

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

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G.W., Appellant )

and )

DEPARTMENT OF THE ARMY, )  
INSTALLATION MANAGEMENT )  
COMMAND, Redstone Arsenal, AL, Employer )

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**Docket No. 12-297**  
**Issued: October 25, 2012**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 19, 2011 appellant filed a timely appeal from a November 16, 2011 decision of an Office of Workers' Compensation Programs' (OWCP) hearing representative who denied his request for a prerecoupment hearing. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the decision denying appellant's request for a hearing.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for a prerecoupment hearing as untimely.

On appeal, appellant asserts that he was informed on the telephone that he could have an extension to request a hearing.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

This case has previously been before the Board. In a June 3, 1998 decision,<sup>2</sup> the Board affirmed a December 12, 1995 OWCP decision granting appellant a schedule award for a six percent loss of use of the left leg. The Board reversed an August 24, 1995 OWCP decision that found that his actual earnings as a firefighter represented his wage-earning capacity.<sup>3</sup> The Board found that the firefighter position did not fairly and reasonably represent his wage-earning capacity because he was unable to perform the regular-duty requirements due to his employment injury. The facts of the previous Board decision are incorporated herein by reference.

By decision dated February 22, 1999, OWCP denied appellant's claim for an employment-related cervical condition. On March 8, 2000 appellant underwent a second surgical procedure. On November 27, 2000 he had a spinal fusion from L4 to the sacrum. Appellant was referred to vocational rehabilitation in July 2002. In January 2003, an infusion pump for medication was implanted.

On October 6, 2003 appellant returned to work as a fire protection inspector. By decision dated April 16, 2004, OWCP determined that his employment as a fire protection inspector fairly and reasonably represented his wage-earning capacity with zero loss. Appellant continued to work in the fire inspector position until September 3, 2007. He had additional surgery for removal of a spinal cord stimulator and retained hardware on September 10 and December 17, 2007. Appellant returned to modified duty on February 25, 2008 and to full duty on May 1, 2008.

Appellant stopped work on January 22, 2009. He was placed on the periodic compensation rolls, based on a weekly pay rate of \$2,016.24, at the 3/4 augmented rate.<sup>4</sup> On November 19, 2010 the employing establishment offered appellant a modified position as administrative support clerk. Appellant returned to the modified position for four hours daily on December 20, 2010.

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<sup>2</sup> Docket No. 96-1493. The decision contains a typographical error indicating that it was issued on June 3, 1993 whereas the actual issue date was June 3, 1998.

<sup>3</sup> On July 11, 1990 appellant a driver operator, injured his lower back moving a window-unit air conditioner. OWCP accepted herniated disc at L4-5 and a recurrence of disability on February 15, 1994. On September 15, 1994 appellant underwent discectomy at L4-5 and L5-S1. He returned to regular duty on April 18, 1995. Appellant retired on disability effective August 1, 1997 and elected FECA benefits in February 1999.

<sup>4</sup> In December 2009, OWCP referred appellant to Dr. Jay R. SoloRio, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a January 11, 2010 report, Dr. SoloRio diagnosed low back pain status post fusion and advised that appellant was totally disabled and needed further management of his chronic pain. A February 15, 2010 functional capacity evaluation (FCE) indicated that appellant could not return to full-time employment. In supplementary reports, Dr. SoloRio reviewed the FCE, which he considered a valid study. He advised that appellant could not perform his previous employment as a firefighter and provided restrictions to his physical activity. OWCP determined that a conflict was created regarding appellant's work capabilities and in April 2010 referred him to Dr. Richard A. Bagby, Jr., a Board-certified orthopedist, for a referee examination. In a June 2, 2010 report, Dr. Bagby advised that sitting was restricted to approximately one-half hour at a time and that appellant could work four hours a day if he could stand and move about for 10 minutes each hour. On February 9, 2011 he advised that appellant could perform sedentary duty eight hours a day, five days a week.

On February 3, 2011 OWCP reduced his compensation to reflect his earnings. It found that the weekly pay rate when disability recurred on January 22, 2009 was \$1,409.95; the current pay rate for job and step when injured was \$941.42; appellant was capable of earning \$467.54 and had a wage-earning capacity of 50 percent, with an adjusted wage-earning capacity of \$704.98; with a loss of wage-earning capacity of \$704.97; yielding an augmented compensation rate of \$528.76, increased by applicable cost-of-living adjustments to \$546.75 per week, for a four-week gross compensation rate of \$2,187.00.

By letter dated April 11, 2011, appellant contended that his compensation rate was incorrect because, as a firefighter, his check was based on 106 hours of regular pay plus 38 hours of overtime, with a gross annual salary of \$73,317.40. His compensation while on total disability was based on this amount but, since returning to work for four hours a day, he was not being paid for overtime. Appellant stopped work on June 6, 2011 for an authorized medical procedure.<sup>5</sup> He was placed on the periodic compensation rolls, based on the January 22, 2009 pay rate or \$1,409.95 weekly and returned to the modified position for four hours daily on July 18, 2011.

On September 19, 2011 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$42,905.92 for the period January 22, 2009 to December 19, 2010 because he was paid compensation at an incorrect pay rate. It used a weekly pay rate of \$2,016.24 a week when he should have been paid based on a weekly pay rate of \$1,409.95 a week. Appellant was found without fault in the creation of the overpayment and was advised of his rights if he disagreed with the preliminary finding. He was provided an overpayment questionnaire and informed to submit the questionnaire in order for waiver of the overpayment to be considered. Appellant was also provided an overpayment action request form which advised him that he could request a telephone conference with OWCP on the issues of fault and possible waiver of the overpayment. He was advised that the overpayment action request must be mailed to OWCP within 30 days.<sup>6</sup> The record contains overpayment worksheets and computer print-outs describing his compensation for the period January 22, 2009 to December 18, 2010. They reflect that appellant was paid compensation for the period calculated on a base annual salary of \$72,814.00 when it should have been calculated on a base annual salary of \$47,672.00.

On October 18, 2011 appellant telephoned OWCP requesting an extension of time to submit information regarding his overpayment. An October 19, 2011 telephone memorandum notes that he stated that he needed an extra two weeks to gather financial information and was told by OWCP that, if there was a problem with this, he would be informed.

In correspondence dated October 27, 2011 and postmarked October 28, 2011, appellant submitted an overpayment action request in which he requested a precoupment hearing and waiver of the overpayment. He also submitted an overpayment questionnaire and financial information.

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<sup>5</sup> A thoracic epidural neurostimulator and generator were implanted on June 6, 2011.

<sup>6</sup> An overpayment of compensation in the amount of \$79.42 was created because appellant was overpaid for the period July 3 to 18, 2011. The \$79.42 overpayment was written off.

By decision dated November 16, 2011, OWCP denied appellant's request for a prerecoupment hearing as untimely.

### **LEGAL PRECEDENT**

OWCP regulations on the recovery of overpayments provide that, before collecting the overpayment, it must provide the claimant with written notice of the fact and amount of the overpayment, the finding of fault, the right to submit evidence challenging the fact, amount or finding of fault and the right to request waiver of the overpayment.<sup>7</sup> The regulations further provide that a claimant may request a prerecoupment hearing with respect to an overpayment.<sup>8</sup> Failure to request the prerecoupment hearing within 30 days shall constitute a waiver of the right to a hearing.<sup>9</sup> The only right to a review of a final overpayment decision is to the Board.<sup>10</sup> The hearing provisions of 5 U.S.C. § 8124(b) of FECA do not apply to a final overpayment decision.<sup>11</sup>

### **ANALYSIS**

The Board finds that OWCP properly denied appellant's request for a prerecoupment hearing as untimely. OWCP notified him of its preliminary determination that he received an overpayment of compensation in a letter dated September 19, 2011. It informed appellant that he could request a telephone conference, a prerecoupment hearing or a final decision based on the written evidence within 30 days of the date of the letter. The record contains telephone memoranda dated October 18 and 19, 2011 in which appellant requested an extension of time to submit financial information. In correspondence postmarked October 28, 2011, appellant returned the overpayment action request, overpayment questionnaire and financial information. OWCP's implementing regulations are specific as to the 30-day time limitation in which to request a prerecoupment hearing. Appellant's request for a prerecoupment hearing was postmarked October 28, 2011, more than 30 days after OWCP's notification of overpayment dated September 19, 2011. As provided in OWCP regulations, his hearing request was therefore untimely and he waived his right to a prerecoupment hearing.<sup>12</sup>

On appeal, appellant reiterated that he was told that he would review an extension to respond to the preliminary determination of overpayment and that his request for a prerecoupment hearing should be considered timely. As noted OWCP regulations do not make

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<sup>7</sup> 20 C.F.R. § 10.431.

<sup>8</sup> *Id.* at § 10.432.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at § 10.440(b); *see H.K.*, Docket No. 11-543 (issued November 25, 2011).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

any provisions for extending the time to request a hearing beyond 30 days.<sup>13</sup> Accordingly, it properly denied his request for a prerecoument hearing.<sup>14</sup>

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for a hearing as untimely.<sup>15</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 16, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>13</sup> 20 C.F.R. § 10.432.

<sup>14</sup> *H.K.*, *supra* note 10.

<sup>15</sup> *Id.* The Board notes that appellant has a further appeal before the Board, Docket No. 12-1171, that will be adjudicated separately.