

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY L. DANBECK and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Jamaica, NY

*Docket No. 98-1323; Submitted on the Record;
Issued January 27, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly found that appellant abandoned his request for a hearing.

On August 30, 1994 the Office issued preliminary determinations that appellant had received overpayments in the amounts of \$446.62 and \$2,017.64 which arose because life insurance premiums were not deducted from his compensation payments. The Office also preliminarily found that appellant was without fault in the matter of the overpayments. By letter dated September 26, 1994, appellant requested a hearing. By decisions dated November 30, 1994, the Office refused to waive the overpayments of compensation.

In April 1997, the Office determined that appellant was entitled to a hearing. The Office refunded to appellant the overpayments in the amounts of \$446.62 and \$2,017.64. By letter dated October 18, 1997, the Office notified appellant that a hearing was scheduled for November 26, 1997. By decision dated December 10, 1997, the Office found that appellant had abandoned his request for a hearing, as he had not appeared for the scheduled hearing, had not presented a written request for postponement three days before the scheduled hearing, and had not shown good cause for not appearing within ten days after the scheduled hearing.

The Board finds that the Office properly determined that appellant abandoned his request for a hearing.

The Office's regulation on postponement or abandonment of hearings¹ states in pertinent part:

“(a) A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown.”

* * *

“(c) A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days ... shall constitute abandonment of the request for a hearing.”

In the present case, appellant requested a hearing following the Office's preliminary determinations that he received overpayments of compensation. By a notice dated October 18, 1997, addressed to appellant at 2501 E. Baseline Road, Phoenix, Arizona 85040, the Office advised appellant of the time, November 26, 1997 at 9:00 a.m., and the place of the hearing. Appellant did not request postponement at least three days prior to the date of the scheduled hearing, did not appear at the hearing, and did not request within ten days after the scheduled date of the hearing that another hearing be scheduled. Appellant's failure to appear or to make such requests constitutes abandonment of his request for a hearing.

The Office has the burden of proving that it mailed to a claimant a notice of a scheduled hearing. 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.² The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.³ In the present case, the record contains a copy of an October 18, 1997 notice of hearing properly addressed to appellant's last known address.

On appeal, appellant contends that he did not receive notice of the hearing scheduled from November 26, 1997 because he moved in March 1997. However, as the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision,⁴ the Board may not consider whether appellant's explanation, submitted for the first time on appeal, is sufficient to rebut the presumption of the “mailbox rule.”⁵ When the Office

¹ 20 C.F.R. § 10.137.

² *Michelle R. Littlejohn*, 42 ECAB 465 (1991).

³ *Larry L. Hill*, 42 ECAB 596 (1991).

⁴ 20 C.F.R. § 501.2(c).

⁵ *Clara T. Norga*, 46 ECAB 473 (1995).

issued its decision on December 10, 1997 that appellant abandoned his request for a hearing, the case record contained no explanation for appellant's failure to appear. The Office's December 10, 1997 decision, therefore, was proper.

The decision of the Office of Workers' Compensation Programs dated December 10, 1997 is affirmed.

Dated, Washington, D.C.
January 27, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member