

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

S.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Uniontown, OH, Employer**

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**Docket No. 11-1632
Issued: April 12, 2012**

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On July 6, 2011 appellant filed a timely appeal from a June 6, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) finding that she received an overpayment of compensation and a June 6, 2011 nonmerit decision denying her request for a prerecoupment hearing. The Board docketed the appeal as No. 11-1632.

On February 28, 2011 OWCP advised appellant of its preliminary determination that she received a \$10,694.31 overpayment of compensation because it paid her compensation at an inaccurate pay rate from November 4 to December 17, 2010 and January 1 to 28, 2011. It further advised her of its preliminary determination that she was at fault in the creation of the overpayment. OWCP notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

Appellant submitted a request for a prerecoupment hearing dated March 4, 2011. On March 31, 2011 OWCP finalized its determination that she received a \$10,694.31 overpayment and that she was at fault in its creation. On June 6, 2011 it vacated its March 31, 2011 decision in order to consider appellant's request for a prerecoupment hearing. By decision dated June 6, 2011, OWCP denied her prerecoupment request as untimely. It found that her request was not date stamped until April 4, 2011 and was thus not made within 30 days of the preliminary

overpayment determination. In another decision dated June 6, 2011, OWCP again finalized the preliminary determination that appellant had received an overpayment of compensation in the amount of \$10,694.31 and that she was at fault in its creation.

The Board has duly considered the matter and notes that section 10.432 of OWCP's regulations provide that, in response to a preliminary notice of an overpayment, a claimant may request a prerecoupment hearing within 30 days of the written notice of overpayment.¹ Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.² OWCP's regulations provide that the timeliness of the request is determined by its postmark or other carrier's date marking.³ The 30-day period for determining the timeliness of appellant's request for a prerecoupment hearing commenced on March 1, 2011, the date following the issuance of the February 28, 2011 preliminary overpayment determination. Appellant's request for a prerecoupment hearing was dated March 4, 2011 and received by OWCP on April 4, 2011. The Board notes that OWCP did not retain or scan into the record the envelope containing her request for a prerecoupment hearing. Consequently, the date of appellant's hearing request, March 4, 2011, is used to determine its timeliness. As it was made within 30 days of the issuance of the February 28, 2011 preliminary overpayment determination as required by 20 C.F.R. § 10.432, it is considered timely.⁴

On remand, OWCP's Branch of Hearings and Review shall conduct the prerecoupment hearing and following any necessary development issue an appropriate decision regarding the fact and amount of overpayment, whether waiver of recovery of the overpayment is warranted and if not, the rate of recovery.

¹ 20 C.F.R. § 10.432; *see Willie C. Howard*, 55 ECAB 564 (2004).

² *See Afegalai L. Boone*, 53 ECAB 533 (2002); *John B. Montoya*, 43 ECAB 1148 (1992).

³ 20 C.F.R. § 10.616(a). OWCP has administratively decided that the test used in 20 C.F.R. § 10.616(a) for determining the timeliness of hearing requests should apply to requests for prerecoupment hearings. 20 C.F.R. § 10.439. Accordingly, timeliness is determined by the postmark of the envelope, if available. Otherwise, the date of the letter itself should be used. *See James B. Moses*, 52 ECAB 465 (2001); *William J. Kapfhammer*, 42 ECAB 271 (1990).

⁴ *Id.*

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 6, 2011 are set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: April 12, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board