

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PAUL S. SELZLER and DEPARTMENT OF HEALTH & HUMAN SERVICES, SISSETON PUBLIC HEALTH SERVICE INDIAN HOSPITAL,  
Sisseton, S.D.

*Docket No. 96-254; Submitted on the Record;  
Issued February 25, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant had abandoned his request for a precoupment hearing in relation to its preliminary determination of an overpayment of compensation; and if so (2) whether the Office properly found that appellant was at fault in the creation of a \$1,521.38 overpayment in compensation.

On April 30, 1986 appellant, then a 28-year-old nurse, filed a traumatic injury claim, alleging low back pain caused by lifting a patient on April 29, 1986. Appellant stopped work and returned to limited-duty work on June 28, 1986. Appellant stopped work again on June 28, 1986. The Office accepted appellant's claim for exacerbation of prior spondylosis. Appellant received appropriate compensation for periods of temporary total disability and during his intermittent returns to limited-duty work with the employing establishment or other employers. By letter dated May 5, 1992, the Office advised appellant that it had made a preliminary determination that he had received and was at fault in the creation of a \$1,521.38 overpayment in compensation because he accepted a payment that he knew or should have known was incorrect. The Office advised appellant to submit additional evidence or argument if he disagreed with the preliminary determination, requested that he complete an overpayment questionnaire, and requested that he fill in a form wherein he had the option of requesting a hearing on the issues of fault and waiver of the overpayment or requesting reevaluation of the aforementioned findings without a hearing. On June 2, 1992 appellant, through counsel, requested a hearing in this matter. On July 17, 1992 appellant submitted his overpayment questionnaire to the Office. In a letter received March 24, 1994, appellant, without counsel, requested that his initial hearing date of March 28, 1994 be postponed to allow him time to fully address the issues. By notice dated July 17, 1995, appellant's hearing was rescheduled for September 13, 1995. In a letter decision dated September 27, 1995, the Office found that appellant had abandoned his request for hearing on the grounds that he failed to appear at the scheduled hearing and did not demonstrate good cause for his failure to appear within the 10-day

designated time frame. By decision dated November 30, 1995, the Office finalized its preliminary determination that appellant had received and was at fault in the creation of an overpayment of compensation. The Office therefore concluded that the overpayment was not subject to waiver.

The Board has duly considered the entire case record on appeal and finds that the Office improperly determined that appellant had abandoned his request for hearing.

Pursuant to *Califano v. Yamasaki*, 422 U.S.C. 682 (1979), the Office has established procedures for handling overpayment cases under 5 U.S.C. § 8129, pertaining to the recovery of overpayments. The Director of the Office has determined that the holding of the Supreme Court in *Califano v. Yamasaki* is applicable to the recovery of overpayments under the Federal Employees' Compensation Act and requires an opportunity for a prerecoument hearing.<sup>1</sup> Accordingly, federal regulations provide that before adjusting future payments or otherwise seeking to recover an overpayment, the Office shall provide the individual with written notice of, among other things, the individual's right to request a prerecoument hearing within 30 days of the date of written notice of the overpayment for the purpose of challenging the fact or amount of the overpayment, the preliminary finding of fault, or for the purpose of requesting waiver.<sup>2</sup> Additional evidence must be submitted, or a prerecoument hearing requested, within 30 days of the Office's written notice to the individual. Failure to exercise the right to a prerecoument hearing within 30 days of the date of notice of overpayment shall constitute a waiver of that right.<sup>3</sup> If additional written evidence is not submitted, or a hearing requested, within the 30-day period, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action.<sup>4</sup>

In the present case, appellant responded to the preliminary determination by the Office and requested a prerecoument hearing in this matter. On his overpayment questionnaire he provided the following address: Box 175, Rutland ND. Appellant also provided the Office with a change of address form dated April 6, 1993 in which he listed his address as noted above and spelled out his state, North Dakota. The Office sent the notice dated July 17, 1995 for the September 13, 1995 hearing to the following address: Box 175, Rutland, SD. Similarly the Office's September 27, 1995 letter decision, finding that appellant had abandoned his hearing request was also sent to the address in South Dakota. A review of the record indicates that both the notice of hearing and the letter decision were returned with the envelopes marked return to sender. The Office has the burden of proving that it mailed to a claimant 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 claimant. This presumption

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<sup>1</sup> *Fred A. Cooper, Jr.*, 44 ECAB 498 (1993) (noting that the right to a prerecoument hearing does not arise under the provisions of 5 U.S.C. § 8124(b) ).

<sup>2</sup> 20 C.F.R. § 10.321(d)(4).

<sup>3</sup> *Id.* § 10.321(e).

<sup>4</sup> *Id.* § 10.321(h).

arises after it appears from the record that the notice was duly mailed and the notice was properly addressed.<sup>5</sup>

In this case, the Office mailed appellant a notice of hearing dated July 17, 1995, however, the letter was not properly addressed to appellant's address of record. Therefore, as the notice was not properly addressed, the presumption does not arise that appellant received notice of hearing.<sup>6</sup> Accordingly, since the Office did not properly notify appellant of the scheduled hearing, he cannot be deemed to have abandoned his request in not appearing at the hearing, and this case must be remanded for the properly requested prerecoupment hearing.<sup>7</sup> Consequently, the Office's finalization of its preliminary determination that appellant was at fault in the creation of an overpayment of compensation must also be set aside as this finding is premature.

The decisions of the Office of Workers' Compensation Programs dated November 30 and September 27, 1995 are set aside, and this case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.

February 25, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>5</sup> *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

<sup>6</sup> *Id.*

<sup>7</sup> A review of the record also indicates that the Office requested an address correction from appellant's attorney of record in November 1995. While appellant's attorney provided an address of 7745 Napoleon Road, Jackson, Michigan, none of the hearing notices from the Office were sent to this address. Moreover, appellant has consistently maintained a post office box for his mail receipt throughout this claim process.