



related.<sup>2</sup> The Office accepted the claim for right knee torn meniscus and paid appropriate compensation benefits. Appellant returned to modified part-time work on September 8, 1997 following his June 20, 1997 right knee arthroscopic surgery.

On December 20, 1999 appellant filed an occupational disease claim alleging that his right knee pain was employment related.<sup>3</sup> The Office accepted the condition of right knee osteoarthritis. The Office accepted a claim for a recurrence of disability and authorized payment of wage-loss compensation beginning November 13, 2000 based on the medical evidence. Appellant returned to a modified job working six hours per day on February 12, 2001. On July 26, 2001 the Office authorized right knee arthroscopy/joint debridement, which was performed on August 27, 2001. On October 25, 2001 the Office placed appellant on the periodic rolls for temporary total disability. She returned to a modified job working six hours per day on December 17, 2001.<sup>4</sup> The Office accepted a March 7, 2002 claim for a recurrence of disability. On May 30, 2002 the Office authorized right knee total knee arthroplasty, which was performed on June 3, 2002. Appellant returned to limited-duty working six hours per day on October 1, 2002.<sup>5</sup>

On December 22, 2004 the Office made a preliminary determination that an overpayment in the amount of \$2,262.82 occurred because appellant received benefits for temporary total disability through January 26, 2002 following his return to work six hours per day on December 17, 2001. The Office found that he was at fault in the creation of the overpayment because he accepted a payment that he knew or should have known was incorrect. The Office advised appellant that, if he disagreed with the fact or amount of the overpayment or the finding of fault, he had a right to submit any evidence or arguments and the right to request a preresoupment hearing within 30 days.

On January 27, 2005 the Office received appellant's completed overpayment recovery questionnaire which was dated January 17, 2005. Appellant contended that he was unaware of the overpayment and that he had notified the Office that he had returned to work six hours per day.

By decision dated January 27, 2005, the Office finalized the overpayment and noted that appellant did not respond to the December 22, 2004 preliminary determination.

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<sup>2</sup> This was assigned File No. 03-0225036.

<sup>3</sup> This was assigned File No. 03-0248034. On April 17, 2000 the Office doubled File No. 03-0248034 and File No. 03-0225036 with File No. 03-248034 as the master file number.

<sup>4</sup> The record contains evidence that appellant was paid compensation for total disability for the periods December 2 through 29, 2001 and December 30, 2001 through January 26, 2002.

<sup>5</sup> On November 6, 2003 appellant filed a claim for recurrence of disability beginning October 25, 2003. The Office denied his claim by decision dated March 3, 2004, which was affirmed by an Office hearing representative in a decision dated July 19, 2004. The Office hearing representative found that the record contained evidence of an overpayment of compensation and remanded the case to the Office to follow the procedures regarding an overpayment of compensation.

In a letter dated February 14, 2005, appellant informed the Office that he had responded to the preliminary determination and that he requested waiver of the overpayment. He also stated that he received no proof that he had received the overpayment.

In a decision dated April 5, 2005, the Office informed appellant that his overpayment recovery form had been received and reviewed. The Office found that the preliminary determination was correct and reissued the January 27, 2005 decision, which found appellant at fault in the creation of an overpayment in the amount of \$2,262.82. Appellant was informed that he was not entitled to a waiver of the overpayment since he had been found at fault in the creation of the overpayment. The Office informed him that, if he disagreed with the decision, the only right of appeal was to the Board. However, the Office attached appeal rights which included requesting an oral hearing before an Office hearing representative.

On April 12, 2005 appellant requested an oral hearing.

By nonmerit decision dated April 7, 2006, the Office denied appellant's request for an oral hearing on the grounds that he had not requested a hearing on the preliminary overpayment determination. In addition, the Office noted that a final decision had been issued on the overpayment issue on April 5, 2005. Appellant was informed that a final decision on an overpayment is not subject to the hearing provisions set forth at 5 U.S.C. § 8124(b).

### **LEGAL PRECEDENT**

Section 10.440(b) of the Office's regulations provides that [t]he only review of a final decision concerning an overpayment is to the Employees' Compensation Appeals Board. The provisions of 5 U.S.C. § 8124(b) (concerning hearings) and 5 U.S.C. § 8128 (concerning reconsiderations) do not apply to such a decision.<sup>6</sup> 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.<sup>7</sup>

### **ANALYSIS**

In its April 5, 2005 overpayment decision, the Office correctly notified appellant that he had the right to appeal that decision to the Board. However, the Office mistakenly attached appeal rights with the April 5, 2005 overpayment decision which indicated that he could request an oral hearing by an Office hearing representative. Appellant, on April 12, 2005, requested an oral hearing before an Office hearing representative based upon the appeal rights given by the Office with the April 5, 2005 final overpayment decision. By the time the Office issued its decision denying appellant's request for an oral hearing on April 7, 2006, the one-year time limitation for review of decisions by the Board had already passed. The Office's almost year delay in responding to the April 12, 2005 request for a hearing and the misleading appeal rights attached to the April 5, 2005 final overpayment decision effectively denied appellant the

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<sup>6</sup> 20 C.F.R. § 10.44(b).

<sup>7</sup> *Charles E. Nance*, 54 ECAB 447 (2003); *Philip G. Feland*, 48 ECAB 485 (1997).

opportunity to obtain a merit review of his overpayment decision before the Board. It is well established that, when the delay in issuing a decision precludes a claimant from exercising his right to appeal a merit decision to the Board, the Office should conduct a merit review.<sup>8</sup> In the present case, it is apparent that appellant's opportunity for a merit review of the April 5, 2005 overpayment decision by the Board has been compromised by the Office's almost one year delay in issuing its decision denying appellant's request for a hearing. The Board accordingly finds that appellant is entitled to a merit review of the issues presented in the April 5, 2005 final overpayment decision in order to protect his appeal rights.

### CONCLUSION

The case will be remanded to the Office for a merit review of appellant's final overpayment decision based on the evidence of record and the issuance of an appropriate decision to protect his appeal rights.

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<sup>8</sup> See, e.g., *Anthony A. DeGenaro*, 44 ECAB 230 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (June 2002) "(when a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, the [Office] should conduct a merit review)."

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 7, 2006 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: April 9, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board