

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMY KEE and TENNESSEE VALLEY AUTHORITY,
POWER PLANT, New Johnsville, TN

*Docket No. 01-1204; Submitted on the Record;
Issued January 9, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

On September 4, 1996 appellant, then a 45-year-old boilermaker, filed a notice of occupational disease alleging binaural hearing loss due to exposure to hazardous noise in the performance of duty.

In a decision dated July 14, 1997, the Office issued a schedule award for three percent binaural hearing loss.

Appellant disagreed with the decision and requested a hearing on August 6, 1997.

In a decision dated June 9, 1998, an Office hearing representative indicated that he had reviewed the case and found that it was not in posture for a hearing. The Office hearing representative reversed the Office's prior decision, finding the evidence sufficient to establish that appellant had at least an eight percent binaural hearing. On remand, the Office was directed to issue an increased schedule award.

In a July 10, 1998 decision, the Office issued a schedule award for an eight percent binaural hearing loss. The period of the award was from April 7 to July 27, 1997.

On March 5, 1999 appellant requested an oral hearing, stating that he disagreed with the Office's June 9, 1998 decision.

In a September 15, 1999 letter, appellant's counsel advised that he had previously filed a request for an oral hearing on or about August 6, 1998, but that the Office had not responded to that request. The record before the Board does not contain this document. He indicated that he was renewing appellant's hearing request.

In a decision dated February 8, 2000, the Office determined that appellant was not entitled to a hearing. The Office noted that appellant had already had an oral hearing in his case and that the Office hearing representative had ruled in his favor by reversing the Office's July 14, 1997 decision.

In a March 31, 2000 letter, appellant's counsel reiterated that appellant had never received an oral hearing on his case, contrary to the Office's February 8, 2000 decision.

In a decision dated October 30, 2000, the Office advised appellant that his request for an oral hearing was untimely filed.¹ The Office nonetheless exercised its discretion and reviewed the case, finding that the issue of the case could be equally well addressed through the reconsideration process by submitting rationalized medical evidence establishing that appellant had greater than an eight percent binaural hearing loss for which he received a schedule award.

On November 21, 2000 appellant requested a hearing and expressed his disagreement with the October 30, 2000 decision.²

On February 5, 2001 the Office also received a request for reconsideration.

In a March 5, 2001 decision, the Office denied appellant's hearing request, once again noting that he had already received a hearing. Appellant, however, was advised that he could pursue his claim by either an appeal to the Employees' Compensation Appeals Board or a request for reconsideration before the Office.

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b) of the Employees' Compensation Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary.³ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁴

In this case, because appellant's March 5, 1999 hearing request was dated more than 30 days after the Office's June 9, 1998 decision, appellant was not entitled to a hearing as a matter of right.⁵ The Office properly considered appellant's request for a hearing and determined that the issue of whether appellant had greater than an eight percent hearing loss for which he had

¹ The Office acknowledged that the February 8, 2000 decision erroneously denied appellant's hearing request on the grounds that a hearing had already been held. Instead, the prior decision should have denied appellant's hearing request on the grounds that it was untimely filed.

² Appellant also submitted a copy of a letter requesting a hearing dated August 6, 1997.

³ See 5 U.S.C. § 8124(b).

⁴ See 20 C.F.R. § 10.616(a) (1999); *Charles J. Prudencio*, 41 ECAB 499, 501 (1990).

⁵ The hearing request is also untimely with respect to the schedule award issued by the Office on July 10, 1998.

received a schedule award could be equally well resolved through a request for reconsideration filed with the Office. The Board therefore finds that the Office did not abuse its discretion in its denial of appellant's request for a hearing.⁶

With respect to the Office's March 5, 2001 decision, the Board notes that it was issued in error since it incorrectly states that appellant has received a hearing in this case. The only grounds for denial of the hearing request is the timeliness issue. The error, however, is harmless given that the Office properly issued the October 30, 2000 denying appellant's hearing request as untimely filed and further explaining his appeal rights.

The decisions of the Office of Workers' Compensation dated March 5, 2001 and October 30, 2000 are hereby affirmed.

Dated, Washington, DC
January 9, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

⁶ Although appellant's counsel correctly points out that appellant has never had an oral hearing, it was his responsibility to timely file a hearing request within 30 days of the Office's July 10, 1998 decision. The record does not support appellant's contention that he timely requested an oral hearing after the July 10, 1998 schedule award.