

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LISA C. HAILEY and U.S. POSTAL SERVICE,
POST OFFICE, Washington, DC

*Docket No. 01-2170; Submitted on the Record;
Issued May 7, 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 properly determined that appellant received an overpayment in the amount of \$20,613.78 for November 23, 1998 through September 11, 1999; (2) whether the Office properly determined that appellant was at fault in creation of the overpayment, which was, therefore, not subject to waiver of recovery; and (3) whether the Office properly found that appellant had abandoned her request for a hearing before an Office hearing representative.

On April 19, 1995 appellant, a 30-year-old mailhandler, injured her lower back in the performance of duty. She filed a claim for benefits on April 24, 1995, which the Office accepted for lumbar strain by letter dated July 19, 1995. The letter advised appellant, under the heading "RETURN TO DUTY" [Caps in original] that:

"If you obtain or return to any employment, you should notify this Office immediately. You are not permitted to receive payments for temporary total disability while employed. If you receive any compensation checks which include payment for any period you have worked, you should return them to us immediately to prevent any overpayment. The employing establishment should also notify this Office as soon as you have returned to duty by calling the telephone number shown above and filing Form CA-3, Report of Termination of Disability and/or Payment."

Appellant returned to work on light duty on June 13, 1995 and missed work for intermittent periods thereafter. The Office paid appellant compensation for appropriate periods.¹

By letter dated January 19, 1996, the Office informed appellant that:

“IF YOU RECEIVE ANY COMPENSATION CHECKS AFTER YOU HAVE RETURNED TO WORK, PLEASE RETURN THEM TO THIS OFFICE IMMEDIATELY AND YOU WILL BE REISSUED A CHECK FOR THE CORRECT PERIOD.” [Caps in original].

On November 23, 1998 appellant returned to full-time work in a modified, light-duty position, with the employing establishment.

By letter dated February 8, 2000, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$20,613.78, covering November 23, 1998 through September 11, 1999. The Office found that appellant was at fault in creating the overpayment because she should have known that she was not entitled to receive compensation payments after she returned to work. The Office informed appellant that if she disagreed with the decision she could, within 30 days, submit evidence or argument to the Office, or request a precoupment hearing with the Branch of Hearings and Review.

In a telephone call dated April 27, 2000, appellant informed the Office that she had attempted to notify the Office that she had returned to work by indicating this on the back of a Form CA-8. The Office noted that, upon review of the file, there was no such notice contained in the case record.

Appellant requested a recoupment hearing, completed and signed the enclosed Form OWCP-20 on March 2, 2000 and indicated she was not at fault at creating the overpayment. In a statement accompanying the form, appellant asserted that she was not at fault in the creation of the overpayment because the Office did not notify her that an overpayment had occurred until February 8, 2000 and that she had informed the Office that she had returned to work. Appellant also indicated that she needed the checks because she had to pay her bills and needed the money immediately.

By letter dated April 6, 2001, the Office informed appellant that a hearing would be held on May 17, 2001.

In a May 22, 2001 decision, the Office found that appellant abandoned her request for a hearing, as she failed to appear at the time and place set for the hearing and did not show good cause for her failure to appear. The Office also finalized its decision that appellant was at fault in creating the overpayment of compensation from November 23, 1998 through September 11, 1999, which amounted to \$20,613.78.

¹ By decision dated July 1, 1996, the Office terminated appellant's compensation. By letter dated July 29, 1996, appellant requested an oral hearing, which was held on February 12, 1997. By decision dated July 16, 1997, an Office hearing representative set aside the July 1, 1996 termination decision and remanded the case for the Office to resolve a conflict in the medical evidence.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$20,613.78 for November 23, 1998 through September 11, 1999.

The record shows the Office incorrectly issued checks for temporary total disability covering November 23, 1998 through September 11, 1999. During that time appellant had returned to work and was, therefore, no longer totally disabled. Therefore, an overpayment had occurred in the amount of \$20,613.78.

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

Section 8129 of the Federal Employees' Compensation Act² provides that an overpayment must be recovered unless "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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.³

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to the creation of an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment, which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual)."⁴

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting a payment, to which she knew or should have known she was not entitled.⁵ Appellant was informed by the Office in its July 19, 1995 and January 19, 1996 letters that she was only entitled to compensation benefits for the period in which her

² 5 U.S.C. § 8129(a) (b).

³ *Bonnye Mathews*, 45 ECAB 657 (1994).

⁴ 20 C.F.R. § 10.433(a).

⁵ *See Russell E. Wageneck*, 46 ECAB 653 (1995).

condition caused disability for work and that she would only be paid until the time she was able to return to suitable employment. Because appellant returned to full-time employment on November 23, 1998 and was, therefore, no longer totally disabled, she knew or should have known that she was no longer entitled to the amount of weekly compensation she had been receiving. Upon her receipt of the disability check from the Office following her return to work, issued for payment of total disability compensation, appellant had a duty to inquire as to whether acceptance of this payment was appropriate or return the check issued for total disability because she had returned to work during the period covered by this check. Instead, appellant cashed this check and all subsequent checks issued by the Office until September 11, 1999, when the Office discovered the overpayment and used the money to pay her bills, as she admitted.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant knew or should have known that the checks issued by the Office subsequent to appellant's return to work on November 23, 1998 were in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$20,613.78 may not be waived. Thus, the Board affirms the Office's finding that appellant was not without fault in creating the overpayment.

The Board also finds that appellant had abandoned her request for a hearing before an Office hearing representative.

In its May 22, 2001 decision, the Office found that appellant abandoned her March 2, 2000 request for an oral hearing before an Office hearing representative. The Office noted that the hearing was scheduled for April 6, 2001, that appellant received written notification of the hearing 30 days in advance, that appellant failed to appear and that the record contained no evidence that appellant contacted the Office to explain her failure to appear.

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) 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.”

* * *

“(b) 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.... The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear to at the second scheduled hearing

without good cause shown, shall constitute abandonment of the request for a hearing.”⁶

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.⁷ 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 2.1601.6.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.

“Under these circumstances, 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 district Office. In cases involving precoupment hearings, [Hearings and Review] will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the [district Office].

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, [Hearings and Review] 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 [Hearings 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.”⁸

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

⁷ 20 C.F.R. § 10.622(b) (1999).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).

In this case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on May 17, 2001. The record shows that the Office mailed appropriate notice to appellant at her last known address. The record also supports that appellant did not request postponement, that she failed to appear at the scheduled hearing and that she failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office's procedure manual, the Office properly found that appellant abandoned her request for an oral hearing before an Office hearing representative.

The May 22, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 7, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member