>1</sup>

By letter dated June 4, 2002, the Office referred appellant to Dr. John Dwyer, a Board-certified orthopedic surgeon, to resolve a conflict between appellant's treating physician, Dr. Samuel J. Chmell, a Board-certified orthopedic surgeon and the second opinion physician, Dr. Richard Sidell, a Board-certified orthopedic surgeon, with regard to appellant's "current medical status." In an opinion dated August 15, 2002, Dr. Dwyer noted that appellant had evidence of chronic low back pain syndrome without any evidence of neurologic deficit, and recommended that appellant be evaluated for return to her occupational duties as a postal worker. Appellant underwent additional impartial medical examinations to determine her ability to work and her ongoing restrictions with Dr. Spiros Stamelos, a Board-certified orthopedic surgeon, on January 29, 2004; Richard Lim, a Board-certified orthopedic surgeon, on October 2, 2004 and Dr. Curtis Whisler, a Board-certified orthopedic surgeon, on December 8, 2005.

By letter dated February 21, 2007, the Office informed appellant that a second opinion examination was necessary and would be scheduled. It informed appellant that her full cooperation with the examination was required or her right to compensation would be suspended until the refusal stopped. By letter dated March 1, 2007, the scheduling agency informed appellant that she had an appointment for a second opinion with Dr. S. Forman, an osteopath, on March 13, 2007 and informed appellant that she had the right to have a physician of her choice attend the examination. By letter dated March 6, 2007, appellant noted that she had a conflict and would be unable to attend this appointment. By letter to the Office dated March 7, 2007, she objected to the second opinion examination. Appellant alleged that she had examinations by multiple physicians and that she was being harassed by the Office. By letter dated March 14, 2007, the scheduling agency informed appellant that, due to her missed appointment, her appointment was now scheduled for April 10, 2007 with Dr. Forman. By letter dated March 15, 2007, the Office informed appellant that the appointment would be rescheduled and again advised her that, if she refused to submit to or obstructed the examination, her right to compensation would be suspended. By letter to the Office dated April 9, 2007, appellant stated that she would not attend the second opinion examination, as she concluded there was no legitimate reason for a "sixth second opinion." She stated that she was "through trying to reason with you" and "not going to jump through any more hoops." Appellant alleged that the Office was harassing her and that she had been denied the right to participate in the selection of the

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<sup>1</sup> This case has been before the Board previously. On August 30, 2006 the Office issued a schedule award for eight percent impairment of appellant's right lower extremity. An Office hearing representative affirmed the decision on April 30, 2007. Appellant appealed this decision to the Board, to which the Board assigned Docket No. 07-1778. At appellant's request, the Board dismissed the appeal by order dated August 16, 2007. *See* Docket No. 07-1778 (issued August 16, 2007). Ultimately, on May 30, 2008, the Office denied appellant's request for reconsideration of the merits and on September 15, 2008 denied appellant's request for review of the written record. Appellant again appealed to the Board. The Board assigned Docket No. 09-278. By decision dated September 22, 2009, the Board affirmed the Office's May 30 and September 15, 2008 decisions. *G.M.*, Docket No. 09-278 (issued September 22, 2009).

doctor. By letter dated April 10, 2007, the scheduling agency informed the Office that appellant did not show for the second appointment.

By decision dated April 10, 2007, the Office stated the proposed suspension of appellant's compensation was effective that date for failure to attend or obstruction of a medical examination required by the Office.<sup>2</sup>

On November 16, 2007 appellant requested reconsideration. She contended, *inter alia*, that the Office engaged in "doctor shopping" and that the Office should have given weight to the opinion of Dr. Chmell, her treating physician. Appellant also discussed the prior medical evidence of record, made numerous arguments considering the validity of each physician's opinion and challenged conclusions reached by the Office.

By decision dated May 4, 2009, the Office denied modification of the April 10, 2007 decision.

### **LEGAL PRECEDENT**

Section 8123 of the Federal Employees' Compensation Act authorizes the Office to require an employee to undergo a physical examination as it deems necessary.<sup>3</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 discretion of the Office.<sup>4</sup> The Office's federal regulations at section 10.320 provide that a claimant must submit to examination by a physician as often and at such times and places as the Office considers reasonably necessary.<sup>5</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 compensation is suspended until the refusal or obstruction ceases.<sup>6</sup> However, before the Office may invoke these provisions, the employee is provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.<sup>7</sup>

### **ANALYSIS**

The Office scheduled appellant for an appointment for a second opinion examination on March 13, 2007 with Dr. Forman, and when appellant noted a conflict with this date, the Office

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<sup>2</sup> Appellant appealed this decision to the Board, to which it assigned Docket No. 09-1777. By an order dated August 16, 2007, the Board dismissed the appeal at appellant's request. Docket No. 07-1777 (issued August 16, 2007).

<sup>3</sup> 5 U.S.C. §§ 8101-8193, 8123(a).

<sup>4</sup> *James C. Talbert*, 42 ECAB 974, 976 (1991).

<sup>5</sup> 20 C.F.R. § 10.323.

<sup>6</sup> 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323.

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

rescheduled the appointment for April 10, 2007. Appellant refused to submit to the examination. Her assertions that she was not required to attend the scheduled examination are incorrect. As noted, 5 U.S.C. § 8123(d) provides that an employee shall submit to an examination as frequently and at such times and places as may be reasonably required. The Office sought a second opinion to determine appellant's current medical status. It made a reasonable determination that a second opinion examination was necessary and advised appellant that she was required to attend. Contrary to appellant's allegation, requiring her to submit to reasonable medical evaluations does not indicate that the Office is breaching its duties to act in a nonadversarial fashion. Appellant did not provide a valid reason for not attending the examination. She may not decide whether the circumstances warrant a second opinion examination. There is no discretion for her to exercise in this matter.<sup>8</sup> Furthermore, as the issue is whether appellant's compensation was properly suspended for her failure to attend the second opinion examination, appellant's arguments with regard to the weighing of the medical evidence are not relevant. The Board also rejects appellant's argument that the May 4, 2009 decision was not timely. Although the Office did delay its decision by more than 90 days, any error made with regard to this delay was rendered moot by the fact that the Office did not deny appellant her right to a merit review; the Office reviewed appellants' case on the merits.

However, the Office did not provide appellant with the required 14-day opportunity to explain why she did not report.<sup>9</sup> Although appellant's earlier reasons for failure to attend the appointment may be without merit, this does not excuse the Office's failure to follow the requirement to provide appellant a proper notice of the proposed suspension of benefits. The decision of the Office suspending appellant's compensation must, therefore, be overturned and her compensation reinstated retroactively.

### **CONCLUSION**

The Board finds that the Office improperly suspended appellant's compensation benefits as it failed to give her proper notice.

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<sup>8</sup> See 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; *S.B.*, 58 ECAB 267 (2007).

<sup>9</sup> *Supra* note 6.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 4, 2009 is reversed.<sup>10</sup>

Issued: June 21, 2010  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>10</sup> In light of the disposition of the case, it is not necessary to address appellant's contentions raised on appeal.