

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DORIS E. WICKEY and U.S. POSTAL SERVICE,
POST OFFICE, Santa Fe, TX

*Docket No. 00-2035; Submitted on the Record;
Issued July 23, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

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 on the grounds that she refused to participate in an examination by a second opinion physician.

The Office accepted that appellant, then a 49-year-old rural route carrier, sustained bilateral de Quervain's tenosynovitis and left carpal tunnel syndrome in the performance of duty on or before March 3, 1999. The Office authorized a left carpal tunnel release performed April 21, 1999 by Dr. Keith Schauder, an attending orthopedic surgeon. Appellant received wage-loss compensation on the daily rolls for intermittent work absences.

Appellant returned to part-time limited-duty work on August 19, 1999 stopped work on October 12, 1999¹ returned to full-time work on October 19, 1999 with permanent restrictions, stopped work on November 5, 1999 and did not return. The record indicates that the Office accepted a recurrence of disability beginning November 8, 1999.² Appellant received wage-loss compensation benefits on the periodic rolls beginning November 8, 1999.

In a February 9, 2000 letter, the Office advised appellant that a second opinion examination had been scheduled with Dr. Stanley J. Hite, a neurosurgeon, on February 15, 2000 at 11:00 a.m. at 8303 Southwest Freeway, Suite 110 in Houston, Texas. Appellant was advised that if she did "not keep the scheduled appointment, [she] must immediately notify [her] claims

¹ In an October 1, 1999 report, Dr. Aaron M. Levine, an attending physiatrist of professorial rank, noted appellant's continuing symptoms of pain and paresthesias in the left hand, with electromyographic and nerve conduction velocity studies demonstrating persistent left carpal tunnel syndrome unrelieved by the April 1999 median nerve release.

² The record contains a January 24, 2000 decision denying appellant's claim for wage loss beginning November 6, 1999. However, this decision is noted as "not approved nor released."

examiner in writing of the reason,” and that if an adequate reason was not provided, her compensation benefits would be suspended under section 8123(d) of the Act. This letter was addressed to appellant at 6520 Burdock Road, Santa Fe, Texas 77510, her address of record.

In a February 16, 2000 letter, the Office stated that appellant did not report for the scheduled February 15, 2000 examination with Dr. Hite. The Office again advised appellant of her responsibilities under section 8123(d) of the Act and directed her to submit a written explanation as to why she failed to attend the appointment “within 14 days of the date of this letter.” The Office stated that if “good cause [was] not established, entitlement to compensation [would] be suspended in accordance with 5 U.S.C. § 8123(d) until [she] report[ed] for examination.”³ This letter was addressed to appellant at her address of record.

In a letter dated February 21, 2000 and date punched as received by the Office on February 24, 2000, appellant stated that she received a letter from the Office on February 18, 2000 and “that was the first [she had] heard about an appointment with” Dr. Hite. Appellant stated that “had [she] known of an appointment with this doctor [she] would have kept it!”⁴

The record contains a February 23, 2000 letter, referring appellant to a Dr. George Cox for a second opinion examination on March 22, 2000. The record demonstrates that she reported for the appointment as directed and cooperated in the examination.

By decision dated March 1, 2000, the Office suspended appellant’s compensation on the grounds that she failed to establish good cause for refusing to submit to the examination with Dr. Hite. The Office found that appellant was advised of the appointment and of the penalty provisions under section 8123 of the Act by February 9 and 16, 2000 letters, but that she failed either to attend the examination or to provide “acceptable written justification” for this failure within 14 days of issuance of the February 16, 2000 letter. The Office noted that no response had been received from appellant as of March 1, 2000.

The Board finds that the Office properly suspended appellant’s compensation benefits under section 8123(d) of the Act on the grounds that she refused to participate in an examination by a second opinion physician.

Section 8123(a) of the Act provides that an “employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably

³ In a February 18, 2000 file memorandum, the Office noted that Dr. Hite, a neurosurgeon, only agreed to answer questions regarding carpal tunnel syndrome, as he felt that de Quervain’s tenosynovitis was an orthopedic condition requiring an orthopedic specialist’s opinion. The Office noted that as appellant did not attend the scheduled appointment with Dr. Hite and that he stated that “even had she shown up, a full report would not have been generated since he would not address the de Quervain’s condition,” a new second opinion appointment would be arranged “with an orthopedic surgeon to hopefully get answers from one physician to all of the questions.”

⁴ In a May 11, 2000 letter submitted accompanying her request for appeal, appellant stated that she did not receive “the original letter telling [her] of the appointment,” “did receive the second letter saying [she] did n[o]t keep the appointment,” and noted that she did keep the appointment with Dr. Cox scheduled for March 22, 2000.

required.”⁵ Section 8123(d) of the Act provides that “[i]f an employee refuses to submit to or obstructs an examination, [her] right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues and the period of the refusal or obstruction is deducted from the period, for which compensation is payable to the employee.”⁶

Additionally, the Office’s Federal (FECA) Procedure Manual provides that if a “claimant does not report for a scheduled appointment, he or she should be asked in writing to provide an explanation within 14 days. If good cause is not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d) until the date on which the claimant agrees to attend the examination.”⁷

The Office’s February 9, 2000 letter, referring appellant for a second opinion evaluation scheduled for February 15, 2000 with Dr. Hite advised her that, pursuant to 5 U.S.C. § 8123(d), if she refused to submit to or obstructed the examination her right to compensation would be suspended until the refusal or obstruction stopped. Appellant did not report for the February 15, 2000 second opinion examination.

In an effort to establish good cause, appellant contended in a February 21, 2000 letter, that she did not keep the February 15, 2000 appointment with Dr. Hite, because she did not receive the Office’s February 9, 2000 letter advising her of the scheduled second opinion examination. However, the Board finds that this contention does not constitute good cause for appellant’s failure to appear.

It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.⁸ This presumption, commonly referred to as the “mailbox” rule, arises when it appears from the record that the notice was properly addressed and duly mailed.⁹ The record demonstrates that the February 9, 2000 letter, advising appellant of the February 15, 2000 appointment with Dr. Hite was mailed to appellant at 6520 Burdock Road, Santa Fe, Texas 77510, her address of record. Therefore, the presumption arises that she received it. Also, the Board notes that appellant received the Office’s February 16, 2000 letter and March 1, 2000 decision, addressed to her at the same address. There is no indication in the record that the Office failed to follow its customary procedures for mailing correspondence to appellant.

Thus, the Board finds that the Office properly suspended appellant’s compensation benefits effective February 15, 2000 under section 8123(d) of the Act as she failed to appear for

⁵ 5 U.S.C. § 8123(a).

⁶ 5 U.S.C. § 8123(d).

⁷ Federal (FECA) Procedure Manual, Part 2 -- *Claims, Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (November 1998).

⁸ *George F. Gidicsin*, 36 ECAB 175 (1984).

⁹ *Mike C. Geffre*, 44 ECAB 942 (1993); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

the second opinion examination scheduled for that date and did not provide good cause for such failure.

The Board further finds that the Office erroneously found in its March 1, 2000 decision, that appellant did not respond as of that date to the Office's February 16, 2000 letter. Appellant submitted a letter dated February 21, 2000, date punched received by the Office on February 24, 2000, contending that she did not receive the February 9, 2000 letter notifying her of the second opinion examination. While appellant is presumed to have received the Office's February 9, 2000 letter under the "mailbox rule" as set forth above, her February 21, 2000 letter is significant as appellant stated that she "would have kept" the appointment for the second opinion evaluation had she known about it.

Thus, any period of obstruction of the second opinion examination or refusal to participate ended no later than February 24, 2000, the date that appellant notified the Office that she would cooperate with a second opinion evaluation. The Board finds that appellant's period of obstruction or refusal and thus the suspension of her compensation, should have ended no later than February 23, 2000.

The March 1, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed as modified.

Dated, Washington, DC
July 23, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member