

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

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**S.B., Appellant**

**and**

**DEPARTMENT OF THE ARMY, ARMY  
DEPOT, New Cumberland, PA, Employer**

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**Docket No. 14-1159  
Issued: October 1, 2014**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On April 21, 2014 appellant, through his attorney, filed a timely appeal from a January 7, 2014 decision of the Office of Workers' Compensation Programs (OWCP) that found an overpayment of compensation. 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 merits of this case.

**ISSUE**

The issue is whether OWCP properly determined that appellant was not entitled to a prerecoupment hearing from a preliminary overpayment finding.

On appeal appellant's attorney asserts that appellant timely requested a hearing from an August 27, 2013 preliminary overpayment decision and, therefore, OWCP erred in issuing a final overpayment decision on October 2, 2013 and denying appellant's request for a prerecoupment hearing on January 7, 2014.

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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 September 18, 2002 decision, the Board affirmed as modified a February 12, 2001 OWCP decision. The Board found that appellant was not entitled to reimbursement for travel expenses incurred by his attendants while he was on vacation or for reimbursement of repairs to his vehicle or for van rental or for travel expenses.<sup>2</sup> The facts of the previous Board decision are incorporated herein by reference.

On July 30, 2013 OWCP informed appellant that a bill for landscape maintenance for 2012, from Black Landscape Contracting, Inc., in the amount of \$6,424.96, was paid in full to him by its bill payment facility, ACS. It noted that it had no record that landscaping services were authorized under the claim, and asked him to provide a copy of the authorization letter within 21 days, if one had been sent.

In correspondence dated August 20, 2013, appellant's attorney responded that appellant did not receive prior authorization for landscape maintenance but that OWCP had previously reimbursed him for landscape work. The record contains an invoice dated December 29, 2012 from Black Landscape Contracting, Inc., for 2012 landscape maintenance at appellant's residence, for the amount of \$6,424.96 and an ACS notice that the invoice was paid.

By letter dated August 27, 2013, OWCP issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$6,424.96 because he was reimbursed in error for landscaping services for the year 2012. Appellant was found at fault in the creation of the overpayment as he knew or should have known of the requirement of requesting authorization prior to submission of a request for reimbursement. There was no evidence to support that the landscaping services were related to the 1985 employment injury. He was provided an overpayment action request form and an overpayment questionnaire and was given 30 days to respond. The notice was sent to appellant's address of record and to his attorney of record. An overpayment memorandum indicates that appellant would not be entitled to reimbursement for landscaping done on his property unless it was previously authorized.

On September 27, 2013 appellant's present attorney provided an appointment of representation form, signed by appellant on September 27, 2013 to OWCP. The attorney asked for a copy of the case record.

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<sup>2</sup> Docket No. 01-1073 (issued September 18, 2002). On August 5, 1985 appellant, a heavy mobile equipment mechanic foreman, sustained a work-related gunshot wound to the right cerebral hemisphere while on official travel. The accepted conditions include brain laceration, paralytic syndrome and major depression. The injury resulted in triplegia that necessitated wheelchair use. Following rehabilitation, appellant returned to modified duty on August 23, 1988 and worked part time for a number of years. He retired on disability on July 10, 1993. On July 29, 1994 he was granted a schedule award for a total 1,087.3 weeks of compensation, to run from July 24, 1994 to May 26, 2015. Appellant also receives disability retirement benefits from the Office of Personnel Management. OWCP paid for modification to his home, including an indoor pool for therapy use, modified vans, and additional durable medical equipment. It also pays for attendant care. The record indicates that appellant owns rental properties and is a co-owner in several businesses. A 2004-05 Office of the Inspector General investigation concluded that appellant was having his attendants perform nonhealth-related activities such as landscaping and work on his rental properties, and that he ordered items in excess at government expense. In November 2005, appellant had a multidisciplinary rehabilitation evaluation which concluded that he needed 24-hour care. His attendant care is now furnished by a nursing service.

By letter dated September 30, 2013, OWCP forwarded appellant's counsel a copy of the letter of new representation and asked him to state, in writing, if his firm still represented appellant in his FECA claim.

Appellant did not respond to the preliminary overpayment finding.<sup>3</sup>

By decision dated October 2, 2013, OWCP finalized the preliminary overpayment decision. It found that appellant was at fault in the creation of the overpayment as he knew or should have known that he was not entitled to the payment received.<sup>4</sup> Appellant's counsel was provided a copy of the final overpayment decision.

On October 8, 2013 appellant's original attorney informed OWCP that he no longer represented appellant in connection with his FECA claim.

In correspondence dated September 27, 2013, received by the Branch of Hearings and Review (BHR) on October 17, 2013 and scanned received on October 21, 2013, appellant's present attorney noted that appellant's file would document that he requested a precoupment hearing. Counsel also asked that his representation be acknowledged. He forwarded a copy of an envelope from his office, addressed to the Branch of Hearings and Review, postmarked September 28, 2013, and a copy of the appointment of representative, signed by appellant on September 27, 2013. By letter dated October 10, 2013, received by the Branch of Hearings and Review on October 17, 2013 and scanned on October 23, 2013, counsel asked that it respond to his September 27, 2013 correspondence regarding the preliminary overpayment determination. He had "received correspondence from the district office dated October 2, 2013 indicating that no appeal had been made of that preliminary decision," and stated that he was again enclosing a copy of appellant's appeal letter dated September 16, 2013. An overpayment action request was attached, signed by appellant on September 16, 2013. A precoupment hearing was requested, and appellant disagreed that an overpayment had occurred or he was at fault. An envelope, addressed to the Branch of Hearings and Review, was attached with a postmark of October 11, 2013.

On October 18, 2013 OWCP notified appellant that it had received his request for an oral hearing. A copy was sent to his attorney. On December 27, 2013 counsel inquired about scheduling the requested hearing.

By decision dated January 7, 2014, OWCP denied appellant's request for a precoupment hearing. It found that it had not received the request for a precoupment hearing within 30 days of the August 27, 2013 preliminary overpayment determination. OWCP advised

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<sup>3</sup> The only evidence of record not mentioned above that was submitted subsequent to the August 27, 2013 preliminary overpayment letter and the final overpayment decision dated October 2, 2013, consists of telephone memoranda and other information regarding appellant's request for a new van, a copy of correspondence dated July 9, 2013 from appellant's physical therapist, and prescriptions from a physician's assistant for a cushion and a new power wheelchair.

<sup>4</sup> The overpayment was repaid by withholding total compensation for two periods and deducting partial compensation for the third period.

that appellant was issued a final decision on the overpayment of compensation and this decision was not subject to the hearing provision found at 5 U.S.C. § 8124(b).

### **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>5</sup> The regulations further provide that a claimant may request a prerecoupment hearing with respect to an overpayment.<sup>6</sup> Failure to request the prerecoupment hearing within 30 days shall constitute a waiver of the right to a hearing.<sup>7</sup> The only right to a review of a final overpayment decision is to the Board.<sup>8</sup> The hearing provisions of 5 U.S.C. § 8124(b) of FECA do not apply to a final overpayment decision.<sup>9</sup>

It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.<sup>10</sup> The mailbox rule provides that proper and timely mailing of a document raises a rebuttable presumption of receipt by the addressee. The Board has applied the mailbox rule to claimants under FECA and to OWCP when it is established that the mailing was in the ordinary course of the sender's business practices. It serves as a tool for determining in the face of inconclusive evidence, whether or not receipt has actually been accomplished. It is to facilitate the fact finder in determining whether receipt of a document has occurred. However, as a rebuttable presumption, receipt will not be assumed when there is evidence of nondelivery.<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 August 27, 2013. 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. Appellant did not respond to the August 27, 2013 preliminary determination within 30 days. On October 2, 2013 OWCP finalized the overpayment determination and notified him that his only appeal right was with the Board. Although the record contains an overpayment action request signed by appellant and

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<sup>5</sup> 20 C.F.R. § 10.431 (2011).

<sup>6</sup> *Id.* at § 10.432.

<sup>7</sup> *Id.*

<sup>8</sup> 20 C.F.R. § 10.440(b); *see H.K.*, Docket No. 11-543 (issued November 25, 2011).

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

<sup>10</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>11</sup> *M.U.*, Docket No. 09-526 (issued September 14, 2009).

dated September 16, 2013, this was not received by the Branch of Hearings and Review until October 17, 2013. The overpayment action request is specific as to the 30-day time limitation and the method for requesting a prerecoumment hearing. It was not received until October 17, 2013, more than 30 days after OWCP's notification of overpayment on August 27, 2013. The 30<sup>th</sup> day following issuance of the August 27, 2013 preliminary overpayment determination was September 26, 2013.

In regard to the argument on appeal that the mailbox rule is applicable, counsel did not begin representing appellant until September 27, 2013, more than 30 days after the preliminary overpayment determination on August 27, 2013. He forwarded a copy of correspondence from his office dated September 27, 2013 in which he noted that a prerecoumment hearing had been requested. This, too, was not received by the Branch of Hearings and Review until October 21, 2013. Counsel also forwarded a copy of an envelope from his office with a postmark of September 28, 2013. The request for a prerecoumment hearing dated September 27, 2013, postmarked September 28, 2013 and mailed within the ordinary course of business by the attorney, was untimely.

As provided in OWCP regulations, the request for a prerecoumment hearing was untimely and appellant waived his right to a prerecoumment hearing.<sup>12</sup>

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for a prerecoumment hearing as untimely.

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<sup>12</sup> 20 C.F.R. § 10.432. The Board also notes that appellant did not timely file an appeal with the Board of the final overpayment decision. For final adverse OWCP decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. See 20 C.F.R. § 501.3(3) (2009); R.C., Docket No. 10-2371 (issued July 14, 2011).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 7, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 1, 2014  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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