

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

J.B., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Houston, TX, Employer**

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**Docket No. 17-1164
Issued: September 11, 2017**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 4, 2017 appellant filed a timely appeal from a November 1, 2016 merit decision and a March 21, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$1,454.34 from September 6 to 17, 2016; (2) whether OWCP properly denied waiver

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from November 1, 2016, the date of OWCP's last merit decision, was April 30, 2017, a Sunday; consequently, the period for filing the appeal ran to the next business day, Monday, May 1, 2017. Since using May 5, 2017, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is April 4, 2017, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

of recovery of the overpayment; and (3) whether OWCP properly denied appellant's request for a prerecoupment hearing.

FACTUAL HISTORY

On November 27, 2013 appellant, then a 50-year-old information technology specialist, filed a traumatic injury claim (Form CA-1) alleging that on November 26, 2013 he injured his right knee, low back, and ankle in the performance of duty. He did not stop work. OWCP accepted the claim for sprains of the lateral collateral ligament and cruciate ligament of the right knee, a tear of the right medial meniscus, and a right ankle sprain.

On March 19, 2015 appellant underwent surgery on his right knee. OWCP paid wage-loss compensation for total disability from March 19 to April 19, 2015. On August 1, 2016 appellant underwent a right partial medial and lateral meniscectomy. OWCP paid compensation for partial disability on August 5, 2016 and for total wage-loss disability from August 6 to September 17, 2016.

Appellant, on September 6, 2016, returned to full-time modified employment with no wage loss.

OWCP, on September 26, 2016, advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$1,454.34 because he had returned to full-time work on September 6, 2016, but received wage-loss compensation for total disability through September 17, 2016. It further advised him of its preliminary determination that he was without fault in the creation of the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On October 3, 2016 the U.S. Postal Service returned the preliminary notice of overpayment to OWCP as undeliverable. It indicated on the envelope that it was returned to sender as not deliverable as addressed and it could not be forwarded.

By decision dated November 1, 2016, OWCP determined that appellant received an overpayment of compensation in the amount of \$1,454.34 for the period September 6 through 17, 2016. It found that he was without fault in the creation of the overpayment, but denied waiver as he had not shown that recovery would defeat the purpose of FECA or be against equity and good conscience. OWCP noted that appellant had not responded to the preliminary overpayment determination.

On November 7, 2016 the U.S. Postal Service returned the November 1, 2016 decision as undeliverable.

Appellant, on January 17, 2017, submitted a change of address request to OWCP. On January 20, 2017 he telephoned OWCP regarding the overpayment. OWCP noted that all correspondence regarding the overpayment had been returned as appellant had not updated his address. It advised that it would resend the information.

By letter dated January 23, 2017, OWCP forwarded to appellant all of the preliminary overpayment documentation.

On February 24, 2017 appellant sent a completed overpayment action request to OWCP's Branch of Hearings and Review. He argued that he was not at fault in creating the overpayment and requested waiver. Appellant also submitted a completed overpayment recovery questionnaire.

In a decision dated March 21, 2017, OWCP denied appellant's request for a prerecoupment hearing. It found that a final overpayment decision was not subject to the hearing provisions of 5 U.S.C. § 8124(b).

On appeal appellant contends that OWCP's decision is inaccurate, noting that he provided appropriate information. He requests waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³

Section 8116(a) of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.⁴ OWCP regulations provide that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.⁵

A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁶ OWCP procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁷

OWCP is required to follow certain procedures in overpayment cases. Its regulations provide that, before seeking to recover an overpayment or adjust benefits, it will advise the individual in writing that the overpayment exists and the amount of the overpayment.⁸ The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.⁹ OWCP must inform the individual of his or her right

³ 5 U.S.C. § 8102.

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500(a).

⁶ *See M.M.*, Docket No. 15-0265 (issued May 27, 2015); *R.W.*, Docket No. 13-1285 (issued November 13, 2013).

⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁸ 20 C.F.R. § 10.431(a).

⁹ *Id.* at § 10.431(b).

to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable, and the right to request a waiver of recovery of the overpayment.¹⁰ Its procedures further provide that a preliminary finding of overpayment must be provided within 30 days and must clearly identify the reason that the overpayment occurred and the basis for any fault finding.¹¹

In the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of OWCP's daily activities, is presumed to have been received at the mailing address in due course.¹² This is known as the mailbox rule.¹³ As a rebuttable presumption, receipt will not be presumed when there is evidence of nondelivery.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision.

As discussed, OWCP is required to follow certain procedures in overpayment cases, including providing written notice informing the individual of the existence and amount of the overpayment before seeking recovery or adjusting benefits.¹⁵ It must additionally advise the individual whether he is at fault in the creation of the overpayment,¹⁶ his right to challenge the fact or amount of the overpayment, his right to contest the preliminary finding of fault in the creation of the overpayment and, if applicable, his right to request a waiver of recovery of the overpayment.¹⁷ OWCP must provide a preliminary finding of overpayment within 30 days that clearly identifies the reason the overpayment occurred and the basis for any fault finding.¹⁸

On September 26, 2016 OWCP mailed appellant a properly addressed notice of preliminary overpayment determination. The mailbox rule provides that proper and timely mailing of a document in the ordinary course of business raises a rebuttable presumption of receipt by the addressee.¹⁹ As a rebuttable presumption, receipt will not be presumed, however, when there is evidence of nondelivery, and the presumption may also be rebutted by other evidence that supports that the addressee did not receive the correspondence.

¹⁰ *Id.* at § 10.431(d).

¹¹ *Supra* note 7 at Chapter 6.200.4(a) (June 2009).

¹² *See L.G.*, Docket No. 17-0004 (issued April 17, 2017).

¹³ *See James A. Gray*, 54 ECAB 277 (2002).

¹⁴ *See C.O.*, Docket No. 10-1796 (issued March 23, 2011); *M.U.*, Docket No. 09-0526 (issued September 14, 2009).

¹⁵ 20 C.F.R. § 10.431(a).

¹⁶ *Id.* at § 10.431(b).

¹⁷ *Id.* at § 10.431(d).

¹⁸ *See supra* note 11.

¹⁹ *See supra* note 13.

The record in this case contains direct evidence of nondelivery of the September 26, 2016 preliminary overpayment determination. Although properly addressed to appellant, the U.S. Post Office returned the notice to OWCP as undeliverable. OWCP received the nondelivered preliminary overpayment determination on October 3, 2016. Consequently, appellant has rebutted the presumption of receipt of the September 26, 2016 preliminary determination of overpayment under the mailbox rule.²⁰

As appellant did not receive a copy of the preliminary overpayment determination, the case will be remanded to OWCP to issue a new preliminary determination of overpayment in accordance with its procedures.²¹ The forwarding of the preliminary and final overpayment determination on January 23, 2017 by OWCP does not constitute a reissuance with appeal rights.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant received an overpayment of compensation.²²

²⁰ See *M.U.*, Docket No. 09-0526 (issued September 14, 2009).

²¹ *Order Remanding Case*, Docket No. 13-0933 (issued August 23, 2013).

²² In view of the Board's disposition of the issue of whether appellant received an overpayment of compensation, the issues of waiver and OWCP's denial of his request for a prerecoupment hearing are moot.

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2017 and November 1, 2016 merit decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 11, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board