

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

M.P., Appellant)
and) Docket No. 17-0046
U.S. POSTAL SERVICE, POST OFFICE,) Issued: June 9, 2017
New Orleans, LA, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 14, 2016 appellant filed a timely appeal from a September 9, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated May 4, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.²

ISSUE

The issue is whether OWCP properly denied appellant's request for a prerecougment hearing.

¹ 5 U.S.C. § 8101 *et seq.*

² Together with his appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated April 19, 2017, the Board denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 17-0046 (issued April 19, 2017).

FACTUAL HISTORY

On November 2, 2007 appellant, then a 39-year-old part-time flexible mail carrier, injured his left ankle when he stepped in a hole while delivering mail. OWCP accepted his traumatic injury claim (Form CA-1) for left ankle sprain. Appellant stopped work on November 2, 2007 and received continuation of pay until he resumed work on November 28, 2007. He continued to work in a limited-duty capacity for several years following his November 2, 2007 employment injury.

In September 2014, OWCP authorized left ankle surgery. Appellant stopped work on October 17, 2014 and underwent surgery on October 21, 2014, which included repair of a partially torn peroneal retinaculum and bone fragment excision of the left talus. He received disability compensation on the daily rolls beginning October 17, 2014 and on the periodic rolls beginning November 16, 2014.

In November 2014, appellant began participating with a field nurse in an OWCP-sponsored nurse intervention program designed to return him to work. In a December 20, 2014 evaluation report, the field nurse indicated that appellant advised her during a December 3, 2014 in-person interview at his home in Louisiana that he was taking a supervisory job with the employing establishment in Dallas, Texas, but she noted that he "did not provide [a] location."

Appellant returned to full-time work, effective December 13, 2014, as a supervisor for the employing establishment in Dallas.³

OWCP continued to pay appellant wage-loss compensation for temporary total disability through February 7, 2015.

In an April 2, 2015 notice, OWCP advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$6,772.93 for the period December 13, 2014 to February 7, 2015 because he returned to full-time work on December 13, 2014, but continued to receive total disability compensation. It also made a preliminary determination that he was at fault in the creation of the overpayment because he had accepted payments that he knew or reasonably should have known was incorrect. OWCP advised appellant that he could submit evidence challenging the fact of the overpayment, amount, or fault finding, and could request waiver of repayment of the overpayment.

In an Overpayment Action Request form accompanying its April 2, 2015 notice, OWCP informed appellant that he could submit additional evidence in writing at a telephone conference with OWCP's district office or at a prerecouplement hearing before a representative of OWCP's Branch of Hearings and Review, but that a telephone conference or prerecouplement hearing must be requested within 30 days of the date of its April 2, 2015 notice.⁴ It requested that appellant

³ Appellant's official return-to-work date was December 13, 2014, but he took sick leave from December 13 to 27, 2014, and appeared in person for the first time at his new job on December 28, 2014.

⁴ The Overpayment Action Request form included the particular address where the signed, written request was to be mailed.

complete and return the enclosed Overpayment Recovery Questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of the overpayment.

Appellant did not return the Overpayment Recovery Questionnaire or Overpayment Action Request form or otherwise request a telephone conference or prercoupmnt hearing within 30 days of OWCP's April 2, 2015 notice.

In a May 4, 2015 decision, OWCP finalized an overpayment of compensation in the amount of \$6,772.93. It also found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

OWCP sent both the April 2, 2015 preliminary determination and the May 4, 2015 final overpayment decision to appellant's address in New Orleans, LA.

On August 17, 2016 OWCP received an Overpayment Recovery Questionnaire and an Overpayment Action Request form that appellant had completed on August 12, 2016. Appellant checked a box on the Overpayment Action Request form requesting a prercoupmnt hearing before a representative of OWCP's Branch of Hearings and Review. On the Overpayment Action Request form and in a separate statement, he indicated that he had not received OWCP's April 2, 2015 notice as it was sent to his former address in Louisiana, rather than to his address in Texas. Appellant asserted that he had advised an OWCP nurse that he moved from Louisiana to Texas. He indicated that he first learned that OWCP had declared an overpayment when he spoke to an OWCP official in June 2016.

In a September 9, 2016 decision, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing. It noted that on April 2, 2015 OWCP made a preliminary determination that he received a \$6,772.93 overpayment for which he was at fault and allowed him 30 days to request a telephone conference with OWCP's district office or a prercoupmnt hearing before a representative of OWCP's Branch of Hearings and Review. OWCP's Branch of Hearings and Review indicated that appellant did not submit a hearing request in connection with the preliminary overpayment determination within the allotted period and noted that OWCP issued a final overpayment decision on May 4, 2015. It indicated that OWCP's May 4, 2015 final overpayment decision was not subject to the provisions of 5 U.S.C. § 8124(b) regarding hearings.

LEGAL PRECEDENT

In response to a preliminary notice of overpayment, an individual may present evidence to OWCP in writing or at a prercoupmnt hearing. The evidence must be presented or the hearing request received within 30 days of the date of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.⁵

⁵ 20 C.F.R. § 10.432. *See also D.P.*, Docket No. 13-630 (issued August 2, 2013); *M.B.*, Docket No. 12-19 (issued October 5, 2012).

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) regarding hearings do not apply to a final overpayment decision.⁶

ANALYSIS

The Overpayment Action Request form that accompanied the April 2, 2015 preliminary overpayment determination was specific as to the 30-day time limitation and the method for requesting a prerecoupment hearing, including the particular address where the signed, written request was to be mailed. Appellant submitted an Overpayment Action Request form dated and postmarked August 12, 2016 and received by OWCP on August 17, 2016.⁷ As noted above, OWCP's implementing regulations specify that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment.⁸

Appellant asserted that he had not received OWCP's April 2, 2015 notice timely. He had advised his field nurse that he moved from Louisiana to Texas in December 2014 to work in a new position for the employing establishment. Absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is known as the mailbox rule.⁹ OWCP sent its April 2, 2015 notice to appellant's then address of record in Louisiana and it is presumed to have been received by him absent any notice of nondelivery. Appellant has not submitted evidence to rebut this presumption. There is no evidence of nondelivery of the April 2, 2015 notice, such as a returned mail notice, and appellant did not provide a written statement to OWCP advising it of a change of address prior to OWCP's issuance of its April 2, 2015 notice.¹⁰

As the Overpayment Action Request form was not received within 30 days of the April 2, 2015 preliminary determination, OWCP properly issued its May 4, 2015 final overpayment determination. Consequently, the September 9, 2016 decision denying appellant's request for a hearing was proper under the law and facts of this case. The Board further notes that appellant's August 2016 hearing request cannot be considered as a request for a hearing in connection with OWCP's May 4, 2015 final overpayment decision because the provisions of 5 U.S.C. § 8124(b) regarding hearings do not apply to a final overpayment decision.¹¹

⁶ 20 C.F.R. § 10.440(b); *see also J.F.*, Docket No. 14-1412 (issued November 6, 2014); *Philip G. Feland*, 48 ECAB 85 (1997).

⁷ The 30th day after April 2, 2015 was May 2, 2015.

⁸ *See supra* note 6.

⁹ *See James A. Gray*, 54 ECAB 277 (2002).

¹⁰ *See generally J.R.*, Docket No. 13-1946 (issued January 7, 2014). In *J.R.*, the Board found that OWCP properly determined that the claimant failed to establish nonreceipt of a notice which OWCP sent him because he had not advised OWCP of a change of address in writing prior to the time OWCP sent him the notice. Appellant had asserted that he advised his vocational rehabilitation counselor of a change of address in connection with his participation in an OWCP-sponsored vocational rehabilitation program.

¹¹ *See supra* note 7.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a prerecoulement hearing.

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 9, 2017
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board