

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

J.H., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS & BORDER PROTECTION,
Blair, WA, Employer**

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**Docket No. 06-1565
Issued: February 20, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 29, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' December 5, 2005 nonmerit decision denying his request for a prerecoupment hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the Office's December 5, 2005 decision.¹

ISSUE

The issue is whether the Office properly denied appellant's request for a prerecoupment hearing.

¹ The only decision before the Board on this appeal is the Office's December 5, 2005 nonmerit decision denying appellant's request for a hearing. Appellant states that he is appealing the Office's October 5, 2005 decision. However, the Office's October 5, 2005 preliminary determination of overpayment is not a final decision with rights of appeal. As of the filing of this appeal, the Office had not issued a final decision on the issue of overpayment. Therefore, the Board does not have jurisdiction over the overpayment issue. (The Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case). 20 U.S.C. § 501.2(c).

FACTUAL HISTORY

On March 9, 2003 appellant, then a 36-year-old customs inspector, filed a traumatic injury claim that was accepted for a medial meniscus tear of the left knee. On December 19, 2003 his employment was terminated. Appellant received compensation for total disability from December 19, 2003 through June 11, 2005, when he returned to work in the private sector.

On October 5, 2005 the Office made a preliminary determination that an overpayment in the amount of \$2,955.17 had occurred because appellant received duplicate payments for the period January 26 through March 19, 2005. The Office further found that appellant was at fault in the creation of this overpayment because he accepted payments that he knew or should have known were incorrect. The Office advised him 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 precoupment hearing within 30 days. By letter dated October 21, 2005, appellant requested an extension of the 30-day time limitation, in order to respond to the October 5, 2005 preliminary finding. The record contains an appeal request form, signed by him and dated November 4, 2005 requesting a hearing on the issue of fault and possible waiver of overpayment; a letter from appellant dated November 4, 2005 requesting a hearing; and a copy of an envelope addressed to the Branch of Hearings and Review, bearing an illegible Canadian postmark.

By decision dated December 5, 2005, the hearing representative denied appellant's request for a hearing on the grounds that his request was untimely. The hearing representative indicated that, although appellant was not entitled to a hearing as a matter of right, the overpayment issue could equally well be addressed by requesting reconsideration.²

LEGAL PRECEDENT

Section 10.432 of the Office's regulations provides that, in response to a preliminary notice of an overpayment, a claimant may request a precoupment hearing within 30 days of the written notice of overpayment.³ Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.⁴

ANALYSIS

In computing a time period, the date of the event from which the designated period of time begins to run shall not be included, while the last day of the period so computed shall be included, unless it is a Saturday, Sunday or a legal holiday.⁵ The Office issued its preliminary

² On February 10, 2006 appellant again requested an oral hearing. On March 8, 2006 he requested that a decision be made based on the written record on the issues of fault and waiver. In a letter dated December 5, 2006, the Office informed appellant that the December 5, 2005 denial of his request for a precoupment hearing remained in effect.

³ 20 C.F.R. § 10.432 (2003).

⁴ *Id.* See *Willie C. Howard*, 55 ECAB 564 (2004).

⁵ *Afegalai L. Boone*, 53 ECAB 533, 537 (2002).

overpayment finding on October 5, 2005 advising appellant that he had 30 days to submit evidence and request a prerecoupment hearing. Therefore, he had until Friday, November 4, 2005 to request a hearing.

The record contains an appeal request form signed by appellant and dated November 4, 2005, requesting a hearing on the issue of fault and possible waiver of overpayment. The record also contains a letter from appellant dated November 4, 2005 requesting a hearing. The record does not contain the envelope itself in which the letter and appeal form were sent, which would bear the postmark. The record does contain a photocopy of the envelope, but the date of the postmark is not clear. Under the Office's procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope, which contains the letter requesting a hearing.⁶ The Branch of Hearings and Review is required to retain the envelope in which a request for a hearing is made, so as to establish the timeliness of the request for a hearing.⁷ In this case, the case record does not contain the envelope itself from which the timeliness of the hearing can be determined. The case will be remanded for the Office to determine, if possible, the date that the letter requesting a hearing was postmarked. If the date of the postmark cannot be determined, the Office should presume that the request was timely and grant the request for a hearing, as it was the Office's responsibility to keep the envelope or otherwise keep evidence of the date of the delivery in the case record.⁸ The December 5, 2005 decision of the Office is hereby set aside and remanded.⁹

CONCLUSION

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

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (January 1999). The Office has administratively decided that the test used. In 20 C.F.R. § 10.616(a) for determining the timeliness of hearing requests should apply to requests for prerecoupment hearings. 20 C.F.R. § 10.439. Accordingly, timeliness is determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used. *See James B. Moses*, 52 ECAB 465 (2001), *citing William J. Kapfhammer*, 42 ECAB 271 (1990); *see also Douglas McLean*, 42 ECAB 759 (1991).

⁷ *Id.* at Chapter 2.1601.3(b).

⁸ *See Carolyn O'Neal*, 53 ECAB 645 (2002); *see also Gus N. Rodes*, 43 ECAB 268 (1991).

⁹ The Board notes that the hearing representative indicated that the overpayment issue could equally well be addressed on reconsideration. However, a request for reconsideration is not available to a claimant in response to a preliminary notice of overpayment. 20 C.F.R. § 10.432.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2005 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for action consistent with this decision.

Issued: February 20, 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