

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

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C.T., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Elizabeth City, NC, Employer )

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**Docket No. 14-2014  
Issued: February 26, 2015**

*Appearances:*  
*Martin Kaplan, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 18, 2014 appellant, through her attorney, filed a timely appeal from a September 5, 2014 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 the claim.

**ISSUE**

The issue is whether OWCP properly reduced appellant's compensation effective June 16, 2014 based on its determination that the constructed position of secretary represented her wage-earning capacity.

On appeal appellant's counsel contends that OWCP erroneously applied the mailbox rule in deeming the proposed reduction of compensation letter properly delivered as it was sent without a zip code and was never received in his office.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## FACTUAL HISTORY

On May 23, 2011 appellant, then a 40-year-old temporary employee, filed an occupational disease claim alleging a stress fracture to her right heel due to excessive walking. She reported her right foot began hurting approximately five/six months ago. Appellant related that the stress fracture resulted from walking on the right side of her foot to keep pressure off the heel. OWCP accepted the claim for a right medial malleolus fracture and right plantar fibromatosis and paid compensation benefits. Appellant stopped working on October 3, 2011 and was eventually placed on the periodic compensation rolls for total disability resulting from this injury.

Appellant was initially treated by Dr. Mark Knable, an orthopedic surgeon, on May 20, 2011 and Dr. David Cho, a podiatrist, since October 10, 2011. On August 28, 2012 Dr. Cho performed right plantar fasciotomy. In his December 28, 2012 report, he found appellant had reached maximum medical improvement and provided sedentary work restrictions with limitations on walking, standing, and climbing to one hour a day, and no lifting more than 10 pounds.

In October 2012 appellant was referred for vocational rehabilitation services. On May 17, 2013 the vocational rehabilitation counselor reported that, based on appellant's restrictions, transferable skills, and educational accomplishments, she would be a candidate for direct placement as the employing establishment did not have a sedentary job that met her restriction.

Dr. Cho advised on July 12, 2013 that appellant could not push, lift, pull, or carry anything above five pounds, she was not able to walk or stand for more than 30 minutes each shift, and she was to elevate her foot as needed.

On July 21, 2013 the rehabilitation counselor identified the positions of secretary, Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 201.362.030 and receptionist, DOT No. 237.367.038 as being medically and vocationally suitable for appellant. He further indicated that the positions were reasonably available in her commuting area. The secretary position was described as sedentary, which was defined as lifting 10 pounds occasionally, sitting majority of the time with occasional walking and standing and negligible amount of force required to lift, carry, push, pull, or otherwise move objects.

In a July 24, 2013 letter, OWCP advised appellant that the positions of secretary and receptionist were suitable to her restrictions. Appellant was advised that she would receive 90 days of placement assistance to help her locate work in the position, provided that she cooperated with such effort. Further she was advised that her wage-loss compensation benefits would be reduced based upon the salary of the selected position at the end of the 90-day placement assistance period.

On October 3, 2013 OWCP referred appellant to Dr. Edward W. Gold, a Board-certified orthopedic surgeon, for a second opinion examination and a determination as to the nature and extent of her injury-related disability. In an October 21, 2013 report, Dr. Gold noted the history of injury, appellant's prior medical treatment, and that she had not worked since October 2011.

He provided examination findings, including discomfort and tenderness to palpation at the posterior aspect of the medial instep with no deformity or swelling in the foot. Dr. Gold indicated that appellant had adequate range of motion in the right ankle and toes, no pain or laxity to stress of the ankle, and normal sensation with good pedal pulses, and capillary refill. An impression of stress fracture right calcaneus, plantar fasciotomy right foot and chronic plantar heel pain was provided. Dr. Gold opined that appellant was able to return to work as a letter carrier with restrictions of no standing or walking more than three hours a day with lifting no more than 25 pounds.

In a November 5, 2013 memorandum, a claims examiner determined that Dr. Gold's second opinion represented the weight of the medical evidence with regard to work tolerance limitations.

On November 7, 2013 OWCP indicated that vocational rehabilitation assistance would resume for 90 days beginning November 15, 2013. It noted that, prior to appellant's clarification of her work tolerance limitations, a viable rehabilitation plan was approved for placement in employment as a receptionist (DOT No. 237.367-038 and secretary (DOT No. 201.362-030). OWCP advised that those goals remained within the work tolerance limitations as indicated by Dr. Gold, whose opinion bears the weight of the medical evidence with regard to work tolerance limitations. OWCP requested that the vocational rehabilitation counselor develop a plan for reemployment in those positions during a 90-day period.

In a December 14, 2013 report, the vocational rehabilitation counselor noted that OWCP accepted the restrictions provided by Dr. Gold.

Dr. Cho continued to submit treatment reports indicating appellant was to avoid walking barefoot and to continue daily stretching exercises. He noted that appellant had developed chronic pain syndrome and was referred to pain management for evaluation and treatment.

In letters dated November 14, 2013 and January 15, 2014, appellant's attorney advised that his office was not notified of appellant's second opinion examination with Dr. Gold on October 21, 2013. He contended that she has been denied statutory rights and OWCP could not rely on this report to determine work tolerance limitations and deny benefits. Counsel requested, in his November 14, 2013 letter, that a copy of all correspondence to and from the second opinion physician, the statement of accepted facts, all medical documentation provided to Dr. Gold, the list of questions to be resolved, a copy of the doctor's report and a copy of the November 16, 2013 memorandum be sent to him. OWCP noted, in a December 23, 2013 letter, that he was copied, using his correct mail address, on the second opinion letter addressed to appellant. In his January 15, 2014 letter, appellant's attorney noted that his zip code was 27624, not 27627, and that some mail gets redirected to the correct address while other mail does not. He reiterated that he did not receive notice of the second opinion examination and, thus, OWCP could not rely on Dr. Gold's October 21, 2013 report for vocational rehabilitation purposes or to deny benefits.

A March 26, 2014 report from Comprehensive Rehabilitation and Pain Specialists, signed by a certified nurse practitioner, was provided. Chronic pain syndrome was diagnosed. An April 1, 2014 three-phase bone scintigraphy was also received.

In an April 23, 2014 report, the vocational rehabilitation counselor reported activities from April 17 through 23, 2014 and recommended the file for vocational rehabilitation be closed as it was beyond 90 days of job search with minimal participation from appellant. In an April 30, 2014 report, the vocational rehabilitation counselor noted placement services began on December 20, 2013 and ended on April 23, 2014. He reported that the position of receptionist and secretary remained vocationally and medically appropriate in relation to appellant's age, education, and experience. The vocational rehabilitation counselor further stated that the selected positions were considered to be in the sedentary category of work and were within the established work restrictions for the weight of the medical evidence of record. He also noted that based on the initial Labor Market Survey dated May 17, 2013 and supported by additional labor market research documented in his reports dated December 2013 through April 24, 2014, both targeted positions exist in sufficient numbers within appellant's commuting area. Range of salary from Labor Market Survey was \$9.50 to \$12.50, with entry pay at \$380.00 per week.

OWCP closed vocational rehabilitation services on April 30, 2014, noting suitable positions had been selected, but appellant was not placed. All targeted positions remained vocationally and medically appropriate and reasonably available in appellant's commuting area.

On May 2, 2014 OWCP issued a notice of proposed reduction of compensation finding that appellant was no longer totally disabled and had the capacity to earn the wages of a secretary at the rate of \$380.00 per week. It noted that the physical requirements of the selected position did not exceed the work restrictions as provided by Dr. Gold. Thus, OWCP concluded that the position was medically suitable. It further noted that in his April 23, 2014 report appellant's vocational rehabilitation counselor documented that the position remained vocationally suitable and was reasonably available in her commuting area. Thus, OWCP found that the position was vocationally suitable and fairly and reasonably represented her wage-earning capacity. It determined that appellant's compensation would be reduced to \$1,378.00 every four weeks. Appellant was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction.

Following the proposed reduction, OWCP received physical therapy reports dated April 28 and May 14, 2014 and a previously submitted a March 26, 2014 report from Dr. Cho, which diagnosed chronic pain syndrome.

By decision dated June 16, 2014, OWCP finalized the reduction of appellant's compensation benefits effective that date in accordance with the May 2, 2014 proposed notice of proposed reduction of compensation. It found that she was physically and vocationally capable of earning the wages of a secretary and the position was reasonably available in her commuting area.

In a letter dated June 19, 2014, which OWCP received the same day, appellant's attorney argued that the proposed reduction notice dated May 2, 2014 was not properly addressed as it was sent without a zip code and he did not receive notice of the proposed determination. He contended that appellant was deprived of her rights and the termination decision must be vacated and OWCP must reissue the proposed LWEC decision properly addressed to his office. Counsel referenced his January 15, 2014 letter previously of record and stated that his assertion regarding the second opinion examination had not been addressed in either the proposed or final decision.

Additional evidence received included a July 16, 2014 laboratory report; physical therapy reports dated May 22 through July 10, 2014; encounter reports from Comprehensive Rehabilitation and Pain Specialists from Jessica Gore, D.O., an osteopath, dated April 23, May 21, June 4 and July 15, 2014 and an undated OWCP-5c completed by Dr. Gore noting appellant was new to the practice and unable to stand or walk for more than 30 minutes and could push, pull, lift, squat, kneel, or climb no more than five pounds in one hour. It further noted that appellant was on medications, which may cause drowsiness.

By decision dated September 5, 2014, OWCP denied modification of its June 16, 2014 decision. It noted that while the attorney's zip code was missing on the May 2, 2014 proposed reduction notice, there was no evidence that mail was returned and, thus, OWCP would presume receipt under the mailbox rule.

### **LEGAL PRECEDENT**

Section 8123(a) of FECA<sup>2</sup> states, in pertinent part:

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 required. The employee may have a physician designated and paid by him present to participate in the examination.

OWCP procedures provide:

*Information Sent to Claimant and the Properly Authorized Designated Representative.* Once the appointment has been scheduled, the claimant/representative should be notified. See *Donald J. Knight*, 47 ECAB 706 (1996) (where ECAB held that OWCP's failure to notify appellant's authorized representative of the referral to a second opinion physician effectively denied appellant's statutory right to have a physician designated and paid by him to be present and participate in the examination pursuant to 5 U.S.C. § 8123). This may be done by OWCP, or by the contractor on OWCP's behalf. The claimant and his or her designated representative should be provided with the following information:

(1) *The name and address of the physician* to whom he or she is being referred, as well as the date and time of the appointment.

(2) *The claimant's right*, under section 5 U.S.C. § 8123 of FECA, to have a physician paid by him or her present during a second opinion examination. 20 C.F.R. § 10.320; *Esther Velasquez*, 45 ECAB 249 (1993) (ECAB held that by misinforming the claimant of the purpose of the medical referral, OWCP effectively denied her the right granted by FECA, and that OWCP was precluded from relying on the resulting medical

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<sup>2</sup> 5 U.S.C. § 8123(a).

report “before affording appellant the opportunity to exercise this statutory right.”)

Because a claimant has a right under the statute to have such a physician attend a second opinion examination, OWCP may not re-characterize an impartial examination as a second opinion examination in the event it determines there was no conflict in the medical evidence; however, the report need not be excluded and may be considered for its intrinsic value.

(3) *A warning that benefits may be suspended* pursuant to 5 U.S.C. 8123(d) for failure to report for examination.

(4) *Information on how to claim travel expenses.*<sup>3</sup>

OWCP regulations provide that a properly appointed representative who is recognized by OWCP may make a request or give direction to OWCP regarding the claims process, including a hearing. This authority includes presenting or eliciting evidence, making arguments on the facts or the law and obtaining information from the case file, to the same extent as the claimant.<sup>4</sup> Any notice requirement contained in the regulations or FECA is fully satisfied if served on the representative and has the same force and effect as if sent to the claimant.<sup>5</sup> The Board has held that decisions under FECA are not deemed to have been properly issued unless both appellant and the authorized representative have been sent copies of the decision.<sup>6</sup>

### ANALYSIS

OWCP accepted appellant’s claim for right medial malleolus fracture and right plantar fibromatosis and paid appropriate benefits. Appellant was placed on the periodic compensation rolls for total disability resulting from this injury and eventually referred for vocational rehabilitation services and direct placement as the employing establishment did not have a position available within her restrictions. OWCP reviewed the medical evidence and determined that a second opinion was necessary for a determination as to the nature and extent of her injury-related disability. Consequently, OWCP referred appellant to Dr. Gold, a Board-certified orthopedic surgeon, and accepted the restrictions rendered by Dr. Gold in determining that the constructed position of secretary represented her wage-earning capacity. It reduced appellant’s compensation effective June 16, 2014 based on its determination that the constructed position of secretary represented her wage-earning capacity.

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<sup>3</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.3(d) (July 2011).

<sup>4</sup> 20 C.F.R. § 10.700(c).

<sup>5</sup> *See also Sara K. Pearce*, 51 ECAB 517 (2000).

<sup>6</sup> *See Travis L. Chambers*, 55 ECAB 138 (2003). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Communications*, Chapter 2.300.4(e) (February 2000).

On appeal and before OWCP, appellant's counsel contends that he did not receive notice of Dr. Gold's second opinion referral or notice of OWCP's May 2, 2014 proposed notice of reduction of compensation. He further argues that OWCP erroneously utilized the mailbox rule in determining that he received such letters.

Under the mailbox rule, it is presumed, in the absence of evidence to the contrary, that a notice properly mailed to an individual in the ordinary course of business was received by that individual. This presumption arises where it appears from the record that the notice was properly addressed and duly mailed. The presumption of receipt does not apply where a notice is sent to an incorrect address.<sup>7</sup>

With regard to receipt of the letter notifying appellant that a second opinion evaluation was needed, counsel argued that it was addressed to the wrong zip code. He asserted that his zip code was 27624, not 27627 as noted in OWCP's letter, and he never received notification that a second opinion evaluation was needed in his office. As the wrong zip code was utilized, counsel was not properly notified of the second opinion examination.<sup>8</sup>

The Board has previously noted that if a representative had actual knowledge of a scheduled examination, lack of proper notification is harmless error.<sup>9</sup> Dr. Gold conducted a second opinion evaluation on October 21, 2013. By letter dated November 14, 2013, counsel requested additional information pertaining to appellant's October 21, 2013 medical examination. His request included the demand that copies of all correspondence to and from Dr. Gold, the statement of accepted facts, all medical documentation provided to Dr. Gold, the list of questions to be resolved, and a copy of Dr. Gold's report be provided to him. This request for information shows that counsel was not actually aware of the second opinion examination, prior to the examination, nor did he have access to the details regarding the nature of the examination or the questions posed to the doctor. The Board thus finds that appellant was denied the opportunity for counsel's assistance in exercising her rights, including the rights provided under section 10.320 of OWCP's regulations.<sup>10</sup> The Board finds that OWCP's failure to provide proper notice of the October 21, 2013 second opinion examination constitutes error.

OWCP's referral of appellant to Dr. Gold was improper as counsel never received notice of such referral. It is therefore precluded from relying on the opinion of Dr. Gold. The case will be remanded to OWCP for referral of appellant for another second opinion examination with

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<sup>7</sup> See *M.U.*, Docket No. 09-526 (issued September 14, 2009).

<sup>8</sup> See *Donald J. Knight*, 47 ECAB 706 (1996); *Henry J. Smith, Jr.*, 43 ECAB 524 (1992), *reaff'd on recon.*, 43 ECAB 892 (1992).

<sup>9</sup> See *David Alan Patrick*, 46 ECAB 1020 (1995).

<sup>10</sup> Section 10.320 provides that an employee may have a qualified physician, paid by him or her, present at a second opinion examination. 20 C.F.R. § 10.320.

appropriate notification to appellant and her counsel, consistent with OWCP procedures, which will afford her the opportunity to have her physician participate in the examination.<sup>11</sup>

**CONCLUSION**

The Board finds that this case is not in posture for decision regarding whether appellant properly reduced appellant's compensation effective June 16, 2014 based on its determination that the constructed position of secretary represented her wage-earning capacity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 5, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision.

Issued: February 26, 2015  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>11</sup> See *Donald J. Knight*, 47 ECAB 706 (1996) (where the Board found that OWCP failed to notify appellant's authorized representative of the referral to a second opinion physician effectively denied appellant's statutory right to have a physician designated and paid by him to be present and participate in the examination pursuant to 5 U.S.C. § 8123).