

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, SD

*Docket No. 99-770; Submitted on the Record;  
Issued September 18, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

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

This is the second time this case has been on appeal. In a February 25, 1998 decision, the Employees' Compensation Appeals Board found that the Office erred in finding that appellant had abandoned his request for a hearing on the issue of overpayment, 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.<sup>1</sup> The Board found that the Office's July 17, 1995 letter notifying appellant of the date and time set for the hearing, was not properly addressed to appellant's address of record. The Board concluded that, as the Office did not properly notify appellant of the scheduled hearing, he could not be deemed to have abandoned his request in not appearing at the hearing. The Board, therefore, set aside the Office's September 27, 1995 decision finding abandonment and remanded the case for the properly requested precoupment hearing. In addition, the Board set aside as premature the Office's November 30, 1995 finalization of its preliminary determination that appellant was at fault in the creation of an overpayment of compensation. A complete procedural history is set forth in the Board's February 25, 1998 decision and is hereby incorporated by reference.

Following the issuance of the Board's decision, by letter dated March 12, 1998, the Office informed appellant that his request for an oral hearing was being processed, and that he would be notified when the date, time and location of the hearing had been set. This letter was sent to an

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<sup>1</sup> Docket No. 96-254 (issued February 25, 1998).

incorrect address.<sup>2</sup> By letter dated July 25, 1998, sent to the correct address of record, the Office notified appellant that the requested hearing was scheduled to take place on August 25, 1998 at 2:00 p.m., in Detroit, Michigan. Subsequently, by letter dated August 19, 1998, and again sent to the correct address of record, the Office notified appellant that the hearing had been rescheduled to take place on September 22, 1998 at 2:00 p.m., in Detroit, Michigan. Appellant did not appear at the hearing. In a decision dated September 29, 1998, the Office found that, as appellant 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, appellant had abandoned his request for a hearing. The Office did not readdress the issue of overpayment.

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 prerecoupment hearing.<sup>3</sup> In the instant case, appellant made a timely request for a hearing before an Office hearing representative.

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 arises after it appears from the record that the notice was duly mailed and the notice was properly addressed.<sup>4</sup> In this case, the Office mailed appellant a notice of hearing dated July 25, 1998 to appellant's address of record and the record contains a copy of this letter. The Office subsequently mailed a notice that the hearing had been rescheduled to appellant's address of record, and the record also contains a copy of this letter. Therefore, as it appears from the record that the notice was duly mailed to appellant and that the notice was properly addressed, the presumption arises that appellant received notice of hearing.<sup>5</sup>

Section 10.137 of Title 20 of the Code of Federal Regulations provides in relevant part: "A claimant who fails to appear at a scheduled hearing may request in writing 10 days after the date set for the hearing that another hearing be scheduled. Where good cause is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days

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<sup>2</sup> The record reflects that, by telephone call made on November 20, 1995, appellant's counsel informed the Office that appellant's correct address was 7745 Napoleon Road, Jackson, Michigan, 49202. The Office's March 12, 1998 letter was sent to a prior address in North Dakota.

<sup>3</sup> *Fred A. Cooper, Jr.*, 44 ECAB 498 (1993) (noting that the right to a prerecoupment hearing does not arise under the provisions of 5 U.S.C. § 8124(b)).

<sup>4</sup> *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

<sup>5</sup> *Id.*

or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for hearing.”<sup>6</sup>

Appellant did not appear at the scheduled September 22, 1998 hearing, of which he had timely and proper notice. However, the Office’s decision, finding that as appellant 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, appellant had abandoned his request for a hearing, was issued only 7 days subsequent to the scheduled hearing date. As the record reflects that the Office did not allow appellant 10 days after the date of the hearing to give a reason for his failure to appear as required by the regulations,<sup>7</sup> appellant cannot be deemed to have abandoned his request, and this case must be remanded for the properly requested precoupment hearing.

The decision of the Office of Workers’ Compensation Programs dated September 29, 1998 is set aside, and this case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC  
September 18, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

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<sup>6</sup> 20 C.F.R. § 10.137(c); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(d) and (e) (October 1992). The Board notes that under the procedure manual, the date of a request for the rescheduling of a hearing is determined by the postmark date.

<sup>7</sup> On appeal, appellant asserts that within the 10-day time frame, he telephoned the Office and advised them that he had moved several times and had not received notice of the scheduled hearing. There is no indication in the record, however, that appellant contacted the Office with respect to his failure to appear at the scheduled hearing.