

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

P.A., Appellant)
and) Docket No. 12-1247
U.S. POSTAL SERVICE, POST OFFICE,) Issued: January 14, 2013
Islandia, NY, Employer)

)

Appearances: Case Submitted on the Record
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

ORDER REMANDING CASE

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

On May 18, 2012 appellant, through his attorney, filed a notice of appeal with respect to a December 29, 2011 decision of the Office of Workers' Compensation Programs (OWCP).¹ The Board docketed the appeal as No. 12-1247.

The Board has jurisdiction to consider and decide appeals from final decisions of OWCP in any case arising under the Federal Employees' Compensation Act² (FECA). Any person adversely affected by a final OWCP decision may file for review of such decision.³ The Board's review is limited to appeals filed within 180 days from the date OWCP issued its decision.⁴

¹ On an AB-1 form, counsel specifically identified a purported December 14, 2011 decision of the Branch of Hearings and Review. As discussed *infra*, the hearing representative's December 14, 2011 correspondence is not a final OWCP decision subject to appeal before the Board. *See* 20 C.F.R. § 501.2(c) (2011).

² *Id.*

³ 20 C.F.R. § 501.3(a).

⁴ *Id.* at § 501.3(e). The Board maintains discretion to extend the time period for filing an appeal if an applicant demonstrates "compelling circumstances," which means circumstances beyond appellant's control that prevent the timely filing of an appeal. *Id.* However, it does not include any delay caused by the failure of the individual to exercise due diligence in submitting a notice of appeal. *Id.*

By correspondence dated October 19, 2011, OWCP advised appellant that he had a third-party recovery surplus of \$13,340.00 stemming from his October 12, 2007 employment injury. In calculating the surplus, it disallowed a reported \$1,000.00 in court costs. OWCP further advised that the surplus must first be exhausted before any additional medical or disability benefits would be paid in connection with appellant's accepted employment injury.⁵ The October 19, 2011 correspondence requested additional itemized information concerning court costs which would potentially reduce the surplus. OWCP also requested certification of whether the amount recovered thus far represented the final recovery against all defendants. It advised appellant that if he had any questions concerning the third-party aspects of the case and his rights and responsibilities under 5 U.S.C. §§ 8131 and 8132, he should contact OWCP. Additionally, OWCP afforded appellant 30 days to submit the requested information.

On October 24, 2011 OWCP received the requested information, including the certification. The attorney who represented appellant in the third-party action documented \$1,000.00 in court costs, which based on his calculations would have reduced appellant's surplus to \$10,972.08.⁶

On November 9, 2011 appellant's counsel requested a hearing regarding the October 19, 2011 "decision."

By letter dated December 14, 2011, the Branch of Hearings and Review advised appellant that its jurisdiction extended only to "final" decisions issued by OWCP. The hearing representative noted that OWCP's October 19, 2011 letter provided information regarding appellant's third-party recovery and it was not an "adverse" decision subject to further review. Additionally, the hearing representative directed appellant's attention to the contact information OWCP provided in its October 19, 2011 correspondence. He further indicated that the case was "not in posture for a hearing at this time." In essence, the hearing representative advised appellant to first exhaust his available remedies and await a final decision from OWCP before requesting a hearing.⁷

On December 29, 2011 OWCP issued a final calculation regarding appellant's third-party recovery surplus. The surplus amount of \$13,340.00 was the same as originally calculated by OWCP on October 19, 2011.⁸ OWCP again disallowed counsel's reported \$1,000.00 court costs, noting parenthetically "costs not itemized, no response from [attorney], disallowed."

Contrary to OWCP's finding, appellant's representative in the third-party action had in fact responded to OWCP's October 19, 2011 request for additional information. It received the

⁵ Because OWCP had not yet disbursed any funds either directly to appellant or on his behalf, there was no refund required as a result of the third-party subrogation.

⁶ The itemized court costs included, *inter alia*, process service fees, court reporter transcription fees, arbitration fees and other costs related to obtaining various medical records.

⁷ Much like OWCP's October 19, 2011 correspondence, the hearing representative's December 14, 2011 letter does not constitute a "final" decision subject to review. See 20 C.F.R. § 501.2(c).

⁸ A copy of OWCP's October 19, 2011 correspondence was attached to the December 29, 2011 decision.

requested certification and itemized court costs on October 24, 2011; more than two months prior to the December 29, 2011 decision.

As the Board's decisions are final with regard to the subject matter appealed, it is crucial that OWCP address all relevant evidence received prior to the issuance of its final decision.⁹ In this instance, OWCP failed to consider the October 19, 2011 itemized statement of various court costs associated with appellant's third-party recovery action. Whether it receives relevant evidence on the date of the decision or several days prior, such evidence must be considered.¹⁰ Because OWCP failed to address all relevant evidence before it at the time, the case is remanded for a proper review of the evidence and issuance of an appropriate final decision.

IT IS HEREBY ORDERED THAT the December 29, 2011 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this order of the Board.

Issued: January 14, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

⁹ 20 C.F.R. § 501.6(d); *see William A. Couch*, 41 ECAB 548, 553 (1990).

¹⁰ *Willard McKennon*, 51 ECAB 145 (1999).