

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

S.P., Appellant)	
)	
and)	Docket No. 22-1273
)	Issued: July 3, 2023
DEPARTMENT OF THE AIR FORCE,)	
MARYLAND AIR NATIONAL GUARD,)	
ANDREWS AIR FORCE BASE, MD, Employer)	
)	

Appearances:
Manuel R. Geraldo, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On August 18, 2022 appellant, through counsel, filed a timely appeal from a May 10, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated May 20, 2021, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for a prerecoupment hearing as untimely filed.

FACTUAL HISTORY

On November 27, 1989 appellant, then a 36-year-old aircraft painter/corrosion control technician, filed an occupational disease claim (Form CA-2) alleging that he developed constant cough, bronchitis, asthma, rhino-sinusitis, pneumonia, and irritation to his bronchial airways due to factors of his federal employment, including exposures to fumes, paints, and other chemicals. OWCP accepted the claim for toxic effects of gas, fume, or vapor, acute pharyngitis, cough, prolonged post-traumatic stress disorder, and painful respirations. It paid compensation on the supplemental rolls beginning on January 1, 1990 and on the periodic rolls beginning September 14, 1991.

By decision dated May 20, 2021, OWCP found that appellant had forfeited his entitlement to wage-loss compensation benefits effective July 31, 2019, the date he pled guilty to defrauding the FECA program. It advised him that any benefits received after July 31, 2019 must be returned pursuant to 5 U.S.C. § 8148(a).

On December 7, 2021 OWCP advised appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$74,268.86 for the period July 31, 2019 through April 24, 2021 because he continued to receive FECA benefits after he pled guilty to a violation of 18 U.S.C. § 1920. It determined that he was at fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it provided an overpayment action request form and advised him that, within 30 days of the date of the letter, he could request a final decision based on the written evidence or request a prerecoupment hearing. OWCP mailed these documents to appellant's last known address of record.

In an overpayment action request form dated February 18, 2022, appellant requested a prerecoupment hearing. He requested waiver of recovery.

By decision dated May 10, 2022, OWCP denied appellant's request for a prerecoupment hearing as untimely filed. It found that, because his request was not dated within 30 days of the December 7, 2021 preliminary overpayment determination, he was not entitled to a prerecoupment hearing as a matter of right.

LEGAL PRECEDENT

OWCP's regulations provide that a claimant may request a prerecoupment hearing with respect to an overpayment.³ The date of the request is determined by the postmark or other

³ 20 C.F.R. § 10.432.

carrier's date marking.⁴ Failure to request the prerecoupment hearing within 30 days shall constitute a waiver of the right to a hearing.⁵

ANALYSIS

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

OWCP issued a preliminary overpayment determination on December 7, 2021. It advised appellant that he had 30 days to request a prerecoupment hearing. On February 18, 2022 appellant completed a request for a prerecoupment hearing in the form of an overpayment action request form. The timeliness of the request for a prerecoupment hearing is determined by the postmark date or other carrier's marking.⁶ However, the case record does not contain a postmarked envelope for appellant's request for a prerecoupment hearing and, therefore, the date of his request is February 18, 2022, the date of the document containing the request.⁷ Since the February 18, 2022 request for a prerecoupment hearing was made more than 30 days after the December 7, 2021 preliminary overpayment determination, it was untimely.

On appeal counsel contends that appellant did not receive the December 7, 2021 preliminary overpayment determination until early February 2022, and that he had 30 days from the date of receipt to request a prerecoupment hearing. The record reflects that OWCP's letter was sent to appellant's last known address of record and there is no indication that it was returned as undeliverable.⁸ Under the mailbox rule, a document mailed in the ordinary course of the sender's business practices to the addressee's last known address is presumed to be received by the addressee.⁹ As provided in OWCP regulations, the request for a prerecoupment hearing was untimely.¹⁰ The Board thus finds that OWCP properly denied appellant's request for a prerecoupment hearing.¹¹

⁴ *Id.* at §§ 10.439, 10.616(a).

⁵ *Id.* at § 10.432; *see also C.L.*, Docket No. 22-0349 (issued August 30, 2022); *S.G.*, Docket No. 22-0476 (issued August 11, 2022); *C.R.*, Docket No. 15-0525 (issued July 20, 2015); *Willie C. Howard*, 55 ECAB 564 (2004).

⁶ *See C.L., S.G., id.; C.W.*, Docket No. 15-0554 (issued May 27, 2015); 20 C.F.R. §§ 10.439, 10.616(a).

⁷ OWCP has administratively decided that the test used in 20 C.F.R. § 10.616(a) for determining the timeliness of a hearing request before OWCP should apply to a request for a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. *See* 20 C.F.R. § 10.439. Accordingly, timeliness is determined by the postmark of the envelope, if available. Otherwise, the date of the letter itself should be used. *See C.L., id.; C.R.*, Docket No. 15-0525 (issued July 20, 2015); *James B. Moses*, 52 ECAB 465 (2001).

⁸ *See J.H.*, Docket No. 20-0785 (issued October 23, 2020); *Kenneth E. Harris*, 54 ECAB 502 (2003).

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.432; *S.B.*, Docket No. 14-1159 (issued October 1, 2014).

¹¹ *See C.L., S.G., supra* note 5; *E.G.*, Docket No. 19-0176 (issued February 23, 2021); *E.V.*, Docket No. 17-1328 (issued December 11, 2017). *See also R.U.*, Docket No. 16-0027 (issued March 24, 2017); *Ronald E. Morris*, Docket No. 05-1553 (issued November 23, 2005).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 3, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board