

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JULIA KULICK-LOPEZ, administrator of the estate of ALFRED V. LOPEZ  
and U.S. POSTAL SERVICE, POST OFFICE, Sacramento, CA

*Docket No. 02-2047; Submitted on the Record;  
Issued February 6, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether the employee had a \$5,959,72 overpayment in compensation; (2) whether the Office Workers' Compensation Programs properly denied appellant's request for waiver of recovery of the overpayment; and (3) whether the Office properly found that appellant had abandoned her request for a hearing before an Office hearing representative.

On June 27, 1991 the employee, then a 47 year-old manger of plant and equipment engineering, filed a claim for dysthymia, general anxiety disorder, severe gastrointestinal hyperacidity, ulcers, posterior myocardial infarction and severe angina. Appellant related his conditions to harassment at work from his superiors beginning with a personal business dispute over car repairs with a coworker who became his superior. The employee claimed that he was removed from his position and his office in 1987, while he was on annual leave over complaints of improper actions, which were not substantiated upon investigation. He claimed the employing establishment deliberately failed to rule on his grievance that his removal violated employing establishment rules. He contended that his wife was sexually harassed by the postmaster, which led to reprisals against him when he protested the incidents of harassment of his wife. The employee stated that he was denied a promotion, which went to a less qualified applicant.

In a June 1, 1992 decision, the Office denied the employee's claim on the grounds that he had not established that he had an employment-related occupational injury. The employee requested a hearing before an Office hearing representative. In a November 3, 1992 decision, issued without a hearing, the Office hearing representative found that the employee had submitted sufficient factual and medical evidence to require further development of the record, particularly responses from officials at the employing establishment to the employee's allegations of harassment. She, therefore, set aside the Office's June 1, 1992 decision and remanded the case for further development. In a March 3, 1993 decision, the Office denied the employee's claim on the grounds that his claimed condition did not arise out of the performance of job duties. The employee requested a hearing before an Office hearing representative. In a January 24, 1995 decision, a second Office hearing representative found that an administrative law judge, in a December 23, 1993 decision, found the employee had been subjected to

retaliation by the postmaster. The Office hearing representative, therefore, found that the employee had shown he had sustained an emotional condition within the performance of duty. He, therefore, reversed the Office's March 3, 1993 decision and returned the case to the Office for payment of appropriate compensation. The Office accepted the employee's claim for dysthymia and began payment of temporary total disability compensation. The employing establishment submitted a February 24, 1994 decision by the employing establishment, which reversed the decision of the administrative law judge and found that the employee had not been subjected to harassment or discrimination by the employing establishment. In a June 5, 1995 decision, the Office rescinded acceptance of the employee's claim. The employee requested a hearing before an Office hearing representative. He submitted a July 3, 1996 final decision of the Equal Employment Opportunity Commission (EEOC), which found that he was discriminated against by reprisal when the employing establishment failed to provide a final decision on his complaint concerning his removal from his position in 1987. The EEOC further found that the employee had established that he was discriminated against when he was not selected for a new position, for which a person with lesser qualifications was selected. In a November 29, 1996 decision, a third Office hearing representative reversed the Office's June 5, 1995 decision and returned the case to the Office for acceptance and reinstatement of compensation.

The employee died on November 10, 1999.<sup>1</sup> In an August 14, 2000 letter, the Office informed appellant that it had made a preliminary determination that the employee had received a \$5,959.72 overpayment in compensation because premiums for his health insurance and life insurance were not deducted from his workers' compensation payments between November 1, 1997 to November 10, 1999. The Office indicated that health insurance not deducted totaled \$967.76; basic life insurance not deducted totaled \$540.71; optional life insurance not deducted totaled \$3,125.05; and postretirement life insurance totaled \$826.20. The Office found that appellant's estate was not at fault in the occurrence of the overpayment. The Office indicated that appellant had a right to submit additional evidence if she disagreed with the amount or the fact of the overpayment. It noted that recovery of the overpayment may not be made if recovery would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience. The Office also informed appellant that she had a right to request a hearing before an Office hearing representative.

In an August 24, 2000 letter, appellant requested a hearing before an Office hearing representative. She stated that the health insurance was not owed because the employee was covered through her health insurance, with the premiums paid from her workers' compensation checks. She claimed that postretirement life insurance was not owed because appellant was not retired during the period November 1, 1997 through November 10, 1999. She requested a breakdown on the pay period premiums for the amount of the claimed basic and optional life insurance and a copy of the signed life insurance policy so she could be sure that the amount claimed was valid. Appellant gave her address as 4608 Ladera Way, Carmichael, California. She also submitted a copy of her appointment as administrator of her husband's estate, indicating

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<sup>1</sup> A newspaper account indicated that the employee was murdered in a domestic dispute and a family member was arrested in connection with the case.

that her attorney was Veronica Susan Roberts, with an address of P.O. Box 660244, Sacramento, California.

In an October 2, 2000 letter, the Office indicated that the matter had been referred to the Branch of Hearings and Review. The address on the letter was to the employee with an address of 4608 Ladera Way, Carmichael, California. The Office indicated that an advance notice of 30 days would be given prior to the date of the hearing. A copy of the letter was sent to Charles Taliaferro, with a P.O. Box 590472, San Francisco, California. In a February 5, 2001 letter, the Office sent to the employee a notice that the hearing was scheduled for March 13, 2001 at 11:15 p.m. The address was 11412 Gold Country Boulevard, Gold River, California. The case record contains another copy of the notice of hearing, indicating that the employee was deceased and that the notice was remailed to appellant at 4608 Ladera Way, Carmichael, California. The letter does not contain a date of remailing. Another copy of the hearing notice indicates that the letter was remailed as of March 1, 2000 but does not contain any changes of the name and address of whom the remailed letter was sent to.

In an April 29, 2002 decision, the Office hearing representative noted that an oral hearing was scheduled but appellant failed to show for the hearing. She found that appellant had received an overpayment of \$5959.72 in compensation because of the failure to withhold premiums for health and life insurance. She indicated that the employee was not at fault in the creation of the overpayment. She concluded, however, that as financial information had not been submitted in support of a request for waiver of recovery of the overpayment, the request for waiver would be denied. The decision was sent to the address of the estate of the employee, 11412 Gold Country Boulevard, Gold River, California.

The Board finds that the Office improperly found that appellant had abandoned her request for an oral hearing.

Under the regulations applicable to the Act, once a hearing is scheduled, it cannot be postponed except for the hospitalization of the claimant or the death of a parent, spouse, or child of the claimant. If the request for a postponement does not meet this test and a change of the hearing date cannot be accommodated on the docket for the hearing trip, no further opportunity for an oral hearing will be provided and the hearing will take the form of a review of the written record.<sup>2</sup> The Office applied this provision in this case to find that appellant had not appeared for an oral hearing to present evidence. It, therefore, issued a decision based on a written review of the record.

On appeal, appellant claimed that she never received notice of the 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. The presumption arises after it appears from the record that the notice was duly mailed and the notice was properly addressed.<sup>3</sup> The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself will raise the presumption that the original was received by

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<sup>2</sup> 20 C.F.R. § 10.622.

<sup>3</sup> *Samuel Smith*, 41 ECAB 226 (1989).

the addressee.<sup>4</sup> That presumption, however, cannot be raised in this case. The preliminary overpayment letter was sent to appellant at her address. The record, however, shows that the October 2, 2000 letter, indicating that the case had been transferred to the Branch of Hearings and Review and the February 5, 2001 notice of the March 13, 2001 hearing, were sent to the address of the employee, even though the Office had been informed that he was deceased and that appellant's wife, at a different address, was the administrator of his estate. The Office was aware of appellant's address as it had sent the preliminary finding of the overpayment to her at her address. The record contains two copies of the February 5, 2001 notice of hearing, both which indicated that it was remailed. One copy contains a handwritten notation that the employee was deceased and a handwritten name and address for appellant. The other copy contains no change of address but a stamped notation that the Office had reviewed the letter on March 1, 2001. The Office's actions do not carry any indication that the February 5, 2001 notice of hearing was resent at all or that the remailing was a part of the normal custom or practice of the Office. There is an indication that the notice of hearing was sent to appellant at the proper address on March 1, 2001. However, if the notice of hearing was properly addressed and sent on March 1, 2001 it was not sent more than 30 days prior to the scheduled hearing, as required by the applicable regulations.<sup>5</sup> The evidence of record, therefore, fails to demonstrate that appellant received timely notice of the March 13, 2001 hearing. The case must, therefore, be returned to the Office so that appellant may receive another opportunity to have an oral hearing if she chooses, at which time she can present additional evidence on the matter of the overpayment.<sup>6</sup>

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<sup>4</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>5</sup> 20 C.F.R. § 10.617(b).

<sup>6</sup> In light of the Board's decision that the Office improperly found that appellant had abandoned her right to an oral hearing, the Board will not consider at this time the issues of whether appellant received an overpayment in compensation and whether the Office properly denied appellant's request for waiver of recovery of the overpayment.

The decision of the Office of Workers' Compensation Programs, dated April 29, 2002, is hereby reversed.

Dated, Washington, DC  
February 6, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member