U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGARET L. EIERMANN and U.S. POSTAL SERVICE,
POST OFFICE, Orlando, FL

Docket No. 02-210; Submitted on the Record;
Issued June 14, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly found that appellant abandoned her request for an oral hearing before an Office hearing representative.

On March 27, 1999 appellant, then a 45-year-old distribution clerk, filed a traumatic injury claim (Form CA-1), for an injury to her left arm sustained on March 19, 1999 when a Tier 3C machine hit her left arm while she was pulling out a jam. The Office accepted the claim for a elbow and forearm sprain. Appellant returned to limited duty on December 13, 1999 working intermittently and to her date-of-injury job duty on March 11, 2000.

In a letter dated December 4, 2000, the Office informed appellant of its preliminary determination that an overpayment of compensation occurred in her case in the amount of $7,007.25, because she received compensation for total disability during the period December 13, 1999 through March 25, 2000 when she returned to work part time on December 13, 1999.

On January 1, 2001 appellant requested a hearing on the issues of fault and possible wavier of the overpayment.[1] In her letter she informed the Office of her new mailing address as P.O. Box 621917, Oviedo, FL 32462.

In a decision dated January 22, 2001, the Office finalized the overpayment and noted appellant had not responded or submitted any evidence.

By letter dated February 14, 2001, appellant noted that she had requested a hearing on the proposed overpayment and was waiting for the hearing to be scheduled.

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[1] The Board notes that the Office issued a decision on January 22, 2001 finalizing the overpayment as well as finding her at fault in the creation of the overpayment.

On February 21, 2000 the Office found that as appellant had requested a hearing the finalization of the preliminary overpayment decision was erroneous and that any collection actions should be suspended.

On May 23, 2001 the Office issued a notice advising appellant that a hearing would be held at a specific time and place on June 26, 2001. The Office mailed the notice to appellant at 2995 Lowery Drive, Oviedo, FL 32765.

In a decision dated August 20, 2001, the Office found that appellant abandoned her request for a hearing. The Office noted that she failed to appear at the hearing and that the record gave no indication that appellant had contacted the Office either prior or subsequent to the scheduled hearing to explain her failure to appear.

The Board finds that the Office abused its discretion in finding that appellant abandoned her request for a hearing.

Section 10.137 of Title 20 of the Code of Federal Regulations, revised as of April 1, 1997, previously set forth the criteria for abandonment:

> "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."
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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, 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, however, were again revised April 1, 1999. Effective January 4, 1999, the regulations 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.

[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).

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.6(e) of the procedure manual, dated January 1999, provides as follows:

> "e. Abandonment of Hearing Requests.
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> "(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.
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> "Under these circumstances, the 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 [d]istrict Office. In cases involving prerecoupment hearings, [hearing and review] will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the [d]istrict [Office].
>
> "(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.
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> "This course of action is correct even if [hearing and review] 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]

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.[5] However, absent evidence of a properly addressed notice, the presumption cannot arise.[6]

By letter dated January 1, 2001, appellant advised the Office that her correct mailing address was "P.O. Box 621917, Oviedo, FL 32462" in her January 1, 2001 letter requesting a hearing. The May 23, 2001 notification letter was sent to an incorrect address, "2995 Lowery Drive, Oviedo, Fl 32765" instead of to appellant's correct address of record, "P.O. Box 621917, Oviedo, FL 32462." Thus, the presumption of receipt under the mailbox rule does not arise. The record does not demonstrate that appellant was notified of the scheduled hearing and appellant

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

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

[6] *Id.*

was denied a hearing to which she was entitled. Therefore, this case must be remanded for appellant to be given the opportunity for his requested hearing.

The August 20, 2001 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further action in accordance with this decision.

Dated, Washington, DC
June 14, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member