

W. A. FITZHUGH

IBLA 75-42

Decided November 27, 1974

Appeal from decision of Eastern States Office, Bureau of Land Management, rejecting a petition for reinstatement of oil and gas lease ES-5326 (Miss.).

Affirmed.

1. Oil and Gas Leases: Reinstatement – Oil and Gas Leases: Rentals

An oil and gas lease terminated by operation of law for failure to make timely payment of advance rentals due will not be reinstated when the lessee fails to show by credible objective evidence that his failure to pay on time was justifiable or not due to a lack of reasonable diligence.

APPEARANCES: W. A. Fitzhugh, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

W. A. Fitzhugh has appealed from the decision of the Eastern States Land Office, Bureau of Land Management (BLM), dated June 19, 1974, which denied his petition to reinstate oil and gas lease ES-5326 (Miss.).

The Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 188(b) (1970), <sup>1/</sup> provides that an oil and gas lease terminates by operation of law if the annual rental is not paid on or before the anniversary date of the lease. The Act further provides for the reinstatement of a terminated lease upon a petition showing that failure to make timely payment "was either justifiable or not due to a lack of reasonable diligence." 30 U.S.C. § 188(c) (1970); 43 CFR 3108.2-1(c).

---

<sup>1/</sup> These provisions were incorporated into the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-59 (1970), under which lease ES-5326 was issued, by section 3 of that Act, 30 U.S.C. § 352 (1970).

The BLM received appellant's rental check, dated April 25, 1974, on May 3, 1974, a Friday, in an envelope postmarked "PM 30 APR 1974." Appellant asserts, in his statement of reasons, that his secretary mailed the payment the same day it was dated, April 25, 1974, earlier than he has mailed payment in other years, and, he asserts, sufficiently early to demonstrate reasonable diligence.

[1] This Board has granted reinstatement in cases where the postmark demonstrates that the payment was deposited in the mails early enough to show reasonable diligence. R. G. Price, 8 IBLA 290, 292 (1972). If the postmark does not demonstrate reasonable diligence in the lessee's mailing of the payment, the Board will not go beyond it in the absence of exceptional circumstances. See Mary White, 13 IBLA 363 (1973) (assertion that money order was mailed when purchased supported by additional probative evidence); A. Anton Frederickson, A-30793 (November 28, 1967) (affidavit of witness to mailing); John W. Monzel, A-28817 (August 31, 1961) (letter from post office detailing possibility of delay).

In the absence of credible objective or documentary evidence to the contrary, the postmark date will be deemed the date of mailing. Mailing payment April 30, the day before it is due, is not the exercise of reasonable diligence contemplated by the statute and regulation. Louis Samuel, 8 IBLA 268 (1972).

Nor has any showing been made that the failure to pay rental timely was justifiable.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman  
Administrative Judge

I concur.

Edward W. Stuebing  
Administrative Judge

## ADMINISTRATIVE JUDGE THOMPSON DISSENTING:

The majority refuses to give any credence to appellant's assertion that the rental payment check was mailed on April 25, 1974, as dated. If there were inconsistencies in appellant's statements which eroded the credibility of those statements, I would agree that an assertion the check was mailed when dated could not be accepted. To this effect, See Martha N. Jackson, 18 IBLA 92 (1974). If, however, there are circumstances and other proof which support the appellant's assertions as to the time of mailing, such proof will be accepted as overcoming any presumptive effect given to the postmark date as the time of mailing. See Mary White, 13 IBLA 363 (1973). For example, an affidavit by appellant's secretary that she mailed the check on the day it was dated and a showing of the usual business practices of the office and any other supportive evidence showing when and where the check was mailed, such as the postal practices in that area, or an explanation from the postal service as to possible delays between the time of mailing and the date of the postmark, could corroborate appellant's assertion as to the time of mailing. I would not automatically discredit appellant's assertion as to the time of mailing in this case, but would, at least, before finally deciding this appeal, afford appellant a further opportunity to submit additional proof to support his assertion that the check was mailed on April 26, 1974, as dated, which time would be within the time necessary to show reasonable diligence in mailing the payment. <sup>1/</sup>

Joan B. Thompson  
Administrative Judge.

---

<sup>1/</sup> Regulation 43 CFR 3108.2-1(c) places the burden upon the petitioner to establish satisfactory proof to warrant reinstatement of his lease. It does not specify the type of evidence necessary. The letter from the Bureau of Land Management to appellant notifying him of the late payment and right to petition for reinstatement did not refer to this burden or given any indication of the type of proof necessary to warrant reinstatement of the lease. Although a lessee is presumed to have knowledge of the regulations and his lack of knowledge cannot give him any right not authorized by law, I do believe better information of the burden upon him and type of proof should be given to the lessee when he is given notice of the late payment and right to petition for reinstatement of the lease.

