

DISCUSSION

Under 35 U.S.C. § 42(d), the Commissioner is authorized to refund any fee paid in excess of that required or paid by mistake. Petitioner did not pay an amount in excess of what was required for the Request for Regrade. On August 2, 1999, Petitioner filed a Request for Regrade of the morning section of his April 1999 registration exam. Along with the request, he enclosed \$230, the required fee. *See* 37 C.F.R. § 1.21(a)(6)(i). Hence, Petitioner paid the correct fee, and he is not entitled to a refund on the basis of an excess payment.

Petitioner is also not entitled to a refund because he did not pay the fee by mistake. An applicant for the registration exam may request a regrade of a failed exam. 37 CFR § 10.7(c). The request must be filed within two months of being notified of failing the exam. *Id.* Petitioner sat for the April 1999 exam, but he did not pass. Within two months of being notified that he failed the April 1999 exam, Petitioner filed a Request for Regrade. The fact that he timely filed the request shows that he did not mistakenly submit the fee. *See Miessner v. United States*, 108 USPQ 6, 7 (D.C. Cir. 1955) (appeal fee paid after examiner's final rejection but prior to examiner's withdrawal of final rejection was not paid by mistake).

Petitioner requests a refund of his regrade fee because he did not receive a decision on his requested regrade before taking and passing the November 1999 exam. Petitioner argues that his regrade petition is now moot and therefore he is entitled to withdraw his request for a regrade, and to obtain a refund of the regrade fee.

Petitioner is correct in arguing that the petition for regrade is moot. A petition for regrade seeks a determination that the Petitioner possesses one of the “necessary qualifications” needed to render patent applicants valuable assistance. 35 U.S.C. § 31; *see also* 37 CFR § 10.7(b). In this

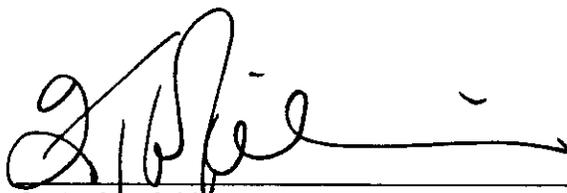
case, such a determination was made when Petitioner successfully sat for the November 1999 examination. Petitioner's intervening act of taking and passing this subsequent exam, instead of waiting for the Commissioner to issue a decision on the petition, rendered the petition moot since the relief sought by the petitioner was granted by passing the exam. *See Brownlow v. Schwartz*, 261 U.S. 216, 217 (1923) (ordering dismissal of a petition because relief sought by petitioner had already been granted, thereby rendering the issue moot). *See also Mills v. Green*, 159 U.S. 651, 654 (1895) (holding that when an intervening event occurs, created either by the plaintiff or by a power beyond the control of either party, "the court will stay its hand"). Therefore, Petitioner's Request for Regrade was properly dismissed as moot. However, the fact that the petition was rendered moot does not establish that the regrade fee was paid by mistake when Petitioner filed the request for regrade in August 1999.

Petitioner's act of taking and passing the November 1999 exam does not provide a basis for refunding the regrade petition fee. Under 35 U.S.C. § 42(d), the Commissioner is authorized to refund any fee paid in excess of that required or paid by mistake. As discussed above, Petitioner did not pay a fee in excess of the required petition fee, nor did he pay the petition fee by mistake. Therefore, Petitioner is not entitled to a refund of the petition fee.

CONCLUSION

Petitioner has failed to show that he paid the regrade fee in excess of what was required or by mistake. Accordingly, it is ORDERED that the request for refund of the \$230 regrade fee is denied.

FEB 16 2000

A handwritten signature in black ink, appearing to read "Q. Todd Dickinson", written over a horizontal line.

Q. Todd Dickinson
Assistant Secretary of Commerce and
Commissioner of Patents and Trademarks

Harry I. Moatz, Acting Director
Office of Enrollment and Discipline