

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN H. MURPHY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, New Orleans, LA

*Docket No. 02-173; Submitted on the Record;
Issued September 18, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in determining that appellant had abandoned his request for a hearing; (2) whether the Office properly denied waiver of an overpayment of compensation of \$4,101.32; and (3) whether the Office properly determined that appellant should repay the overpayment by deducting \$46.15 every four weeks from his continuing compensation.

Appellant's claim filed on April 14, 1992 after he stepped off a curb and twisted his right leg was accepted for a right knee meniscus tear and ankle strain. Appellant had a total knee replacement that later required revision in December 1994. He subsequently retired.

On March 15, 2001 the Office issued a preliminary notice of an overpayment of compensation of \$4,101.32, which occurred from July 6, 1995 through January 27, 2001, because no deductions were made for appellant's post-retirement life insurance. The Office found that appellant was at fault in creating the overpayment because he accepted compensation payments that he should have known were incorrect.

On April 10, 2001 appellant disagreed with the Office's finding of fault and requested a hearing. He argued that his benefit checks since September 1994 had been directly deposited into his bank and that he had never received any statement of deductions. The hearing was set for August 14, 2001 and a notice was sent to appellant at his address of record. Appellant failed to appear and the hearing representative decided that he had abandoned his request for a hearing.

On September 24, 2001 the hearing representative found that appellant was not at fault in creating the overpayment of \$4,101.32, but was not entitled to waiver of recovery of the overpayment because he had failed to furnish evidence supporting his statement of monthly income and expenses. The hearing representative set a repayment schedule of \$50.00 a month or \$46.15 every four weeks.

The Board finds that the Office acted within its discretion in determining that appellant abandoned his request for a prerecoupment hearing.

Section 8124(b) of the Federal Employees' Compensation Act¹ provides claimants under the Act a right to a hearing if they request a hearing within 30 days of the Office's decision. Section 10.137 of the Code of Federal Regulations previously set forth the criteria for abandonment of a request for a hearing:

“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. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant.”

* * *

“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, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing.”²

These regulations were revised, effective January 4, 1999 and now make no provision for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.³ Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.e of the procedure manual, dated January 1999, provides as follows:

“e. Abandonment of Hearing Requests

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

¹ 5 U.S.C. §§ 8101-8193.

² 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

³ 20 C.F.R. § 10.622(b) (1999).

“Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [district office]. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

“This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend.”⁴

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁵ The Office’s procedures, which require the Office to exercise its discretion to grant or deny a hearing request when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.⁶

Similarly, prerecoupment hearings fulfill the Office’s obligation to provide section 8124(b) rights under the Act. The implementing regulation, section 10.439,⁷ applies to overpayments and states that prerecoupment hearings shall be conducted in the same manner as other hearings in accordance with sections 10.615 through 10.622. Section 10.617 provides that the hearing representative retains complete discretion to set the time and place of the hearing and will mail a notice of the time and place of the oral hearing to the claimant and any representative at least 30 days before the scheduled date.⁸

In this case, appellant argued that he never received the hearing notice and was thus unaware that his requested hearing had been scheduled. Appellant requested a hearing by letter dated April 8, 2000, on stationary that contained his address: P.O. Box 3372, Cumming, Georgia, 30028. The Office H&R sent appellant a letter dated April 24, 2001, notifying him that his hearing request had been received and a letter dated June 22, 2001, scheduling the hearing for

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.e (January 1999).

⁵ *Bonnie Goodman*, 50 ECAB 139, 145 (1998).

⁶ *Martha A. McConnell*, 50 ECAB 129-30 (1998); *Michael J. Welsh*, 40 ECAB 994, 997 (1989).

⁷ 20 C.F.R. § 10.439.

⁸ 20 C.F.R. § 10.617(a).

August 14, 2001. On June 21, 2001 the Office sent appellant an earnings and employment form to be completed. All three letters were sent to the same post office box address. Appellant signed the required earnings and employment form on June 26, 2001 and returned it to the Office.

It is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by the individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.⁹

In this case, the Office mailed its notice of a hearing to appellant's long-time address of record well in advance of the scheduled hearing. Appellant has provided no evidence to rebut the presumption, known as the "mailbox rule," that a letter properly addressed and mailed in the course of business is presumed to have arrived at the mailing address. Further, he received the earnings and employment form mailed on June 21, 2001 as shown by the completed form in the record. Therefore, the Board concludes that appellant was presumed to have received timely notice of the hearing.

However, appellant failed to appear at the scheduled hearing on August 14, 2001. The record reveals no request by him for a postponement of the scheduled hearing, pursuant to section 10.622(b),¹⁰ or withdrawal of the hearing request, pursuant to section 10.622(a).¹¹ Nor did appellant notify the hearing representative in writing within 10 days of the scheduled hearing that he was unable to attend.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.¹² Here, the record contains no evidence that the Office abused its discretion in finding that appellant abandoned his request for a hearing.¹³

⁹ *Newton D. Lashmett*, 45 ECAB 181 (1993); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

¹⁰ 20 C.F.R. § 10.622(b).

¹¹ 20 C.F.R. § 10.622(a).

¹² *Linda J. Reeves*, 48 ECAB 373, 377 (1997).

¹³ See *Gustavo H. Mazon*, 49 ECAB 156, 161 (1997) (finding that the Office acted within its discretion in suspending appellant's compensation because he failed to keep medical appointments and offered no reasonable, credible explanation). Cf. *Charles R. Hibbs*, 43 ECAB 699, 701 (1992) (finding that Office's failure to consider a letter from appellant's attorney requesting a hearing constituted an abuse of discretion).

The Board also finds that the Office acted within its discretion in denying waiver of recovery of the overpayment.¹⁴

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁵ The only exception to this requirement must meet the tests set forth in section 8129(b): “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”¹⁶ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹⁷

In this case, appellant was without fault in creating the overpayment because he was unaware that deductions for his postretirement life insurance were not being made.

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under section 8129(b), as specified in section 10.436 provides:

“(a) The beneficiary from whom [the Office] seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and

“(b) The beneficiary’s assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.”¹⁸

Section 10.437 of the regulations covers the equity and good conscience standard and provides:

“(a) Recovery of an overpayment is considered against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.

¹⁴ The calculation of the \$4,101.32 overpayment was based on an annual salary of \$31,221.52. From July 6, 1995, when appellant retired, to April 24, 1999, the pertinent premium was \$26.52 every two weeks. From April 25, 1999 to January 27, 2001, when the proper deductions began, the premium was \$31.96. The number of days in the first period was 1,389, which was divided by 14; the result was multiplied by \$26.52, equaling \$2,631.16. That added to the amount for the second period, \$1,470.16, equals the overpayment.

¹⁵ 5 U.S.C. § 8129(a).

¹⁶ 5 U.S.C. § 8129(b).

¹⁷ *Anthony V. Knox*, 50 ECAB 402, 409 (1999).

¹⁸ 20 C.F.R. § 10.436.

“(b) Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. In making such a decision, [the Office] does not consider the individual’s current ability to repay the overpayment.

“(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

“(2) To establish that an individual’s position has changed for the worst, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss.”¹⁹

The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.²⁰ The fact that a claimant was without fault in creating the overpayment does not necessarily preclude the Office from recovering all or part of the overpayment; the Office must exercise its discretion in determining whether waiver is warranted under either of these two standards.²¹

For waiver under the first standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed a specific resource base. An individual is deemed to need substantially all of his current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.²²

¹⁹ 20 C.F.R. § 10.437.

²⁰ *Rudolph A. Geci*, 51 ECAB ____ (Docket No. 98-1791, issued March 29, 2000).

²¹ *Linda Hilton*, 52 ECAB ____ (Docket No. 00-2711, issued August 20, 2001). Pursuant to the second standard, the evidence in this case does not establish that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpayment. Nor did appellant claim any lost right or detrimental reliance; *see Christine P. Burgess*, 50 ECAB 444, 449 (1999) (appellant sustained no loss due to detrimental reliance because her compensation was offset by her wage-earning capacity).

²² *Jan K. Fitzgerald*, 51 ECAB ____ (Docket No. 98-2007, issued September 13, 2000); *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

In this case, appellant submitted an overpayment recovery questionnaire that failed to include either his social security benefits or his monthly compensation as income. Further, he supplied no documents supporting the amount of credit card debts -- two of which totaled \$35,500.00 and \$18,875.00 -- and monthly payments he listed.²³

Appellant argued that he was “unclear” about what documentation was required. However, the preliminary determination of overpayment dated March 15, 2001, defined such documentation as “copies of income tax returns, bank account statements, bills and canceled checks, pay slips and any other records which support the income and expenses listed.” The Office letter explained that this information would be used to determine whether to waive the overpayment or, if not waived, how to collect repayment.

Because appellant failed to submit supporting documentation, the Office was unable to determine whether recovery of the overpayment would defeat the purpose of the Act. Therefore, the Board finds that the Office properly denied waiver of recovery of the overpayment on this ground.²⁴

Appellant also argued that because he was without fault in creating the overpayment, he should not have to repay it. The relevant regulation states plainly that there are only two criteria in determining waiver.²⁵ Section 10.435(a) provides that an error by a government agency, including the Office, which resulted in an overpayment, does not by itself relieve a claimant from liability for repayment.²⁶ While there are circumstances under which a claimant may be found to be without fault because of misinformation or errors in calculation,²⁷ those instances do not apply in this case.²⁸

The Board further finds that the Office properly determined that appellant should repay the overpayment by deducting \$46.15 every four weeks from his continuing compensation.

²³ Appellant was receiving \$1,693.22 every four weeks and his wife’s income is listed at \$1,698.08, with \$755.00 in social security benefits, for a total monthly income of \$4,146.30. His credit card payments totaled more than \$2,200.00 a month, not including car payments of \$302.00 and \$252.00 a month.

²⁴ See *John Skarbek*, 53 ECAB ___ (Docket No. 01-1396, issued June 21, 2002) (finding that appellant’s failure to submit the necessary financial information in support of waiver justified the Office’s refusal to waive recovery of the overpayment).

²⁵ 20 C.F.R. § 10.434(a)(b).

²⁶ 20 C.F.R. § 10.435(a).

²⁷ 20 C.F.R. § 10.435(b).

²⁸ See *James Lloyd Otte*, 48 ECAB 334, 337 (1997) (finding that appellant was responsible for basic life insurance premiums that were not deducted from his compensation, resulting in an overpayment); see also *Howard R. Nahikian*, 53 ECAB ___ (Docket No. 01-138, issued March 4, 2002) (finding that waiver of recovery of the overpayment is not automatic because appellant is without fault in creating it). See generally *William J. Murphy*, 40 ECAB 569, 571 (1989).

Section 10.441(a) states in relevant part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other factors, so as to minimize any hardship.”²⁹

In this case, the hearing representative could not determine a repayment rate that would minimize financial hardship because appellant provided no documentation to substantiate his income and claimed expenses. The hearing representative noted that appellant was receiving \$1,693.22 every four weeks in wage-loss benefits, that he had social security benefits and that his wife was working. He set a minimal repayment rate of \$50.00 a month, calculating that the debt would be paid in 2009.

The record demonstrates that the hearing representative gave due regard to the factors enumerated in section 10.441(a)³⁰ and there is no indication that the Office failed to consider other factors to ensure that any resulting financial hardship would be minimal.³¹ Therefore, the Board finds that the Office acted within its discretion in requiring appellant to repay the overpayment at the rate of \$46.15 every four weeks from his continuing compensation.

²⁹ 20 C.F.R. § 10.441(a).

³⁰ *Id.*

³¹ See *Donzel R. Yarbour*, 50 ECAB 179, 185 (1998) (finding that the Office’s decision to withhold 10 percent or \$200.00 a month from appellant’s continuing compensation was appropriate under the circumstances of the case); *James Lloyd Otte*, *supra* note 28 at 340 (finding that withholding \$25.00 every four weeks from appellant’s continuing compensation would not cause undue hardship). See *Michael L. Leffingwell*, 53 ECAB ____ (Docket No. 00-1411, issued January 25, 2002) (finding that a wage-earning capacity determination may not be used as a relevant financial factor in collecting overpayments).

The September 24, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 18, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member