



benefits did not constitute an abuse of discretion.<sup>1</sup> The law and facts of the previous Board decision are incorporated herein by reference. Thereafter, appellant continued to receive compensation on the periodic rolls.

The Office continued to develop the claim, and by letter dated January 17, 2008, notified appellant that there was no current medical evidence to establish entitlement to continuing compensation and asked that she provide a detailed narrative medical report. Appellant did not submit the requested medical report, and in September 2008, the Office informed her that a second opinion evaluation was needed to address whether any or all of her accepted employment injuries had resolved and, if not, whether she could return to work in a limited-duty capacity. On October 31, 2008 the Office referred her to Dr. Raymond Fletcher, a Board-certified orthopedic surgeon, for a second opinion evaluation. The appointment was cancelled,<sup>2</sup> and on November 13, 2008, Medical Consultants Network (MCN), the contract medical appointment scheduler, notified appellant that an appointment had been made for an evaluation by Dr. Charlton Barnes, also Board-certified in orthopedic surgery, at 4:00 p.m., on December 10, 2008, in Pascagoula, Mississippi.

On December 4, 2008 appellant telephoned the Office, stating that she could not attend the scheduled appointment because she was physically unable to drive. The Office explained that transportation could be provided, but she stated that she would not attend the appointment. It informed her that, if she changed her mind, transportation could be provided. On December 11, 2008 MCN informed the Office that appellant did not attend the appointment scheduled for December 10, 2008.

On December 12, 2008 the Office proposed to suspend appellant's compensation benefits on the grounds that she failed to appear for the examination scheduled for December 10, 2008 with Dr. Barnes. Appellant was informed of the penalty provision of section 8123(d) of the Federal Employees' Compensation Act<sup>3</sup> and was given 14 days to provide in writing good cause for her failure to appear. She did not respond in writing.<sup>4</sup>

By decision dated December 30, 2008, the Office finalized the proposed termination. It noted that appellant did not attend the appointment scheduled for December 10, 2008 and did not provide an explanation for her failure to attend. In a December 31, 2008 letter, appellant

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<sup>1</sup> Docket No. 92-2283 (issued July 31, 1995). On December 6, 1984 appellant sustained employment-related neck and back injuries when a chair was pulled out as she was trying to sit. The claim was accepted for contusion to the lower back, cervical and lumbar sprains and cervical disc syndrome at C4-5 for which she had surgery on May 7, 1987. Appellant was placed on the periodic compensation rolls in 1985.

<sup>2</sup> Appellant had seen Dr. Fletcher for a second opinion evaluation on April 30, 2003. In June 2003 she called both the Office and the physician's office, stating that she was not pleased with his report. In November 2008 appellant called the appointment scheduler, threatening to sue for the referral to Dr. Fletcher. The appointment was then cancelled.

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> Appellant telephoned the Office on December 19, 2008. The call was returned on three occasions but there was no answer. Appellant called again on December 29, 2008, stating that she would respond to the December 12, 2008 letter.

requested 60 days to provide medical information and stated that she would have had to ride a bus to the scheduled appointment. She also stated that she had seen physicians on December 20 and 22, 2008 for high blood pressure. Appellant submitted reports dated June 30 and July 26, 2006 from Board-certified internists, Dr. J. Donald Kirby and Dr. Gary M. Rich, respectively, advising that she had been treated for six years for multiple medical problems and an employing establishment memorandum dated December 20, 1984 regarding possible exposure to formaldehyde. On January 20, 2009 she requested a hearing.<sup>5</sup> In a February 28, 2009 report, Dr. Julia Dannelley, a Board-certified internist, advised that appellant was under her care for complications of cirrhosis of the liver and hypertension. She stated that appellant had not been able to travel outside of Mobile recently and so could not make it to her workers' compensation appointment.

At the hearing, held telephonically on June 10, 2009, appellant testified that she called MCN on December 5, 2008 to cancel the appointment because she could not travel due to poor health and talked with MCN again on December 8, 2008. The hearing representative instructed appellant to provide records regarding the telephone calls to MCN and informed her of her responsibilities regarding resumption of compensation. The hearing representative also informed appellant that she needed to provide a medical report explaining why she was so ill in December 2008 that she could not travel when she would be furnished transportation to the appointment and why she continued to be medically unable to travel. Appellant stated that she would rather sue in federal court than comply.

Appellant submitted nothing further, and by decision dated September 29, 2009, the Office hearing representative affirmed the December 30, 2008 decision.

### **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>6</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>7</sup> The Office's regulations at section 10.320 provide that a claimant must submit to examination by a qualified physician as often and at such times and places as the Office considers reasonably necessary.<sup>8</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>9</sup> Office procedures provide that before the Office may invoke these

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<sup>5</sup> On February 6 and 10, 2009 appellant telephoned the Office. On each date she was informed that the suspension would be reversed when she indicated, in writing, a willingness to appear for a second opinion evaluation. Appellant was also informed that transportation would be provided.

<sup>6</sup> 5 U.S.C. § 8123.

<sup>7</sup> *J.T.*, 59 ECAB 293 (2008).

<sup>8</sup> 20 C.F.R. § 10.320.

<sup>9</sup> 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; *Dana D. Hudson*, 57 ECAB 298 (2006).

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>10</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>11</sup>

### ANALYSIS

The Board finds that appellant refused to submit to the scheduled December 10, 2008 second opinion examination with Dr. Barnes within the meaning of section 8123 of the Act. The Office directed appellant to attend a second opinion evaluation with Dr. Barnes, a Board-certified orthopedic surgeon.

On November 13, 2008 appellant was referred to Dr. Barnes for a second opinion evaluation, scheduled at 4:00 p.m. on December 10, 2008.

Appellant did not attend the December 10, 2008 appointment, and in a December 12, 2008 notice, the Office afforded her 14 days to provide good cause in writing for her failure to attend the scheduled examination. She was advised of the penalty provision of section 8123(d) of the Act for failure to attend such an examination. Although appellant telephoned the Office, she did not provide an explanation in writing or submit any evidence addressing why she did not appear for the scheduled December 10, 2008 examination.

The Board has recognized the Office's responsibility in developing claims.<sup>12</sup> Section 8123 authorizes it to require an employee, who claims disability as a result of federal employment, to undergo a physical examination as the Office deems necessary. 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. The only limitation on this authority is that of reasonableness.<sup>13</sup> The referral to an appropriate specialist in appellant's area at the Office's expense cannot be considered unreasonable. In this case, the Office clearly acted within its discretion by referring appellant for a second opinion examination to assess her employment-related condition. When appellant failed to attend, the Office properly advised her of its intention to suspend compensation benefits. She did not respond in writing to the notice of proposed suspension or otherwise provide reasons for not attending the examination.

After the Office's December 30, 2008 decision suspending appellant's right to compensation, she requested 60 days to provide additional medical information and submit additional evidence. The 1984 employing establishment memorandum and the 2006 medical reports are irrelevant as to why she failed to appear for the scheduled examination in

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000); *J.T.*, *supra* note 7.

<sup>11</sup> *Id.*

<sup>12</sup> *Scott R. Walsh*, 56 ECAB 353 (2005).

<sup>13</sup> 20 C.F.R. § 10.320; *see J.T.*, *supra* note 7.

December 2008. Dr. Dannelley's report is also insufficient to establish that appellant was unable to attend the December 10, 2008 examination. While she generally advised in her February 28, 2009 report that appellant was under her care for complications of cirrhosis of the liver and hypertension and had not been able to travel outside Mobile recently, she did not provide an explanation as to why appellant was medically unable to travel on December 10, 2008, when transportation would have been provided.

Appellant testified at the hearing that she called MCN to cancel the appointment and could not travel due to poor health. The hearing representative requested that she submit documentation of the telephone calls and a medical report specifically addressing her condition at that time. No responsive evidence was received prior to issuance of the hearing representative's decision on September 29, 2009. The Board thus finds that the Office properly suspended benefits for not attending the scheduled medical examination.<sup>14</sup>

### CONCLUSION

The Board finds that the Office properly suspended appellant's compensation benefits on December 30, 2008 as she failed to attend a scheduled medical examination without showing good cause for her refusal.

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<sup>14</sup> *J.T., supra* note 7.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 29, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: February 22, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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