



## **FACTUAL HISTORY**

On May 28, 1999 appellant, then a 53-year-old mail handler, filed an occupational disease claim (Form CA-2) for lower back pain and radiculopathy. He claimed that he felt pain in his lower back while pushing overloaded postal containers (or “postcons”) at work. Appellant related that since 1994 his workload and the weight of the equipment he used had increased. He did not stop work.

OWCP, by development letter dated July 23, 1999, informed appellant of the deficiencies in his claim and afforded him 30 days to submit additional and factual and medical evidence. Appellant did not respond.

In an August 31, 1999 decision, OWCP denied appellant’s occupational disease claim, finding that the evidence of record was insufficient to establish that factors of his federal employment caused or contributed to his claimed medical condition. It noted that he did not respond to its July 23, 1999 development letter.

On August 30, 2000 appellant requested reconsideration and submitted additional factual and medical evidence in support of his claim.

By decision dated November 24, 2000, OWCP modified its August 31, 1999 decision, finding that appellant had established the claimed employment factors, but denied his occupational disease claim as the medical evidence of record failed to establish causal relationship between those factors and his diagnosed lumbar radiculopathy.

On October 26, 2001 appellant, through counsel, requested reconsideration and submitted medical evidence which indicated that he had lumbar radiculopathy due to his work duties.

In a January 22, 2002 decision, OWCP vacated the November 24, 2000 decision and accepted appellant’s claim for lumbosacral radiculopathy. It paid him disability compensation on the periodic rolls beginning June 16, 2002.

In a December 7, 2016 letter, OWCP informed appellant that there was no current medical evidence in the case file to establish his entitlement to continuing compensation benefits. It requested that he submit a current medical report from an attending physician addressing his employment-related residuals and disability. OWCP also requested that the physician complete an accompanying work capacity evaluation (OWCP-5c form), indicating whether appellant was able to return to work. Appellant was afforded 30 days to submit the requested information.

By letter dated December 27, 2016, OWCP referred appellant, together with a statement of accepted facts, the medical record, and a list of questions, to Dr. Timothy J. Henderson, an orthopedic surgeon, for a second opinion evaluation. It advised that an appointment had been scheduled for January 10, 2017 at 10:00 a.m. with Dr. Henderson. Appellant was further advised that, if he refused or obstructed the examination, his compensation could be suspended under 5 U.S.C. § 8123(d).

In a January 6, 2017 statement, appellant claimed that he was unable to respond to OWCP’s December 7, 2016 development letter within the allotted time period due to an acute stroke he had on August 27, 2016. He requested an additional week to submit the requested information. In

support of his request, appellant submitted a September 1, 2016 medical record from Mt. Sinai West Hospital which indicated that he was leaving the hospital against the medical advice of Dr. Leonard Girardi, a Board-certified thoracic surgeon.

On January 11, 2017 OWCP proposed to suspend appellant's compensation benefits pursuant to section 8123(d) of FECA for failure to attend the January 10, 2017 examination with Dr. Henderson. Appellant was advised that he should provide a written explanation of his reasons, with substantive corroborating evidence, within 14 days for failing to attend the scheduled examination. He did not respond.

By decision dated January 31, 2017, OWCP finalized its proposed suspension, effective that same date. It noted that it had directed appellant on December 27, 2016 to report for the examination scheduled for January 10, 2017, but he did not attend the examination or show good cause for his failure to attend the examination as he failed to respond to the proposed suspension.

### **LEGAL PRECEDENT**

Section 8123 of FECA authorizes OWCP to require an employee, who claims disability as a result of federal employment, 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 province and discretion of OWCP.<sup>4</sup> OWCP regulations provide that a claimant must submit to an examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary.<sup>5</sup> Section 8123(d) of FECA and OWCP 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>6</sup> OWCP procedures provide that, before OWCP 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>7</sup> If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.<sup>8</sup>

### **ANALYSIS**

The Board finds that OWCP properly suspended appellant's compensation for failure to attend a medical examination on January 10, 2017.

OWCP scheduled a second opinion medical examination on January 10, 2017 with Dr. Henderson. Appellant did not appear for the scheduled examination. By decision dated

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<sup>3</sup> 5 U.S.C. § 8123.

<sup>4</sup> *J.T.*, 59 ECAB 293 (2008); *S.B.*, 58 ECAB 267 (2007); *James C. Talbert*, 42 ECAB 974 (1991).

<sup>5</sup> 20 C.F.R. § 10.320.

<sup>6</sup> *Supra* note 5; 20 C.F.R. § 10.323; *Dana D. Hudson*, 57 ECAB 298 (2006).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010).

<sup>8</sup> *Id.*

January 31, 2017, OWCP suspended his compensation benefits based on his failure to appear. 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 OWCP. The only limitation on OWCP's authority, with regard to instructing a claimant to undergo a medical examination, is that of reasonableness.<sup>9</sup> 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.<sup>10</sup>

On December 27, 2016 OWCP advised appellant that it would refer him for a second opinion medical examination and that, if he did not attend the appointment, his benefits could be suspended. Appellant was referred for a second opinion medical evaluation with Dr. Henderson and was advised of the need for the examination and the time and place for the scheduled appointment. While appellant related in his January 6, 2017 letter that he would require more time to respond to OWCP's December 27, 2016 letter due to his August 27, 2016 stroke, he did not allege that he could not attend the second opinion evaluation due to his medical condition. Appellant did not attend the scheduled January 10, 2017 appointment.

OWCP subsequently allowed appellant 14 days to provide reasons for failing to appear. Again, appellant did not respond. As appellant did not respond to the proposed suspension, he has not established good cause for refusing to undergo the January 10, 2017 examination.<sup>11</sup>

Thus, the Board finds that OWCP properly suspended his compensation benefits, effective January 31, 2017 pursuant to section 8123(d) of FECA.<sup>12</sup> When appellant actually reports for examination, payment retroactive to the date on which he agreed to attend the examination may be made.<sup>13</sup>

### CONCLUSION

The Board finds that OWCP properly suspended appellant's compensation benefits, effective January 31, 2017 pursuant to 5 U.S.C. § 8123(d) due to his failure to attend a scheduled medical examination.

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<sup>9</sup> *Lynn C. Huber*, 54 ECAB 281 (2002).

<sup>10</sup> *M.B.*, Docket No. 10-1755 (issued March 24, 2011).

<sup>11</sup> *L.B.*, Docket No. 14-2005 (issued January 28, 2015).

<sup>12</sup> *Supra* note 5; *S.B.*, 58 ECAB 267 (2007).

<sup>13</sup> *C.S.*, Docket No. 11-1366 (issued December 12, 2011); *E.B.*, 59 ECAB 298 (2008). When the claimant actually reports for examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made. *Supra* note 7 at Chapter 2.810.13(e) (September 2010).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 31, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 22, 2018  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board