

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

C.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Richlands, VA, Employer**

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**Docket No. 13-1337
Issued: November 1, 2013**

Appearances:
John J. Gifford, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 7, 2013¹ appellant, through counsel, filed a timely appeal from a November 9, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. Because more than 180 days has elapsed between the last merit decision dated July 16, 2012 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim. Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the November 9, 2012 nonmerit decision.

¹ Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. See 20 C.F.R. § 501.3(f)(2). As OWCP's merit decision was issued on November 9, 2012, the 180-day computation begins November 10, 2012. One hundred and eighty days from November 10, 2012 was May 8, 2013. Since using May 14, 2013, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is May 7, 2013, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal appellant's counsel contends that the preliminary overpayment determination was faulty and that OWCP erred in finding appellant at fault in the creation of the overpayment.

FACTUAL HISTORY

On October 3, 1994 appellant, then a 47-year-old part-time flexible distribution clerk, filed a traumatic injury claim alleging that on October 1, 1994 she injured her lower back while picking up a tray of mail. OWCP accepted the claim for lumbar sprain and degenerative lumbar disc disease and authorized L3-4 and L5 microdiscectomy and L3-4 decompressive hemilaminectomy with associated foraminotomy, which occurred on July 27, 1995. By letters dated June 23 and October 20, 1995, appellant was placed on the periodic rolls for temporary total disability.³

By decision dated November 23, 1998, OWCP reduced appellant's wage-loss compensation based on her actual earnings in the position of distribution/window clerk. It noted that the employment was effective September 30, 1996.

On October 13, 2010 OWCP issued a retroactive loss of wage-earning capacity decision effective April 14, 1997 based upon appellant's actual earnings working four hours per day in the position of distribution clerk.

On October 27, 2010 OWCP issued a preliminary notice of overpayment finding that she had been overpaid \$245,017.69 because she received compensation for total disability for the period April 14 to June 21, 2010 while reemployed in a modified-duty position. It also noted that a loss of wage-earning capacity decision had been issued. OWCP found appellant at fault in the creation of the overpayment as she should have been aware that the compensation payment she received was incorrect.

In a November 12, 2010 letter, appellant disagreed with OWCP's finding that she was at fault in the creation of the overpayment. She questioned the amount and calculation of the overpayment. Appellant informed OWCP that she was reserving her right to request a telephone conference.

On November 18, 2010 OWCP issued an amendment to the preliminary notice of overpayment finding that appellant had been overpaid \$226,151.26 for the period June 22, 1997 to September 25, 2010 because she had been working 33.3 hours per week and a loss of wage-earning capacity decision should have been issued effective June 22, 1997. It found she was at

³ On April 2, 2007 appellant filed a claim for a schedule award. OWCP has not issued a final decision for any employment-related permanent impairment due to her accepted employment conditions. The Board therefore lacks jurisdiction to address this issue on appeal. 20 C.F.R. § 501.2(c); *see E.L.*, 59 ECAB 405 (2008); *Linda Beale*, 57 ECAB 429 (2006) (the Board's jurisdiction extends only to the review of final decisions by OWCP).

fault in the creation of the overpayment on the grounds that she should have known that compensation payment she received was incorrect.

In correspondence dated November 23, 2010, appellant disagreed with OWCP's preliminary overpayment findings. She also requested a prerecouplement hearing, a telephone conference and review of the written record by an OWCP hearing representative.

By decision dated July 16, 2012, OWCP finalized its preliminary determination that an overpayment of \$226,151.26 was created due to appellant receiving compensation for total disability when she returned to her date-of-injury position working 33.3 hours per week effective June 22, 1997. It noted that appellant should have been placed on a loss of wage-earning capacity because of her earnings. OWCP found that waiver of the recovery of the overpayment was precluded as appellant had been at fault in creation of the overpayment.

In a letter dated July 29, 2012, appellant requested reconsideration. She argued that OWCP erred in issuing a final overpayment decision when it had failed to provide her with either a hearing or telephone conference as requested. Appellant contended that OWCP erred in basing the overpayment on her working a 33.3-hour workweek when she worked a 20-hour workweek. She provided evidence supporting her contention that she worked a 20-hour workweek and not a 33.3-hour workweek as found by OWCP.

By decision November 9, 2012, OWCP denied reconsideration.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁵ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁷

⁴ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁵ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁶ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁷ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

ANALYSIS

OWCP issued a preliminary overpayment determination on October 27, 2010 and an amendment to the preliminary overpayment determination on November 18, 2010. On December 7, 2010 appellant requested a telephone conference, a prerecoupment hearing and review of the written record. By decision dated July 16, 2012, OWCP finalized the overpayment of compensation and found that waiver of recovery of the overpayment was precluded as appellant had been at fault in the creation of the overpayment. Appellant requested reconsideration of this decision on July 29, 2012. OWCP denied merit review in a November 9, 2012 decision.

The Board finds that appellant met the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In connection with her October 2012 application for reconsideration, appellant argued that OWCP erred in failing to provide her with either a telephone conference or prerecoupment hearing as requested prior to the final overpayment decision, which was issued approximately 20 to 21 months after the preliminary notice and amended preliminary notice of overpayment. She also provided new evidence showing that she had not worked more than 20 hours per week since returning to work in 1997.

Given that appellant submitted new argument showing that OWCP erroneously applied a specific point of law, and pertinent new and relevant evidence showing that she worked no more than 20 hours per week since 1997, OWCP improperly denied merit review pursuant to 20 C.F.R. § 10.608. Therefore, the case shall be remanded to OWCP in order to provide appellant with either a prerecoupment hearing or telephone conference regarding the overpayment found by OWCP. After such proceedings as it deems necessary, OWCP shall issue an appropriate decision on the merits.

In view of the above decision, the arguments made by appellant's counsel need not be addressed.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 9, 2012 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: November 1, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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