

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROY WASHINGTON and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, Calif.

*Docket No. 96-1742; Submitted on the Record;
Issued May 6, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant had abandoned his initial request for a hearing before an Office hearing representative; and (2) whether the Office properly denied appellant's second request for an oral hearing before an Office representative on the grounds that it was untimely.

On November 5, 1994 appellant, then a 42-year-old postal worker, filed a claim for benefits for occupationally induced tinnitus. Appellant related his hearing condition to the noise made by the small parcel bundle machine and surrounding machines, in the area where he worked. Appellant submitted medical and factual evidence in support of his claim.

In a decision dated May 4, 1995, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office specifically found the factual evidence did not establish that appellant was exposed to hazardous noise levels, in the course of his federal employment and that the medical evidence of record, was insufficient to establish a causal relationship between appellant's diagnosed tinnitus and conditions of his federal employment. The Office therefore denied appellant's claim.

In a letter received by the Office on May 31, 1995, appellant requested a hearing regarding his claim.

In an October 25, 1995 letter, the Office informed appellant that a hearing would be held on December 12, 1995. This letter was sent to appellant's address of record.

In a January 17, 1996 decision, the Office found that appellant abandoned his request for a hearing, as he failed to appear at the time and place set for the hearing and did not show good cause for his failure to appear within 10 calendar days after the time set for the hearing.

Subsequently, by letter received February 16, 1996, postmarked February 12, 1996, appellant stated that he was unable to attend the first hearing due to lack of money and requested another hearing.

In a decision dated April 19, 1996, the Office denied appellant's second request for a hearing on the grounds that appellant had already received a hearing on the same issue. The Office further informed appellant that it had determined that the issue in his claim could be equally well resolved by submitting new evidence on reconsideration.

By letter dated May 7, 1996, appellant requested reconsideration of the Office's decision denying his claim. In support of his request, appellant submitted additional medical and factual evidence.

The only decisions before the Board on this appeal are the January 17 and April 19, 1996 decisions of the Office. As more than one year has elapsed from the date of the Office's May 4, 1995 decision, to the date of the filing of appellant's appeal on May 14, 1996, the Board lacks jurisdiction to review this decision.¹ In addition, as the Office's June 17, 1996 decision, was issued subsequent to appellant's May 14, 1996 appeal to the Board, this decision is also not before the Board.²

The Board finds that the Office properly determined in its January 17, 1996 decision, that appellant had abandoned his request for a hearing.

Section 8124(b) of the Federal Employees' Compensation Act³ provides claimants under the Act a right to a hearing if they request a hearing within 30 days of the Office's decision. Pursuant to section 10.137 of the applicable regulations⁴ a scheduled hearing may be postponed, upon written request of a claimant or his representative if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. If a claimant fails to appear for a scheduled hearing, he has 10 days after the date of the scheduled hearing to request that another hearing be scheduled. Where good cause for the failure is shown, a second hearing will be scheduled.

In the instant case, appellant failed to appear at the scheduled hearing on December 12, 1995, did not attempt to provide appropriate notice that he would not attend and made no attempt to postpone the hearing date. Further, appellant failed to show good cause within 10 days of the scheduled hearing date as to why he failed to appear. Based on these facts, therefore, the Office properly concluded under section 10.137 that appellant's request for hearing was abandoned.

The Board further finds that the Office properly denied appellant's second request for an oral hearing before an Office representative.

¹ See 20 C.F.R. § 501.3(d).

² See *Douglas E. Billings*, 41 ECAB 880 (1990).

³ 5 U.S.C. § 8124.

⁴ 20 C.F.R. § 10.137.

Following the Office's January 17, 1996 decision, finding that appellant had abandoned his first request for a hearing, by letter postmarked February 12, 1996, appellant requested, for the second time, an oral hearing before an Office representative.

In a decision dated April 19, 1996, the Office denied appellant's request for a hearing, on the grounds he had already received a hearing on the same issue. The Office further informed appellant that it had determined that the issue in his claim could be equally well resolved by submitting new evidence on reconsideration.

The Board finds that although the Office's decision contains a misstatement of fact, in that, due to his prior abandonment of his hearing request, appellant had not received an oral hearing on his claim, appellant's second request was nonetheless untimely and, therefore, the Office properly determined that appellant was not entitled to a hearing before an Office representative.

Section 8124(b) of the Act, concerning entitlement to a hearing before an Office representative states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... 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."⁵

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant or deny a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request, on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.⁶

In this case, the Office issued its decision denying appellant's claim for compensation benefits on May 4, 1995. Appellant's letter containing his second request for a hearing, was postmarked February 12, 1996, which was beyond 30 days from the date that the May 4, 1995 decision was issued.⁷ Because appellant did not request a hearing within 30 days of the Office's May 4, 1995 decision, he was not entitled to a hearing under section 8124 as a matter of right.

⁵ 5 U.S.C. § 8124(b)(1).

⁶ *Henry Moreno*, 39 ECAB 475 (1988).

⁷ Under the Office's regulations implementing 5 U.S.C. § 8124(b), the date the request is filed is determined by the postmark of the request; *see* 20 C.F.R. § 10.131(a).

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion.⁸ In this case, the Office advised appellant that it considered his request in relation to the issue involved and the hearing was denied, on the basis that the issues in the claim could be equally well resolved by a request for reconsideration. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.⁹ There is no evidence of an abuse of discretion in the denial of the hearing request in this case.

The decisions of the Office of Workers' Compensation Programs dated April 19 and January 17, 1996 are affirmed.

Dated, Washington, D.C.
May 6, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁸ *William F. Osborne*, 46 ECAB 198 (1994); *Herbert C. Holley*, 33 ECAB 140 (1981).

⁹ *Daniel J. Perea*, 42 ECAB 214 (1990).