

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

S.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Providence, RI, Employer**

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**Docket No. 09-1020
Issued: November 3, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 9, 2009 appellant filed a timely appeal of the May 7, 2008 merit decision of the Office of Workers' Compensation Programs finding an overpayment of compensation for which she was at fault. 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 appellant received an overpayment in the amount \$8,081.46 for the period April 19 through August 6, 2005; and (2) whether appellant was at fault in the creation of the overpayment such that it is not subject to waiver.

FACTUAL HISTORY

On January 13, 2005 appellant, then a 48-year-old rural carrier, filed an occupational disease alleging that she developed carpal tunnel syndrome due to her federal job duties. The Office accepted her claim for bilateral carpal tunnel syndrome and bilateral surgical releases. It entered appellant on the periodic rolls on February 28, 2005. Appellant returned to full-time

regular duty on April 19, 2005. On October 12, 2005 the Office accepted left thumb trigger finger.

The Office paid appellant compensation for total disability from April 19 through August 6, 2005. It notified the employing establishment on October 14, 2005 that she was overpaid wage-loss compensation April 19 through August 6, 2005. On August 15, 2007 the Office determined that appellant received an overpayment in the amount of \$8,081.46 as she received compensation for total disability for the period April 19 through August 6, 2005.

In a letter dated August 17, 2007, the Office made the preliminary determination that appellant had received an overpayment of compensation in the amount of \$8,081.46 because she received compensation for total disability April 19 through August 6, 2005 after returning to full-time work on April 19, 2005. It found that she was at fault in the creation of the overpayment as she accepted payments which she knew or should have known were incorrect. The Office allowed appellant 30 days to request a prerecoument hearing, a telephone conference, or to submit financial information to be considered in a written decision.

Appellant responded on September 6, 2007 and requested a telephone conference. She disagreed with the amount of the overpayment and contended that she was without fault in the creation of the overpayment. Appellant stated that she underwent surgery on January 14, 2005 and first received compensation payments in March 2005. She believed that the additional payments were for periods of disability resulting from her first surgery. Appellant stated that she was filing for bankruptcy. She submitted an overpayment recovery questionnaire and indicated that she had no earned income as she was awaiting payment from the Office for her most recent surgery. Appellant indicated that she received \$220.00 a month in alimony. She listed her monthly expenses as \$850.00 in rent, \$200.00 for food; \$60.00 for clothing and \$300.00 for utilities. Appellant listed \$600.00 in automobile expenses and medical expenses. She also indicated that she owed \$2,500.00 in legal fees, \$130.50 a month for storage and \$50.00 for medical expenses for total monthly expenses of \$2,198.50. Appellant indicated that she had \$150.20 in her checking account and \$4,000.00 in her thrift savings plan.

The Office entered appellant on the periodic rolls on October 4, 2007.

By decision dated May 7, 2008, the Office found that appellant had received an overpayment in the amount of \$8,081.46 as she returned to work on April 19, 2005 and continued to receive compensation for total disability from April 19 through August 6, 2005. It found that she was at fault in the creation of the overpayment. The Office requested that appellant repay the overpayment in full. It did not address her request for a telephone conference or the financial documents she submitted.

LEGAL PRECEDENT -- ISSUE 1

Section 10.432¹ of the Office's regulations provide that an individual can present evidence to the Office in response to a preliminary notice of overpayment in writing or at a prerecoument hearing. The evidence must be presented or the hearing requested within 30 days

¹ 20 C.F.R. § 10.432.

of the date of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.

ANALYSIS -- ISSUE 1

The Office issued its preliminary finding of overpayment on August 17, 2007. In a letter dated September 6, 2007, and received by the Office on September 19, 2007, appellant requested a telephone conference with the district Office and submitted financial information. The record does not contain an envelope with a postmark associated with these documents. While this letter was not received by the Office until September 19, 2007, the envelope bearing the letter was not retained by the Office.² Chapter 2.1602.3(b)(1) of the Office's procedure manual provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope.³ As the Office did not retain the envelope for appellant's September 6, 2007 letter, the Board finds that the date of the letter itself should be used.⁴ The Board has held that, when a request for a prerecoupment hearing is timely made, but improperly ignored by the Office, the case will be remanded for the Office to respond to appellant's request.⁵ The September 6, 2007 letter was a timely request for a telephone conference regarding the overpayment of compensation. Appellant submitted financial information that should be considered by the Office prior to issuing a final overpayment decision.

CONCLUSION

The Board finds that the case is not in posture for decision as the Office did not consider appellant's timely request for a telephone conference regarding the overpayment of compensation.

² *Compare L.C.*, 59 ECAB ____ (Docket No. 08-209, issued June 16, 2008) (finding that when a postmark was in the record and established that a request for a prerecoupment hearing was untimely, then the Office properly denied this request).

³ The Office's procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(b)(1) (January 2004).

⁴ *Id.*; *Jack D. Johnson*, 57 ECAB 593, 596 (2006).

⁵ *Willie C. Howard*, 55 ECAB 564, 569 (2004).

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: November 3, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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