

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANN SMITH and U.S. POSTAL SERVICE, MARINE MAIL
PROCESSING CENTER, Inglewood, Calif.

*Docket No. 97-1176; Submitted on the Record;
Issued April 7, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits under section 8123(d) of the Federal Employees' Compensation Act for the period September 11 to October 12, 1996, on the grounds that she refused to attend scheduled second opinion examinations on August 22 and 27, 1996.

The Office accepted that on March 6, 1990 appellant, then a 36-year-old distribution clerk, sustained contusions of both knees, acute cervical, thoracic and lumbar spine sprains, a mild concussion, major depression and an anxiety disorder when a table fell on her.¹ She stopped work on March 6, 1990 and did not return. She received appropriate compensation benefits.²

In a July 26, 1996 letter, sent to appellant at her address of record,³ the Office advised appellant of her referral to two second opinion physicians. The Office noted an August 22, 1996 appointment at 9:00 a.m. with Dr. Lewis Cozen, an orthopedist, and an August 27, 1996 appointment at 1:00 p.m. with Dr. Irving Berkovitz, a psychiatrist. The Office noted under section 8123(d) of the Act, "If an employee refuses to submit to or obstructs and examination, his right to compensation ... is suspended until the refusal or obstruction stops." Appellant was also advised that she must immediately advise the Office in writing if she failed to attend the

¹ The record indicates that on July 13, 1989 appellant sustained back and right leg injuries when a bonus belt cage fell on her right leg, striking her above the kneecap, and causing her to fall backwards onto a coworker trying to catch her. Any claim related to this incident is not before the Board on the present appeal. The record also indicates that appellant was in a motor vehicle accident on October 22, 1989. There is no indication of record that the motor vehicle accident was related in any way to appellant's federal employment.

² She sought orthopedic, neurologic and psychiatric treatment beginning in March 1990 continuing through 1996.

³ 1448 West 91 St., Los Angeles, California 90047.

examinations and that her benefits would be suspended if she failed to provide an acceptable reason for not appearing for the examination.

In an August 27, 1996 telephone memorandum, the Office noted contacting Dr. Cozen's and Dr. Berkowitz's offices and that appellant had not attended either appointment. Therefore, the Office sent appellant an August 27, 1996 letter, noting her failure to keep the two appointments as set forth in the July 26, 1996 referral letter. The Office again advised appellant of the provisions of section 8123(d). The Office instructed appellant to submit, within 14 days, a written explanation "for failing to keep the scheduled medical appointment," including her intentions regarding cooperating "in undergoing the necessary medical examination."

In an undated telephone memorandum, an Office claims examiner noted speaking with Bonnie Streeter, a nurse rehabilitation specialist assigned to appellant, who related that appellant was not receiving her mail.

In a September 5, 1996 letter, received by the Office on September 11, 1996, appellant stated that in response to the Office's August 27, 1996 letter, she did not receive the Office's July 26, 1996 letter, scheduling appointments "with Dr. Cozen or Berkovitz. [She] never heard of them until [she] received [the] letter dated August 27, 1996." Appellant also alleged that she did not receive an August 2, 1996 correspondence from the Office regarding her referral to Ms. Streeter until meeting her on September 3, 1996 when she accompanied her to a medical appointment. "Therefore, [she] could [not] keep a doctor's appointment that [she] was not aware of."⁴

By decision dated September 11, 1996, the Office suspended appellant's compensation benefits on the grounds that she did not attend the scheduled second opinion examinations with Dr. Berkovitz and Dr. Cozen and had not provided a written response to the August 27, 1996 letter as of September 11, 1996.

The Board finds that the Office improperly suspended appellant's compensation benefits under section 8123(d) of the Act for the period September 11 to October 12, 1996 on the grounds that she refused to attend scheduled second opinion examinations.

Section 8123(d) of the Act⁵ provides: "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops." There is no evidence in the present case, that appellant either refused to submit to or obstructed the examinations. Instead, appellant did not attend the examination because she was not informed that the examinations would take place. The evidence indicates that appellant did not receive the Office's July 26, 1996 letter, notifying her of the examinations due to a disruption in mail delivery. The record demonstrates that the Office was aware of this disruption. Appellant asserted that she did not attend the examinations as she was unaware they

⁴ On appeal appellant asserted that she obtained information from her elected representative regarding mail theft in appellant's delivery area at the time the July 26, 1996 letter, would have been delivered. She noted not receiving any mail for four days and that she notified her local post office.

⁵ 5 U.S.C. § 8123(d).

had been scheduled, and provided no indication that she would refuse to cooperate fully with any required examination. Under these circumstances, appellant cannot be held to have refused to undergo or obstructed the second opinion examinations when she was not aware where and when to report for the examinations.⁶

Therefore, the Office's September 11, 1996 decision, suspending appellant's compensation benefits was in error, as was finding that appellant did not respond to the August 27, 1996 letter. Therefore, the September 11, 1996 decision, must be reversed and the case returned to the Office for payment of appropriate compensation for the period September 11 to October 12, 1996.

The decision of the Office of Workers' Compensation Programs dated September 11, 1996 is hereby reversed.

Dated, Washington, D.C.
April 7, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁶ *Edward M. Beebe*, 34 ECAB 982 (1983).