

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

J.M., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
DEPOT, Sacramento, CA, Employer**

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**Docket No. 08-1615
Issued: June 3, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 19, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated February 21, 2008 which denied his request for an oral hearing. Because more than one year has elapsed between the most recent merit decision dated August 11, 2006 and the filing of this appeal on May 19, 2008, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue on appeal is whether the Office properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On October 21, 1988 appellant, then a 32-year-old electronic industrial control mechanic, injured his left hip at work. The Office accepted the claim for a left hip contusion. Appellant was placed on the periodic rolls and received benefits for temporary total disability.

The employing establishment submitted an investigative memorandum from the Office of the Inspector General dated April 18, 2005 which noted that on December 16, 2004 appellant was convicted of three felony counts of unlawfully issuing and uttering an altered prescription for narcotic drugs, related to his compensation claim. Appellant was sentenced to 365 days in jail.

In a decision dated April 19, 2005, the Office terminated appellant's compensation and medical benefits effective December 16, 2004 on the grounds that he pled guilty to unlawfully issuing and using an altered prescription for narcotic drugs which he attempted to get approved for payment through his compensation claim.

On April 20, 2005 the Office made a preliminary determination that appellant received a \$9,684.89 overpayment of compensation because of the retroactive termination of benefits. Appellant's compensation was improperly granted for the period December 17, 2004 to April 16, 2005. The Office found appellant at fault in creating the overpayment as he knew or reasonably should have known that he was no longer entitled to benefits after his conviction. Appellant requested an oral hearing that was held on April 27, 2006.

In a decision dated August 11, 2006, an Office hearing representative finalized the preliminary overpayment determination and affirmed the April 19, 2005 decision terminating compensation and medical benefits.

In a September 18, 2006 letter, appellant requested an oral hearing and submitted several letters asserting his innocence.

In a decision dated September 29, 2006, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing. It found that, since appellant had previously received a hearing on the same issue, he was not entitled to an oral hearing as a matter of right.

On November 15, 2007 appellant requested a telephone hearing. He stated that he sought review of the overpayment decision as well as the termination of benefits decision. In a February 2, 2008 letter, appellant contended that at the time of the alleged illegal attainment of prescription drugs he was suffering from delusional disorder.

In a February 21, 2008 decision, the Office denied appellant's hearing request finding that, since appellant had previously received a hearing on the same issue, he was not entitled to another hearing as a matter of right. It noted that appellant was not entitled to another hearing or to reconsideration following a final overpayment decision. The Office noted that appellant could appeal to the Board if he disagreed with the Office's decision.

LEGAL PRECEDENT

Section 10.440(b) of the Office's regulations provides that the only review of a final decision concerning an overpayment is to the Board. The provisions of 5 U.S.C. § 8124(b) (concerning hearings) and 5 U.S.C. § 8128(a) (concerning reconsiderations) do not apply to such

a decision.¹ The Board has found that the implementation of this regulation is a proper exercise of the Director's discretion and that a claimant has no further right to review by the Office once a final decision on the issue of overpayment has been issued.²

ANALYSIS

The Office issued a final overpayment decision in this case on August 11, 2006. Appellant requested a telephone hearing regarding his overpayment on November 15, 2007. In a decision dated February 21, 2008, the Branch of Hearings and Review denied appellant's request for an oral hearing finding that it could not grant further review on the overpayment issue. As noted above, this decision is in accordance with the Office's regulations and the findings of the Board. As appellant was not entitled to an oral hearing following the final overpayment decision of August 11, 2006, the Branch of Hearings and Review properly denied his request of November 15, 2007.³

Although the Office properly denied appellant's hearing request with regard to the overpayment matter, the Board notes that, on November 15, 2007, he also sought a hearing from the April 19, 2005 Office decision which terminated his compensation benefits. The Office, in its February 21, 2008 decision, did not specifically address his hearing request regarding this separate issue. Therefore, the Board finds that, upon return of the case record, the Office should issue an appropriate decision with regard to appellant's hearing request of the April 19, 2005 Office decision terminating benefits.

CONCLUSION

The Board finds that the Office properly denied appellant's request for an oral hearing with regard to the final overpayment decision dated August 11, 2006. The Board further finds that the case must be remanded for the Office to issue an appropriate decision with regard to his request for an oral hearing from the Office's April 19, 2005 termination decision.

¹ 20 C.F.R. § 10.440(b). *See also Jan K. Fitzgerald*, 51 ECAB 659 (2000).

² *Charles E. Nance*, 54 ECAB 447 (2003); *Philip G. Feland*, 48 ECAB 485 (1997).

³ After the August 11, 2006 decision, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal as the Office has not considered it in reaching a final decision. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2008 decision of the Office of Workers' Compensation Programs is affirmed with regard to the denial of a hearing from the overpayment decision. The case is remanded for further action regarding appellant's hearing request pertaining to the termination of his compensation benefits.

Issued: June 3, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board