

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

R.K., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
EGLIN AIR FORCE BASE, FL, Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 08-1284
Issued: October 6, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 1, 2008 appellant filed a timely appeal from the December 10, 2007 nonmerit decision of the Office of Workers' Compensation Programs, which denied a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this denial. The Board has no jurisdiction to review appellant's September 25, 2006 schedule award or the Office's February 9, 2007 merit decision denying modification of that schedule award. Appellant had one year from the date of each of those decisions to file an appeal to this Board. Because he did not file his appeal until March 1, 2008, the Board's jurisdiction is now limited to reviewing whether on December 10, 2007 the Office properly denied appellant's request for a review of the written record.¹

ISSUE

The issue is whether the Office properly denied appellant's October 23, 2007 request for a review of the written record.

¹ The Board has no jurisdiction to review the new evidence appellant submitted on appeal. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On September 25, 2005 appellant, then a 62-year-old test programming specialist, filed a claim alleging that his hearing loss was a result of his federal employment: “Being near military aircraft and active flight line, also conducted mission where ... unused munitions are blown up using cases of C-4 explosives by [explosive ordinance disposal] personnel.” The Office accepted his claim for bilateral hearing loss due to noise.

On September 25, 2006 the Office issued a schedule award for a 33 percent bilateral hearing loss.² Appeal rights attached to the schedule award notified appellant that any request for an oral hearing or review of the written record must be made before any request for reconsideration. The appeal rights further notified him that any request for a hearing must be made within 30 calendar days after the date of the schedule award, as determined by the postmark of the letter.

On October 13, 2006 appellant made a timely request for an oral hearing before an Office hearing representative. In an undated letter received on November 13, 2006, however, appellant withdrew his request for an oral hearing and requested reconsideration.

The Office granted appellant’s request for reconsideration. In a decision dated February 9, 2007, the Office reviewed the merits of his claim but denied modification of the schedule award. Appeal rights attached to the February 9, 2007 decision notified appellant that he had one year, or until February 9, 2008, to request reconsideration. The appeal rights further notified appellant that he had no more than one year to file an appeal to this Board.

Appellant did neither. Instead, in a letter postmarked October 23, 2007, he requested a review of the written record by an Office hearing representative.

In a decision dated December 10, 2007, the Office denied appellant’s request. It found that he was not entitled to a review of the written record as a matter of right because he had previously requested reconsideration of the schedule award. The Office nonetheless considered the matter and denied a discretionary hearing on the grounds that appellant could equally well address the matter by requesting reconsideration and submitting evidence not previously considered establishing that he is entitled to a greater schedule award.

² Under the law, a claimant with 100 percent loss of hearing in both ears (a claimant who is completely deaf), may receive no more than 200 weeks of compensation for that impairment. 5 U.S.C. § 8107(c)(13)(B). Partial losses are compensated proportionately. *Id.* at § 8107(c)(19). Appellant therefore received 66 weeks of compensation (33 percent times 200 weeks). Although his hearing loss is permanent and he will live it for the rest of his life, long after the schedule award expired on October 7, 2007, the law limits the compensation that is payable to a specific number of weeks. Many claimants take issue with how the law is structured, but no claimant may receive more than the law allows.

LEGAL PRECEDENT

Section 8124(b)(1) of the Federal Employees' Compensation Act provides:

“Before review under section 8128(a) of this title [relating to reconsiderations], 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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary.”³

Initially, the claimant can choose between two hearing formats: an oral hearing or a review of the written record.⁴ The request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought. The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.⁵

The Board has held that the Office, in its broad discretionary authority to administer the Act, has the power to hold hearings in circumstances where no legal provision is made for such hearings, and that the Office must exercise that discretionary authority.⁶ Specifically, the Board has held that the Office has the discretion to grant a hearing request when the request is made after the 30-day period for requesting a hearing⁷ or when the request is made after a request for reconsideration.⁸ In such cases the Office will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons.⁹ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and of Board precedent.¹⁰

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. § 10.615.

⁵ *Id.* at § 10.616(a).

⁶ *Mary B. Moss*, 40 ECAB 640 (1989) (untimely request for hearing); *Shirley A. Jackson*, 39 ECAB 540 (1988) (hearing request made after request for reconsideration); *Johnny S. Henderson*, 34 ECAB 216 (1982) (request for a second hearing); *Rudolph Bermann*, 26 ECAB 354 (1975) (injury occurring prior to effective date of the statutory amendments providing right to hearing).

⁷ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁸ *James W. Croake*, 37 ECAB 219 (1985).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4.b(3) (June 1997).

¹⁰ *Jeff Micono*, 39 ECAB 617 (1988); *Henry Moreno*, 39 ECAB 475 (1988).

ANALYSIS

Appellant had 30 days after the September 25, 2006 schedule award, or until October 25, 2006, to request a review of the written record. His request for a review of the written record, postmarked October 23, 2007, was therefore a year too late. But the Office denied his request on other grounds. As the appeal rights attached to the schedule award explained, any request for a review of the written record must be made before a request for reconsideration. When appellant made his October 23, 2007 request for a review of the written record, he had already requested reconsideration of the schedule award. He requested reconsideration in an undated letter received on November 13, 2006. The Office reconsidered the award but denied modification.

Because appellant previously requested reconsideration of the schedule award, the Office correctly found that he was not entitled to a review of the written record as a matter of right. The Office nonetheless retained discretion to grant the request but decided that a review of the written record was not necessary because appellant could equally well pursue his arguments by requesting reconsideration through the district Office. Appellant still had two more months, or until February 9, 2008, to request reconsideration of the Office's February 9, 2007 merit decision. The Board finds that the denial of appellant's request on these grounds was an appropriate exercise of the Office's discretionary authority. The Board will affirm the Office's December 10, 2007 decision denying a review of the written record.

CONCLUSION

The Board finds that the Office properly denied appellant's October 23, 2007 request for a review of the written record.

ORDER

IT IS HEREBY ORDERED THAT the December 10, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 6, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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