

**United States Department of Labor
Employees' Compensation Appeals Board**

B.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Diego, CA, Employer**

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**Docket No. 09-1266
Issued: January 15, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 16, 2009 appellant filed a timely appeal from the March 12, 2009 merit decision of the Office of Workers' Compensation Programs concerning an overpayment of compensation and abandonment of a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant abandoned a hearing; (2) whether the Office properly determined that she received a \$3,782.62 overpayment of compensation; and (3) whether the Office properly determined that she was at fault in creating the overpayment of compensation, thereby precluding waiver of the overpayment.

FACTUAL HISTORY

In June 2003, the Office accepted that appellant, then a 48-year-old mail processing clerk, sustained a neck strain, left shoulder impingement syndrome, left elbow epicondylitis, left wrist

strain and left-sided trigger fingers (1st & 3rd digits) due to the performance of her repetitive work duties over time.¹ Appellant received Office compensation for periods of disability.

In a February 15, 2008 letter, the Office advised appellant of its preliminary determination that she was not entitled to compensation as of February 5, 2008 because she refused, without good cause, a limited-duty position offered by the employing establishment which was available that date. It provided her an opportunity to present evidence and argument challenging this proposed action. In an April 8, 2008 decision, the Office indicated that it had finalized its preliminary determination that appellant was not entitled to compensation from February 5, 2008 onwards.²

In a June 11, 2008 letter, the Office advised appellant of its preliminary determination that she received a \$3,782.62 overpayment of compensation for the period February 5 to March 14, 2008 because a suitable limited-duty job assignment was available to her beginning February 5, 2008 and she was not entitled to compensation after February 5, 2008.³ It also made a preliminary determination that she was at fault in the creation of this overpayment, because she accepted a payment that she knew or reasonably should have known was incorrect.⁴

Appellant timely requested a prerecoument hearing with an Office hearing representative. In an October 22, 2008 letter sent to her last known address, the Office advised her regarding the place and time of a hearing scheduled for November 20, 2008 in Los Angeles. The letter contained instructions for requesting a postponement of the hearing if necessary.

In a March 12, 2009 decision, the Office determined that appellant abandoned her request for a hearing noting that she did not request postponement, appear at the scheduled hearing or provide any notification for such failure within 10 days of the scheduled date of the hearing. It further found that she received a \$3,782.62 overpayment of compensation and that she was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

¹ The Office also accepted under a separate claim file that appellant sustained a work-related lumbosacral strain.

² The Office's April 8, 2008 decision is not within the Board's jurisdiction as it was not issued within the year prior to appellant's filing of this appeal with the Board. *See* 20 C.F.R. § 501.3.

³ The record contains evidence showing that appellant received \$3,782.62 in Office compensation for the period February 5 to March 14, 2008 *via* check dated March 14, 2008. Appellant actually received a check in the amount of \$3,901.71 covering the period February 2 to March 14, 2008, but the Office calculated the portion of the check that appellant was not entitled to receive, *i.e.*, the portion covering the period February 5 to March 14, 2008.

⁴ The Office indicated that appellant had been advised in a February 15, 2008 letter that she could not receive Office compensation effective beginning February 5, 2008 and continuing.

LEGAL PRECEDENT -- ISSUE 1

The authority governing abandonment of hearings 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, H&R [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 DO [district Office]. In cases involving precouplement hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

(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.

This course of action is correct even if H&R 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."⁵

ANALYSIS -- ISSUE 1

In the present case, the Office scheduled a precouplement hearing before an Office hearing representative at a specific time and place on November 20, 2008. The record shows that it mailed appropriate notice, dated October 22, 2008, to appellant at her last known address. The record also supports that she 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 a hearing before an Office hearing representative.⁶

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

⁶ See also *Claudia J. Whitten*, 52 ECAB 483, 485 (2001).

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of the Federal Employees' Compensation Act⁷ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁸ Section 8129(a) of the Act provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁹

Section 8106(c)(2) of the Act provides in pertinent part, “A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation.”¹⁰

ANALYSIS -- ISSUE 2

The record reveals that appellant received \$3,782.62 in Office compensation for the period February 5 to March 14, 2008 *via* check dated March 14, 2008. However, she was not entitled to receive compensation for this period because the Office had determined, in an April 8, 2008 decision, that she was not entitled to receive Office compensation beginning February 5, 2008 and continuing due to the fact that she refused, without good cause, a suitable limited-duty position offered by the employing establishment. Therefore, the Office properly found that appellant received a \$3,782.62 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of the Act¹¹ 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.¹² 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 this

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Id.* at § 8102(a).

⁹ *Id.* at § 8129(a).

¹⁰ *Id.* at § 8106(c)(2).

¹¹ *Id.* at §§ 8101-8193.

¹² *Id.* at § 8129(a).

subchapter or would be against equity and good conscience.”¹³ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹⁴

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

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

- (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....”¹⁵

Section 10.433(c) of the Office’s regulations provides:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”¹⁶

ANALYSIS -- ISSUE 3

The Board finds that the Office improperly determined that appellant was at fault in creating the \$3,782.62 overpayment of compensation. Appellant received \$3,782.62 in Office compensation for the period February 5 to March 14, 2008 *via* check dated March 14, 2008. However, she was not advised of the Office’s determination that she could not receive compensation beginning February 5, 2008 until the Office issued its April 8, 2008 decision making this finding.¹⁷ Therefore, the Office had no clear basis to find that appellant knew or should have known that she accepted a payment to which she was not entitled when she received payment of \$3,782.62 on March 14, 2008.

Since it has been determined that appellant was without fault in the creation of the overpayment, the Office may only recover the overpayment, in accordance with section 8129(b) of the Act,¹⁸ if a determination has been made that recovery of the overpayment would neither

¹³ *Id.* at § 8129(b).

¹⁴ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

¹⁵ 20 C.F.R. § 10.433(a).

¹⁶ *Id.* at § 10.433(c).

¹⁷ In the Office’s February 15, 2008 letter, appellant was only advised of the possibility that such a holding could be made in the future.

¹⁸ 5 U.S.C. § 8129(b).

defeat the purpose of the Act nor be against equity and good conscience.¹⁹ Therefore, the case should be remanded to the Office for further development with respect to whether appellant is entitled to waiver of the \$3,782.62 overpayment under 20 C.F.R. §§ 10.322; 10.323. After such development as it deems necessary, the Office should issue an appropriate decision on this matter.

CONCLUSION

The Board finds that the Office properly determined that appellant abandoned a hearing and that she received a \$3,782.62 overpayment of compensation. The Board further finds that the Office improperly determined that appellant was at fault in the creation of the overpayment and the case is remanded to the Office for further development regarding whether appellant is entitled to waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2009 decision of the Office of Workers' Compensation Programs is affirmed with respect to hearing abandonment and the fact and amount of the overpayment of compensation. The March 12, 2009 decision is set aside with respect to the finding of fault and remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: January 15, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in 20 C.F.R. §§ 10.322; 10.323.