

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

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**L.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Little Rock, AR, Employer**

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**Docket No. 17-1891  
Issued: December 11, 2018**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 6, 2017 appellant filed a timely appeal from a March 20, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 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 OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d), effective June 20, 2016, due to her failure to attend a scheduled medical examination.

**FACTUAL HISTORY**

On January 14, 1988 appellant, then a 31-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained injuries to her upper extremities due to

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

factors of her federal employment. She noted that she first became aware of her claimed conditions and of their relationship to her employment on January 8, 1988.

OWCP accepted her claim for bilateral carpal tunnel syndrome, left elbow contusion, and chronic pain on January 3, 1989.

In an undated letter issued on December 16, 2014, OWCP advised appellant that an appointment had been scheduled for her in order to assess the nature of her condition, the extent of disability, and appropriate treatment. It explained that her entitlement to compensation could be suspended, pursuant to 5 U.S.C. § 8123(d), if she refused to submit to or obstructed an examination.

By letter dated July 29, 2015, mailed to appellant's address of record, OWCP referred appellant to Dr. Jeannie Andersson, a Board-certified orthopedic surgeon, for an appointment on August 13, 2015 at 4:10 p.m. Central Standard Time (CST), to determine the nature and extent of any residuals of her accepted work-related conditions, and whether she was capable of returning to full duty.

By letter dated August 14, 2015, a case coordinator notified OWCP that appellant had not kept her appointment with Dr. Andersson for August 13, 2015 at 4:10 p.m. CST.

On August 18, 2015 OWCP proposed to suspend appellant's compensation benefits pursuant to section 8123(d) of FECA for failure to attend the August 13, 2015 examination with Dr. Andersson. It advised appellant that she should provide a written explanation of her reasons, with substantive corroborating evidence, within 14 days for failing to attend the scheduled examination.

In a record of a telephone conversation dated August 21, 2015, appellant stated that she never received a letter regarding her appointment with Dr. Andersson. She further explained that she did not appreciate being referred to a physician, as she had already been approved for disability retirement. An OWCP representative explained that OWCP needed to obtain examination findings. Appellant reiterated that she did not think the examination was necessary.

By letter dated August 24, 2015, appellant reiterated that she never received notice of her appointment with Dr. Andersson.

In a record of a telephone conversation dated September 1, 2015, appellant stated that she would attend a second opinion examination if it was rescheduled. In another record of a telephone conversation of even date, an OWCP representative explained that nonattendance would not preclude appellant from electing Office of Personnel Management (OPM) retirement benefits.

By letter dated September 10, 2015, appellant stated that she would cooperate with a "so-called" second opinion examination "under duress." She reiterated that she had been approved for disability retirement, and that she wanted to obtain her payments from September 17, 2014 through present. Appellant stated that she would cooperate to the best of her ability.

By letter dated May 2, 2016, OWCP rescheduled appellant's second opinion examination. It advised appellant that an examination had been scheduled with Dr. Robert E. Holladay, IV, a

Board-certified orthopedic surgeon, located in Texarkana, TX, for May 25, 2016 at 10:00 a.m. CST. OWCP mailed the letter to appellant's address of record in Little Rock, Arkansas.

On May 23, 2016 appellant elected to receive OPM retirement benefits instead of benefits to which she may be entitled under FECA.

By letter dated May 27, 2016, a case coordinator notified OWCP that appellant had not attended the examination with Dr. Holladay on May 25, 2016 at 10:00 a.m. CST.

On June 2, 2016 OWCP again proposed to suspend appellant's compensation benefits pursuant to section 8123(d) of FECA due to failure to attend the May 25, 2016 examination with Dr. Holladay. It advised appellant that she should provide a written explanation of her reasons, with substantive corroborating evidence within 14 days for failing to attend the scheduled examination. She did not respond.

By decision dated June 20, 2016, OWCP finalized its proposed suspension, effective that same date. It noted that it had directed appellant on May 2, 2016 to report for the examination scheduled on May 25, 2016, but she did not attend the examination or show good cause for her failure to attend the examination, as she failed to respond to the proposed suspension.

In a letter dated June 24, 2016, appellant stated that she had not received the letter regarding her appointment with Dr. Holladay. She noted that she did not know about the examination until she was called two days before the date of examination. Appellant stated that she did not understand why she was being sent to another appointment, as she had retired. She accused OWCP of harassment, and claimed that she had undergone mediation related to this case. Appellant noted that she had not received the first letter and had no one to drive her to the appointment.

On July 9, 2016 appellant requested a telephonic hearing before an OWCP hearing representative. The hearing was held on February 14, 2017. During the hearing, appellant testified that she was having issues with mail delivery and that she never received the July 29, 2015 letter for her appointment with Dr. Holladay. She stated that she did not receive a copy of the letter until she called OWCP to find out why they were sending her to an out-of-state physician. The hearing representative explained to appellant that OWCP does not enter into mediation with claimants, and that OWCP referred to any additional medical opinions as "second opinions." She explained to appellant that one of the provisions for continuing to receive benefits under FECA was scheduling medical appointments and attending these appointments. The hearing representative asked appellant if she would be willing to attend an appointment if another second opinion examination was scheduled. Appellant responded that she would attend such an appointment if it were within the state, as she could not drive long distances by herself. The hearing representative noted that transportation could be arranged if it was medically necessary and asked again if appellant would attend an appointment if it were rescheduled, to which appellant replied, "Yeah, I hear you." Later, the hearing representative stated that appellant had indicated a willingness to attend another appointment.

By decision dated March 20, 2017, the hearing representative affirmed OWCP's decision dated June 20, 2016. She noted that appellant had avoided two second opinion appointments, the second of which appellant had previously agreed to attend only "under duress." She further noted

that appellant's testimony at the hearing was less than convincing as to her willingness to attend, but that she ultimately indicated that she would do so. The hearing representative noted that the case would be returned to the office for rescheduling of an appointment.

### **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>2</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>3</sup> OWCP's 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>4</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>5</sup> OWCP's 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>6</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>7</sup>

### **ANALYSIS**

The Board finds that OWCP properly suspended appellant's compensation for failure to attend a medical examination on May 25, 2016.

By letter dated December 16, 2014, OWCP notified appellant that she was being referred for a second opinion examination to determine the nature and extent of any residuals of her accepted injuries. It informed her of her obligations to attend and cooperate. The notice clearly explained that appellant's compensation benefits would be suspended for failure to report to or for obstruction of the examination. By letter dated May 2, 2016, OWCP advised her of the date and time of her appointment with Dr. Holladay. It also provided appellant with Dr. Holladay's address. As noted, she did not appear for the appointment, nor did she attempt to reschedule the appointment prior to the designated time. Appellant's refusal to submit to the medical examination warrants

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<sup>2</sup> 5 U.S.C. § 8123.

<sup>3</sup> *J.T.*, 59 ECAB 293 (2008); *S.B.*, 58 ECAB 267 (2007); *James C. Talbert*, 42 ECAB 974 (1991).

<sup>4</sup> 20 C.F.R. § 10.320.

<sup>5</sup> *Supra* note 2; 20 C.F.R. § 10.323; *Dana D. Hudson*, 57 ECAB 298 (2006).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010).

<sup>7</sup> *Id.*

suspension of entitlement to compensation unless she can establish good cause for her failure to report at the scheduled time.<sup>8</sup>

The Board finds that appellant did not establish good cause for her failure to report to the scheduled examination with Dr. Holladay. In a letter dated June 24, 2016, appellant claimed that she had not received the letter regarding her appointment with Dr. Holladay. She noted that she did not know about the examination until she was called two days before the date of examination. As such, appellant admitted that she knew about the appointment two days before the date, yet did not attempt to reschedule. Moreover, although appellant maintains that she did not receive the appointment letter, 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. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.<sup>9</sup> The mailbox rule provides that proper and timely mailing of a document raises a rebuttable presumption of receipt by the addressee. The Board has applied the mailbox rule when it is established that the mailing was in the ordinary course of the sender's business practices. It serves as a tool for determining in the face of inconclusive evidence, whether or not receipt has actually been accomplished. The mailbox rule is to facilitate the fact finder in determining whether receipt of a document has occurred. However, as a rebuttable presumption, receipt will not be assumed when there is evidence of nondelivery.<sup>10</sup> In the present case, OWCP's May 2, 2016 letter was mailed to appellant's address of record and there is no evidence of record that the mailing was undeliverable. As such, the Board finds that the May 2, 2016 correspondence was received by appellant.<sup>11</sup>

Appellant further argued that she was incapable of driving the approximately 148-mile distance to attend the examination with Dr. Holladay. The Board finds that appellant's objection to driving this distance to attend the appointment was not a valid excuse to refuse to attend the second opinion examination, as appellant did not submit any medical or factual evidence showing that she was incapable of attending the appointment by any other mode of transportation, or that she could not take breaks in her driving to the scheduled appointment.

The evidence of record is insufficient to establish that appellant had good cause for not attending the scheduled medical examination. The Board, therefore, finds that OWCP properly suspended her right to compensation benefits, effective June 20, 2016, pursuant to 5 U.S.C. § 8123(d).

### **CONCLUSION**

The Board finds that OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d), effective June 20, 2016 for failure to attend a medical examination.

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<sup>8</sup> *Supra* note 7 at Chapter 2.810.13(e) (September 2010); 20 C.F.R. § 10.320.

<sup>9</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>10</sup> *M.U.*, Docket No. 09-0526 (issued September 14, 2009).

<sup>11</sup> *C.B.*, Docket No. 16-1562 (issued December 22, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 20, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 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