U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KIM L. SKOGLUND and U.S. POSTAL SERVICE,
NORTH BAY GENERAL MAIL FACILITY, Petaluma, CA

Docket No. 98-2520; Submitted on the Record;
Issued March 15, 2000

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of $5,972.22 during the period May 20 to November 15, 1991; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment; (3) whether the Office properly determined that recovery of the overpayment would be made by payment in full; and (4) whether the Office properly determined that appellant abandoned her request for a hearing.

The Board finds that appellant received an overpayment in the amount of $5,972.22.

In this case, the Office accepted that on December 31, 1990 appellant, then a 40-year-old letter sorting machine operator, sustained a herniated nucleus pulposus in the course of her federal employment duties. The Office further accepted the periods of hospitalization and surgical procedures necessitated by appellant's injuries. Appellant stopped work on January 3, 1991, and was paid appropriate wage-loss compensation for total disability beginning that date. By letter dated April 26, 1991, the Office fully explained the terms under which appellant was entitled to receive compensation, and specifically instructed appellant that, in order to avoid an overpayment of compensation, she should notify the Office immediately when she returned to work and that if she worked for any portion of the period for which a payment was made, she must return that compensation check to the Office. On May 10, 1991 appellant signed and returned a form provided by the Office indicating that she understood the terms of her compensation benefits.

Appellant returned to work at her usual wage, four hours a day, beginning May 20, 1991, she began working six hours a day on October 21, 1991, and she returned to work full time, at her usual wage, on February 29, 1992. Appellant notified the Office of her anticipated, and actual, return to part-time work by CA-8 forms dated May 13, June 11 and July 11, 1991, as well as by letter dated August 1, 1991. The Office, however, did not take the necessary action to reduce compensation upon receipt of the notification by appellant that she had returned to part-

time work, and appellant continued to receive and cash checks for compensation for total disability during the period she was regularly receiving pay checks from the employing establishment. On July 28, 1994 the Office informed appellant that it had made a preliminary determination that an overpayment of compensation in the amount of $5,972.22 had occurred, and that appellant was at fault in the creation of the overpayment. By letter dated August 19, 1994, appellant requested an oral hearing before an Office representative. At appellant's request, the hearing was postponed and rescheduled five separate times. Finally, after appellant failed to appear at the last scheduled hearing, in a decision dated May 1, 1998, the Office hearing representative determined that appellant had abandoned her request for a hearing, and found the overpayment of $5,972.22 due and payable in full.

As appellant continued to receive and cash checks for compensation for total disability during the period she was regularly receiving pay checks from the employing establishment for part-time work, the Office properly determined that appellant received an overpayment of compensation.[1]

The Board further finds that appellant was not without fault in the matter of the overpayment of compensation.

Section 8129(a) of the Federal Employees' Compensation 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. The only exception to this requirement is a situation which meets the tests set forth as follows 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 the Act or would be against equity and good conscience."[2] No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or, alternatively, "with fault," section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent part:

"An individual is with fault in the creation of an overpayment who:

(1) Made an incorrect statement as to a material fact which the individual

(2) Failed to furnish information which the individual knew or should have known to be material; or

(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[3]

[1] *Charles E. Watkins, Jr.*, 33 ECAB 1451 (1982).

[2] 5 U.S.C. § 8129.

[3] 20 C.F.R. § 10.320(b).

In this case, the Office applied the third standard in finding appellant to be at fault in creating the overpayment.

The evidence of record establishes that appellant knew or reasonably should have known that she was not entitled to regular paychecks for part-time work and compensation for total disability simultaneously, and that she failed to take appropriate action to resolve the error when she received full compensation checks for periods which she had already received paychecks. In its April 26, 1991 letter, the Office outlined the terms under which appellant could receive compensation. As appellant received this letter, and signed a statement indicating that she understood the terms discussed therein, appellant should have known that she was not entitled to receive compensation for total disability for periods after May 20, 1991, when she returned to work part time. The fact that appellant promptly notified the Office of her return to part-time work does not absolve appellant of fault in the creation of the overpayment. The Board has held that, although the Office may have been negligent in issuing a claimant a compensation check to which she was not entitled, this does not excuse the claimant from accepting such check to which she knew or should have been expected to know she was not entitled.[4] As appellant was aware of the terms under which she was entitled to receive compensation, the Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the amount of compensation she received for periods between May 20 and November 14, 1991 was in error. Therefore, appellant is at fault in the creation of the overpayment and it is not subject to waiver.

With respect to the recovery of the overpayment, the Board notes that its jurisdiction on appeal is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. The record indicates that as appellant returned to work full time on February 29, 1992, and, therefore, was no longer receiving wage-loss compensation benefits at the time the Office issued its final decision regarding recovery of the overpayment. Therefore, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment under the Debt Collection Act.[5]

Finally, the Board finds that the Office properly determined that appellant abandoned her request for a hearing.

Section 8124(b) of the Act provides that a claimant dissatisfied with a decision on his or her claim is entitled, upon timely request, to a hearing before a representative of the Office.[6]

By letter dated August 19, 1994, appellant timely requested an oral hearing in connection with the July 28, 1994 preliminary overpayment determination. In an April 20, 1995 notice addressed to appellant at her address of record, the Office advised appellant that the hearing she requested had been scheduled for May 18, 1995. At appellant's request, however, the hearing

[4] *See Lee B. Bass*, 40 ECAB 334 (1988); *Robert W. O'Brien*, 36 ECAB 541 (1985).

[5] *Gregory A. Compton*, 45 ECAB 154 (1993).

[6] 5 U.S.C. § 8124(b).

was postponed and rescheduled five separate times, for various reasons.[7] The final notice to appellant dated February 28, 1998 was also addressed to appellant at her address of record, and rescheduled the hearing for April 15, 1998. Together with this notice, the Office included a letter dated March 9, 1998, informing appellant that under no circumstances would another postponement be granted. Appellant did not request an additional postponement, but failed to appear at the April 15, 1998 hearing.

Section 10.137 of Title 20 of the Code of Federal Regulations, which pertains to the postponement, withdrawal or abandonment of a hearing request, provides in relevant part:

> "A scheduled hearing may be postponed or canceled 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."
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> * * *
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> "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."[8]

In the present case, appellant neither requested postponement at least 3 days prior to the scheduled date of the hearing, nor did she request another hearing within 10 days after the date of the previously scheduled hearing. Appellant's failure to make such requests, together with her failure to appear at the scheduled hearing, constitutes abandonment of her request for a hearing, and the Board finds that the Office properly so determined in its May 1, 1998 decision.

On appeal, appellant's counsel contends that she did not receive proper notice of the 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.[9] This presumption, commonly referred to as the "mailbox" rule, arises when it appears from the record that the notice was properly addressed and duly mailed.[10] The Office's finding of abandonment in this case rests on the strength of this presumption. Although appellant currently contends that she did not receive proper notice of the hearing, the February 28 and March 9, 1998 letters notifying appellant of the new hearing date were sent to appellant's address of record, the same address to which the previous five hearing notices were sent, all of which were duly received by appellant. Therefore, as the record contains no explanation for appellant's failure to appear, and

[7] Hearings were rescheduled for November 15, 1995, June 18 and December 12, 1996, July 16, 1997 and April 15, 1998.

[8] 20 C.F.R. § 10.137(a) and (c).

[9] *George F. Gidicsin*, 36 ECAB 175 (1984).

[10] *Mike C. Geffre*, 44 ECAB 942 (1993); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

further contains no evidence which rebuts the presumption of receipt raised by the "mailbox" rule, the Office's May 1, 1998 decision was proper.

The decision of the Office of Workers' Compensation Programs dated May 1, 1998 is affirmed.

Dated, Washington, D.C.
March 15, 2000

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member