



On May 8, 2003 the Office notified appellant, through its scheduling agent, The Ricwel Corporation, that she had an appointment with Dr. L. Cass Terry on May 28, 2003.<sup>1</sup> Ricwel advised:

“Please contact the undersigned at 1-800-433-5012 extension 134 immediately if for some reason this appointment must be rescheduled or you are unable to attend as scheduled. Please understand that we are not the decision maker concerning any change of appointment, however, we will immediately get in touch with the U.S. Department of Labor concerning your request.”

The record indicates that on or about May 14, 2003 appellant contacted Ricwel and advised that the appointment was not going to work because it was on her day off, it was around a holiday weekend and it was not convenient for her. Ricwel contacted the Office. The Office, in turn, advised Ricwel that the examination would not be rescheduled: “If she does not attend, this Office will proceed with its rules for sanction.”

On May 29, 2003, one day after the scheduled appointment, Ricwel notified the Office that appellant was a “no show.” On June 5, 2003 the Office asked appellant to submit a letter explaining the reason she failed to appear for her scheduled examination on May 28, 2003. The Office informed appellant of the sanction under 5 U.S.C. § 8123(d) and advised that it would impose this sanction if she failed to respond within 14 days or her reasons for not appearing were not justified.

In a decision dated June 23, 2003, the Office suspended appellant’s compensation effective that day for refusing to submit to or obstructing an examination. The Office noted that it gave appellant 14 days to show good cause but “no reply from you has been received to date.”

Appellant requested an oral hearing before an Office hearing representative, which was later changed to a review of the written record. She argued that she did respond to the Office’s June 5, 2003 request by certified mail on June 18, 2003. She submitted a copy of a letter dated June 18, 2003, together with a copy of her certified mail receipt showing a postmark dated June 18, 2003. The letter explained that she did not fail to appear; rather she followed the procedure set out by Ricwel on May 8, 2003 to contact them immediately “if for some reason this appointment must be rescheduled or you are unable to attend as scheduled.” Appellant stated that she followed that procedure to the letter when she called to advise that she was unable to meet the appointment time. After mentioning that the appointment was on her weekend, she stated that she had two other medical appointments that day, which she kept: “One appointment was for me and one was to assist and help a friend who is seriously ill. This was the prime reason for the cancellation.”

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<sup>1</sup> This was a rescheduled appointment originally set for April 25, 2003. In making the original appointment, the Office notified appellant of her responsibilities with respect to the medical examination and warned that benefits may be suspended under 5 U.S.C. § 8123(d) for failure to report for examination.

Appellant submitted a letter from Diane Meyer, a secretary, St. Luke's South Shore:

"To Whom It May Concern--

"I am writing this letter to tell you that [appellant] was with Wayne Jacobi on May 28, 2003. They were here to see Dr. Howard and also to receive a treatment. They were here a total of 5 [to] 6 hours."

In a decision dated July 27, 2004, the Office hearing representative affirmed the suspension of appellant's compensation. The hearing representative noted: "Although the claimant indicates that she had a prior medical appointment scheduled for the same day as the second opinion exam[ination], she failed to provide evidence to support that she actually had an appointment on that date."

### **LEGAL PRECEDENT**

Section 8123 of the Federal Employees' Compensation 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 required.<sup>2</sup> If an employee refused to submit to or obstructs an examination, his or her right to compensation under the Act 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.<sup>3</sup>

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>4</sup>

### **ANALYSIS**

When Ricwel, the Office's scheduling agent, notified appellant that she had a medical appointment on May 28, 2003, it instructed her to call if the appointment had to be rescheduled or she was unable to attend. Ricwel made clear that it was not the decision maker concerning any change of appointment, but that it would immediately get in touch with the Office concerning her request.

Appellant followed the instructions given to her. She called Ricwel, spoke to the person who notified her of the May 28, 2003 appointment and advised that the appointment was not convenient for various reasons. Appellant complied with the instructions provided to cancel the appointment. The Office informed Ricwel that the appointment would remain as scheduled. However, neither Ricwel nor the Office notified appellant of this fact. The Office failed to notify appellant that her reasons for canceling the appointment were not valid. This left her no reason

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<sup>2</sup> 5 U.S.C. § 8123(a).

<sup>3</sup> *Id.* at § 8123(d).

<sup>4</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

to believe that she still had an appointment on May 28, 2003. It was only when she received the Office's June 5, 2003 letter asking her to explain her failure to appear that she learned the appointment was not canceled.

The fact that appellant did not keep this appointment is not evidence that she refused to submit to an examination under section 8123(d) of the Act. Had the Office or Ricwel informed her that she was still expected to appear for an examination on May 28, 2003, she might have kept the appointment.<sup>5</sup> By not informing her, the Office permitted her to believe that she had no appointment to keep. Under the circumstances, the Board finds it inequitable for the Office to sanction appellant for a situation that it was responsible for creating. The evidence in this case fails to establish that appellant refused to submit to an examination, the Board will reverse the Office's July 27, 2004 decision suspending her compensation under 5 U.S.C. § 8123(d).

### **CONCLUSION**

The Board finds that the Office did not meet its burden of proof to justify suspending appellant's compensation under 5 U.S.C. § 8123(d). The evidence does not establish that she refused to submit to an examination.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 27, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 14, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>5</sup> Appellant's objections to the scheduling date may not be used to justify sanctions under 5 U.S.C. § 8123(d). *See Leanna Garlington*, 37 ECAB 849 (1986) (the Office cannot suspend compensation if a claimant prospectively declares that she will not appear for the examination or makes statements that leads to the cancellation of the examination by the Office or the physician requested to perform the examination).