

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

S.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Youngstown, OH, Employer**

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**Docket No. 08-1312
Issued: December 17, 2008**

Appearances:

*John P. Lutseck, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 25, 2008 appellant filed a timely appeal of a February 21, 2008 decision of the Office of Workers' Compensation Programs, denying his request for an oral hearing. Since more than one year has elapsed between the last merit decisions on November 30 and December 11, 2006 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2) and 501.6(c) and (d).

ISSUE

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

FACTUAL HISTORY

The Office accepted that appellant sustained a permanent aggravation of preexisting degenerative arthritis of the right knee, and post-traumatic patellofemoral arthritis of the left knee. On September 13, 1994 it issued a schedule award for a 52 percent permanent impairment

to the right leg.¹ Appellant received a schedule award dated April 14, 2003 for a 15 percent left leg permanent impairment

On June 13, 2006 the Office issued a payment of \$56,826.77, which represented an additional schedule award of a 29 percent leg impairment. It advised appellant by letter dated June 15, 2006 that the payment had been issued prematurely and additional development of the medical evidence was warranted. By decision dated August 14, 2006, the Office determined that appellant was entitled to an additional one percent for the left leg and no additional impairment for the right leg.

In a letter dated August 14, 2006, the Office advised appellant of a preliminary finding that an overpayment of \$56,826.77 was created and appellant was at fault in creating the overpayment. Appellant was advised of a right to request a hearing before an Office hearing representative within 30 days.

A decision dated November 30, 2006 was issued finalizing an overpayment of \$56,826.77 and denying waiver. The decision indicated that appellant had agreed to repay the overpayment at \$300.00 per month. By decision dated December 11, 2006, the Office issued a schedule award for an additional one percent permanent impairment to the left leg.

By letter dated August 28, 2007, appellant requested that he be exempted from repaying the overpayment due to limited income. On October 15, 2007 he submitted an overpayment recovery questionnaire (Form OWCP-20).

By letter dated November 28, 2007, the Office advised appellant that it had reviewed the financial information submitted and determined that a change in the repayment plan was not warranted. It noted that appellant had not submitted a \$300.00 payment since June 2007 and if necessary the Office would pursue recovery of the debt by contacting the Office of Personnel Management (OPM) to offset disability retirement benefits.

By letter dated December 26, 2007, appellant's representative requested an oral hearing of the Office "decision" dated November 28, 2007. In a decision dated February 21, 2008, the Office's Branch of Hearings and Review noted the preliminary overpayment determination was dated August 14, 2006, and therefore appellant's request for a hearing was untimely. The Branch of Hearings and Review further stated that in its discretion it had considered the request, and found the district Office had issued a final decision on November 30, 2006. It was also noted that appellant could appeal the case to the Board.

¹ The Board affirmed the Office's finding of a 52 percent permanent impairment to the right leg. Docket No. 00-55 (issued November 17, 2000).

LEGAL PRECEDENT

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of the Office. Section 8124(b)(1) provides as follows:

“Before review under [s]ection 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary....”

The Office’s regulations provide a claimant may request a prerecoupment hearing with respect to an overpayment.² Failure to request the prerecoupment hearing within 30 days shall constitute a waiver of the right to a hearing.³ The only right to a review of a final overpayment decision is to the Board.⁴ The hearing provisions of 5 U.S.C. § 8124(b) do not apply to a final overpayment decision.⁵

ANALYSIS

The August 14, 2006 preliminary determination of overpayment provided appellant with a right to request a prerecoupment hearing within 30 days. As noted above, if a claimant does not request a hearing within 30 days, it is considered a waiver of the right to a hearing. When the final overpayment decision is issued, there is no right to a hearing and the Office does not have discretion to grant a hearing. The only right of appeal is to the Board.

With respect to a prerecoupment hearing on the overpayment, therefore, appellant’s December 26, 2007 request is clearly untimely. Once the Office issued its November 30, 2006 final overpayment decision, appellant’s only appeal right was to the Board. In his December 26, 2007 request for a hearing, he asserted that he was appealing a decision of the Office dated November 28, 2007. The Office letter dated November 28, 2007 was not, however, a final decision with appeal rights that included a right to a hearing. The letter did not provide any information on appeal rights.⁶ Moreover, it addressed repayment of the overpayment that did not involve continuing wage-loss compensation payments. Appellant was receiving disability benefits from OPM and the Office indicated that it may have to pursue debt collection from OPM. This issue is not under the jurisdiction of the Federal Employees’ Compensation Act.⁷

² 20 C.F.R. § 10.432.

³ *Id.*

⁴ 20 C.F.R. § 10.440.

⁵ *Id.*; see also *Philip G. Feland*, 48 ECAB 485 (1997).

⁶ An Office final decision is accompanied by information about the claimant’s appeal rights. 20 C.F.R. § 10.126 (1999).

⁷ See *Robert S. Luciano*, 47 ECAB 793, 799 (1996); *Levon H. Knight*, 40 ECAB 658 (1989).

The Board therefore finds the December 26, 2007 request for an oral hearing before an Office hearing representative was properly denied. Appellant is not entitled to a hearing with respect to the November 30, 2006 decision and the November 28, 2007 letter from the Office was not a final decision with appeal rights.

CONCLUSION

The Office properly denied appellant's request for an oral hearing before an Office hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 21, 2008 is affirmed.

Issued: December 17, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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