

right carpal tunnel release on April 3, 2008 and left carpal tunnel and trigger thumb release on July 3, 2008. Following a period of work absence, appellant retired from the employing establishment effective October 14, 2008.

On April 23, 2009 appellant claimed a schedule award. By decision dated October 27, 2009, OWCP granted her a schedule award for a three percent impairment of the right upper extremity and a two percent impairment of the left upper extremity. Following additional development,² it issued an augmented schedule award on January 19, 2011 for an additional two percent impairment of the right arm and three percent impairment of the left arm, for a total five percent impairment of each upper extremity. Pursuant to appellant's February 6, 2012 claim for an additional schedule award, OWCP issued a September 13, 2013 schedule award for an additional one percent impairment of each arm, or a total of six percent for each arm.³

Appellant claimed an additional schedule award on October 9, 2013.⁴ On January 5, 2014 OWCP obtained a second opinion from Dr. Alexander Doman, a Board-certified orthopedic surgeon, who found a two percent impairment of each upper extremity, less than the six percent previously awarded.

By decision dated January 31, 2014, OWCP denied appellant's claim for an additional schedule award as the weight of the medical evidence established a two percent impairment of each upper extremity, less than the six percent previously awarded.

In a February 12, 2014 manual adjustment worksheet, OWCP calculated that appellant was paid \$18,384.00 in compensation for a six percent impairment of each arm, whereas she was only entitled to \$5,958.20 for a two percent impairment of each arm, resulting in an overpayment of \$12,425.80.

By notice dated February 12, 2014, OWCP advised appellant of its preliminary determination that a \$12,425.80 overpayment of compensation was created in her case, as she was compensated for a six percent impairment of each upper extremity whereas she was entitled to compensation for only a two percent impairment of each arm. It found that she was not at fault. OWCP advised appellant of her right to request a prerecoupment hearing within 30 days of the date of the letter and the requirement to submit financial information for reconsideration of waiver.

In response to the preliminary notice of overpayment, appellant submitted an overpayment recovery questionnaire (Form OWCP-20) signed on March 11, 2014. OWCP

² Appellant requested reconsideration on November 13, 2009, denied by decision dated December 1, 2009. He again requested reconsideration on May 18, 2010, denied by July 14, 2010 decision. Pursuant to an October 6, 2010 request for reconsideration, OWCP issued a January 7, 2011 decision vacating its July 14, 2010 determination.

³ OWCP applied the \$3,914.86 schedule award to a debt incurred under appellant's claim in File No. xxxxxx972.

⁴ Appellant submitted her physician's September 24, 2013 opinion finding a 30 percent impairment of the left arm and a 20 percent impairment of the right arm due to grip strength weakness. An OWCP medical adviser opined that there was no probative evidence establishing more than the six percent impairment awarded. By decision dated October 11, 2013, OWCP denied an additional schedule award. In a November 16, 2013 letter, appellant requested reconsideration.

received the form into the case record on March 20, 2014. Appellant asserted that there was no overpayment as her physicians opined that she had more than six percent impairment of each arm. The top right corner of the first page of the questionnaire is marked “Hearing Req.”

By decision dated March 17, 2014, OWCP finalized the preliminary finding of a \$12,425.80 overpayment of compensation. It found that, although appellant was without fault, it could not consider waiver as she failed to submit financial information.

In a March 21, 2014 memorandum, OWCP noted that appellant’s “representative requested a prerecoumment hearing. Therefore, the case will be suspended until a decision is reached.” In April 15 and 22, 2014 letters, appellant’s attorney requested a telephonic hearing regarding the March 17, 2014 final overpayment determination.

By decision dated March 24, 2014, OWCP vacated its March 17, 2014 decision, finding that the case was not in posture for a decision as appellant had timely requested a prerecoumment hearing. It placed her case under the jurisdiction of its Branch of Hearings and Review.

By decision dated September 4, 2014, an OWCP hearing representative denied appellant’s request for a prerecoumment hearing as it was untimely. She found that appellant’s request for a hearing was postmarked on April 15, 2014, more than 30 days after the issuance of the February 12, 2014 preliminary notice of overpayment. The hearing representative returned the case to OWCP “so that the preliminary overpayment finding can be finalized.”

LEGAL PRECEDENT

In response to a preliminary notice of overpayment, an individual may present evidence to OWCP in writing or at a prerecoumment hearing.⁵ The hearing request must be sent within 30 days of the date of the written notice of overpayment, as evidenced by a postmark or other carrier’s date marking.⁶ Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.⁷

The only review of a final decision concerning an overpayment is an appeal to the Board. The provisions of 5 U.S.C. §§ 8124(b) and 8128(a) regarding hearings and reconsideration do not apply to a final overpayment decision.⁸

⁵ 20 C.F.R. § 10.432.

⁶ *Id.* at § 10.439 (provides that prerecoumment hearings shall be conducted in exactly the same manner as provided in sections 10.615 through 10.622); *id.* at § 10.616(a) (provides that the hearing request must be sent within 30 days (as determined by postmark or other carrier’s date marking) of the date of the decision for which a hearing is sought). *See also* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions, Preliminary and Final Decisions*, Chapter 6.200.4.a(2) (June 2009).

⁷ *Id.* at § 10.432. *See also* *S.B.*, Docket No. 14-1159 (issued October 1, 2014).

⁸ *Id.* at § 10.440(b).

ANALYSIS

The overpayment action request form that accompanied the February 12, 2014 preliminary determination was specific as to the 30-day time limitation and the method for requesting a prerecoumment hearing. Appellant submitted an overpayment recovery questionnaire signed and dated March 11, 2014, with the notation "Hearing Req." OWCP's March 21, 2014 memorandum acknowledged that appellant had requested a prerecoumment hearing.

Appellant's request for a prerecoumment hearing was dated March 11, 2014, within 30 days of the February 12, 2014 notice. OWCP regulations clearly specify that the hearing request must be sent within 30 days of the date of the decision for which a hearing is sought. The 30-day time period is determined by the request's postmark or other carrier's date of marking.⁹ The regulations do not measure timeliness based on the date of receipt, but instead on the postmark.¹⁰ However, OWCP's Branch of Hearings and Review did not retain the envelope or postmark that would have verified timely mailing. The Board has held that, if there is no postmark of record, other evidence of timeliness must be considered.¹¹ Under these circumstances, the Board will rely on the date appellant signed the form, March 11, 2014. The Board therefore finds that appellant filed a timely request for a prerecoumment hearing, within 30 days of the February 12, 2014 preliminary notice of overpayment.¹² Appellant is thus entitled to a prerecoumment hearing.

Following appellant's request, appellant's attorney submitted April 15 and 22, 2014 letters requesting a hearing regarding the March 17, 2014 final overpayment determination later vacated by OWCP's Branch of Hearings and Review. In its September 4, 2014 decision, OWCP construed the April 15, 2014 letter as an untimely request for a prerecoumment hearing, and denied appellant's hearing request on that basis.¹³ The Board finds that this was in error, as appellant's March 11, 2014 hearing request remained valid. The September 4, 2014 decision must therefore be reversed, and the case remanded to OWCP's Branch of Hearings and Review to conduct a prerecoumment hearing as appellant requested. Following this and any other development deemed necessary, OWCP will issue an appropriate decision in the case.

On appeal, appellant asserts that the March 11, 2014 questionnaire constituted a timely request for a prerecoumment hearing. As stated above, the Board finds that her timely requested a prerecoumment hearing and that the September 4, 2014 decision was in error. Appellant also requests waiver of the overpayment as she is not at fault in its creation. She asserts that she is unable to repay the overpaid compensation due to her poor health, her husband's poor health,

⁹ *Id.* at § 10.616(a).

¹⁰ *Id.* See also *S.E.*, Docket No. 11-1632 (issued April 12, 2012); *T.W.*, Docket No. 11-732 (issued November 29, 2011.)

¹¹ *S.E.*, *id.*; *T.W.*, *id.*

¹² *Id.*

¹³ Although OWCP stated that the request for the prerecoumment hearing was postmarked on April 15, 2014, there is no copy of the postmarked envelope in the record before the Board.

and the resultant financial hardship. The Board notes that as there was no final decision regarding the overpayment prior to appellant filing her appeal, the Board does not have jurisdiction over the overpayment issue. The Board is therefore unable to address her argument regarding waiver.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for a prerecoupment hearing as untimely. The case will be remanded to OWCP's Branch of Hearings and Review to conduct a prerecoupment hearing, to be followed by an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case remanded to OWCP for appropriate additional development.

Issued: March 17, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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