

duty. In a Form CA-7 claim for compensation, she indicated that she had one dependent, her husband. Appellant was placed on the periodic compensation rolls for temporary total disability. The Office advised her that she would receive wage-loss compensation at the three-fourths augmented pay rate for employees with one or more dependents.

In an Office Form CA-1032 dated April 1, 2003, reporting employment and income, appellant indicated that she was not eligible to receive compensation at the augmented pay rate for an employee with dependents as of November 2, 2002, the date her divorce became final. She answered "no" in answer to the question in Part C of the form as to whether she had any dependents.

By letter dated April 12, 2007, the Office advised appellant of its preliminary determination that she received a \$10,167.05 overpayment of compensation. It found that she received compensation at the three-fourths compensation rate for employees with dependents from November 2, 2002 to April 14, 2007,¹ but she was divorced as of November 2, 2002. The Office determined the amount of the overpayment by subtracting the amount of compensation she was entitled to receive as of November 2, 2002, using the proper two-thirds pay rate for an employee without dependents, \$81,322.35, from the compensation she received at the augmented rate of \$91,499.40. This resulted in an overpayment of \$10,167.05. The Office notified appellant of its preliminary determination that she was without fault in the creation of the overpayment. Appellant was given 30 days in which to submit additional evidence or argument or request a telephone conference, a prerecoument hearing before the Branch of Hearings and Review or a final decision.

On May 1, 2007 appellant requested a prerecoument hearing on the issue of waiver. She submitted a completed overpayment recovery questionnaire listing monthly income and expenses. The overpayment questionnaire was stamped as received by the Office on May 11, 2007.

By notice dated July 25, 2007, the Office advised appellant that a hearing was scheduled for September 5, 2007 and provided the place and time. The notice was sent to her address of record. It was not returned to the Office as undeliverable. Appellant did not appear for the scheduled hearing.

By decision dated September 19, 2007, the Office finalized its determination that appellant received an overpayment of \$10,167.05 from November 2, 2002 to April 14, 2007 because she received payments at the three-fourths pay rate for employees with dependents but had no dependents after November 2, 2002, the date of her divorce. It found that appellant was not at fault in the creation of the overpayment but waiver would not be considered because she did not submit financial information. The Office further found that appellant had abandoned her request for a hearing.

¹ The Office indicated on the first page of its letter that the overpayment continued through April 17, 2007. However, the record shows that appellant's compensation check for the period April 15 to May 12, 2007 was paid at the correct two-thirds rate. The memorandum to the file included in the April 12, 2007 letter calculates the overpayment from November 2, 2002 to April 14, 2007 at \$10,167.05.

In an undated memorandum to the file, an Office hearing representative noted that on September 26, 2007 appellant telephoned to advise that she did not receive the July 25, 2007 notice of the hearing scheduled for September 5, 2007. Appellant did not become aware of the scheduled hearing until she received the September 19, 2007 decision. The hearing representative advised appellant to send a written request for a new hearing to the chief of the Branch of Hearings and Review.²

By decision dated October 3, 2007, the Office found that appellant had abandoned her request for a hearing. Appellant failed to appear for the September 5, 2007 hearing, and did not timely contact the Office prior or subsequent to the scheduled hearing to explain her failure to appear.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act 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 duty.³ If the disability is total, the United States shall pay the employee monthly monetary compensation equal to 66 2/3 percent of her monthly pay, which is known as the basic compensation for total disability.⁴ Under section 8110 of the Act, an employee is entitled to compensation at the augmented rate of three-fourths of her weekly pay if she has one or more dependents.⁵ If a claimant receives augmented compensation during a period when she has no eligible dependents, the difference between the compensation she was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-fourths rate constitutes an overpayment of compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that the Office correctly determined that appellant received a \$10,167.05 overpayment. The record shows that appellant received total wage-loss compensation from the Office at the augmented three-fourths rate for employees with dependents in the amount of \$91,499.40 from November 2, 2002 to April 14, 2007. Because appellant was divorced as of November 2, 2002 and no longer had an eligible dependent, she was not entitled to receive wage-loss compensation at the augmented rate on and after that date. The Office calculated the

² The record shows that on September 27, 2007 appellant faxed a copy of her letter requesting a new hearing to the Office's Branch of Hearings and Review. However, this letter was not associated with the record until October 4, 2007, subsequent to the October 3, 2007 decision. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision on October 3, 2007. See 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

³ 5 U.S.C. § 8102(a).

⁴ 5 U.S.C. § 8105(a). See also *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

⁵ 5 U.S.C. § 8110.

⁶ See *Diana L. Booth*, 52 ECAB 370 (2001) (the Board held that the claimant received an overpayment of compensation because she received compensation at the augmented rate during a period when she had no dependents following her divorce).

amount of the overpayment by subtracting the compensation she was entitled to receive from November 2, 2002 to April 14, 2002 using the proper two-thirds pay rate for an employee without dependents, \$81,332.35, from the compensation she received at augmented rate. It determined that appellant received a \$10,167.05 overpayment of compensation November 2, 2002 to April 14, 2007 based on an incorrect pay rate. The Board will affirm the fact and amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that, when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Office by decreasing later payments to which the individual is entitled.⁷

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁸ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery would defeat the purpose of the Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁹

The individual who received the overpayment is responsible for providing information concerning income, expenses and assets as specified by the Office.¹⁰ This information is needed to determine whether recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience.¹¹ This information will also be used to determine the repayment schedule, if necessary.¹² Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is provided.¹³

⁷ 5 U.S.C. § 8129.

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.* at § 10.434. Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents. *Id.* at § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt. *Id.* at § 10.437(a). Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. *Id.* at § 10.437(b).

¹⁰ 20 C.F.R. § 10.438(a).

¹¹ *Id.*

¹² *Id.*

¹³ 20 C.F.R. § 10.438(b).

ANALYSIS -- ISSUE 2

Although appellant was determined to be without fault in creating the \$10,167.05 overpayment that arose from November 2, 2002 to April 14, 2007, she bears responsibility for providing the financial information necessary to support her request for waiver. She submitted a completed overpayment recovery questionnaire listing income and expenses which the Office received on May 11, 2007. However, the Office found, in its September 19, 2007 decision, that appellant did not submit any financial information and it did not consider the issue of waiver. Because she provided information on her income and expenses, the Office improperly denied consideration of waiver.

LEGAL PRECEDENT -- ISSUE 3

A claimant who has received a final adverse decision by the Office may obtain a hearing by writing to the address specified in the decision within 30 days of the decision for which a hearing is sought.¹⁴ Unless otherwise directed in writing by the claimant, the Office hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.¹⁵ The Office has the burden of proving that it mailed to appellant and her representative a notice of a scheduled hearing.¹⁶

The authority governing abandonment of hearings rests with the Office's procedure manual,¹⁷ which provides as follows:

“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, [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 [district Office].”¹⁸

¹⁴ 20 C.F.R. § 10.616(a).

¹⁵ 20 C.F.R. § 10.617(b). Office procedure also provides that notice of a hearing should be mailed to the claimant and the claimant's authorized representative at least 30 days prior to the scheduled hearing. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(a) (October 2005).

¹⁶ See *A.B.*, 58 ECAB ___ (Docket No. 07-387, issued June 4, 2007).

¹⁷ See *Claudia J. Whitten*, 52 ECAB 483 (1991).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (October 2005).

ANALYSIS -- ISSUE 3

The record establishes that, on July 25, 2007, in response to appellant's request for an oral hearing, the Office mailed an appropriate notice of the scheduled September 5, 2007 hearing. The Board notes that the notice was sent more than 30 days prior to the hearing.

Appellant asserts that she never received a copy of the hearing notice. However, the record reflects that a copy of the July 25, 2007 hearing notice was mailed to the correct address of record for appellant and was not returned as undeliverable. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course.¹⁹ This is known as the "mailbox rule." As the record reflects that the Office mailed a hearing notice to appellant's address of record, it is presumed that it arrived at her mailing address. The record shows that appellant did not request a postponement of the hearing and failed to provide an explanation for her failure to attend within 10 days of the scheduled date of the hearing.²⁰ As the circumstances of this case meet the criteria for abandonment, the Board finds that appellant abandoned her request for a hearing.

Appellant has explained to the Board, through her attorney, that she did not, in fact, receive the notice of hearing. She advised that she lives in a rural area and sometimes does not receive mail sent to her address. Appellant asserted that the Office hearing representative told her in their September 26, 2007 telephone conversation that other claimants failed to appear for their hearings on September 5, 2007, raising the issue of misdirected or lost hearing notices. However, the Board's jurisdiction to decide appeals from final decisions of the Office is limited to reviewing the evidence that was before the Office at the time of its final decision.²¹ The Board may not, therefore, consider whether appellant's explanation is sufficient to rebut the presumption of receipt raised by the "mailbox rule."²²

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$10,167.05 overpayment from November 2, 2002 to April 14, 2007. The Board finds that the Office improperly denied consideration of waiver of the overpayment. The Board further finds that the Office properly found that appellant abandoned her request for a hearing.

¹⁹ *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004); *James A. Gray*, 54 ECAB 277 (2002).

²⁰ Her September 26, 2007 telephone call to the Office hearing representative was not timely made within 10 days of the date of the hearing.

²¹ 20 C.F.R. § 501.2(c).

²² *See Mike C. Geffre*, 44 ECAB 942 (1993) (Thomas, dissenting).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 3 and September 19, 2007 are affirmed as to the abandonment of hearing issue. The September 19, 2007 decision is affirmed as to the fact and amount of the overpayment but is set aside on the issue of waiver of overpayment and remanded for further action consistent with this decision of the Board.

Issued: July 8, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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