

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIE E. BORCHERT and DEPARTMENT OF THE INTERIOR,  
TENNESSEE VALLEY AUTHORITY, New Johnsonville, TN

*Docket No. 02-10; Submitted on the Record;  
Issued May 6, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing as untimely filed; and (2) whether appellant's claim for a hearing loss was timely filed.

On August 19, 1999 appellant, then a 62-year-old former pipe fitter, filed an occupational disease claim alleging that his hearing loss was related to federal employment. In response to an Office inquiry, appellant explained that he was exposed to noise from air drills and other construction equipment from 1958 to 1966 without ear protection, that his employment was intermittent from 1967 to 1977 and that he was self-employed from 1978 through 1995.

On December 18, 2000 the Office denied appellant's claim on the grounds that it had not been timely filed. The Office noted that appellant's last exposure was on November 17, 1972 and that appellant had provided no evidence that his immediate supervisor had knowledge of any hearing loss.

By letter dated June 18, 2001, appellant stated that he would like to appeal the Office's decision and enclosed a copy of an audiological evaluation. The Office responded in a letter dated June 29, 2001, asking appellant to specify which appeal option he wanted.

Appellant stated in a letter dated July 10, 2001, that he wanted an oral hearing. By decision dated August 28, 2001, the Office denied appellant's request for a hearing as untimely filed. The Office determined, after considering appellant's request, that the issue in the case could be equally well addressed by requesting reconsideration and submitting evidence not previously considered, which establishes that appellant's claim was timely filed.

The Board finds that appellant is not entitled to an oral hearing because his request was not timely filed.

Section 8124(b)(1) of the Federal Employees' Compensation Act<sup>1</sup> provides:

“Before review under section 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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary.”<sup>2</sup>

The Board has held that 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 that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>3</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing request when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.<sup>4</sup>

In this case, appellant's request for a hearing was dated July 10, 2001, well beyond the 30-day limitation of section 8421(b)(1) and its implementing regulation.<sup>5</sup> Because appellant failed to request an oral hearing within 30 days of the Office's December 18, 2000 decision, he is not entitled to an oral hearing as a matter of right.

While the Office has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its August 28, 2001 decision, stated that it had reviewed appellant's request and determined that whether appellant filed a timely claim could be resolved with a request for reconsideration and evidence showing that appellant's supervisor had knowledge of his hearing loss.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.<sup>6</sup> The record does not indicate that the Office acted in any manner in denying appellant's request for a hearing that could be found to be an abuse of discretion. Appellant argued on appeal that he did not receive the Office's December 18[, 2000] decision “in time.” However, the Office mailed its decision to appellant's address of record and appellant has provided no evidence to rebut the presumption, known as the “mailbox rule,” that a letter properly addressed and mailed

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 5 U.S.C. § 8124(b)(1).

<sup>3</sup> *Bonnie Goodman*, 50 ECAB 139, 145 (1998).

<sup>4</sup> *Martha A. McConnell*, 50 ECAB 129, 130 (1998); *Michael J. Welsh*, 40 ECAB 994, 997 (1989).

<sup>5</sup> 5 U.S.C. § 8421(b)(1); 20 C.F.R. § 10.616(a).

<sup>6</sup> *Linda J. Reeves*, 48 ECAB 373, 377 (1997).

in the course of business is presumed to have arrived at the mailing address.<sup>7</sup> Therefore, the Office properly denied appellant's request for a hearing as untimely.

The Board also finds that appellant failed to file his claim for a hearing loss within the applicable time limitations of the Act.

In cases of injury prior to September 7, 1974, a claim for compensation must be filed within one year of the date that claimant was aware or reasonably should have been aware that the condition may have been caused by the employment factors.<sup>8</sup> The one-year filing requirement may be waived if the claim is filed within five years and (1) it is found that such failure was due to circumstances beyond the control of the person claiming benefits; or (2) that such person has shown sufficient cause or reason in explanation thereof and material prejudice to the interest of the United States has not resulted from such failure.<sup>9</sup>

The test for whether sufficient cause or reason was shown to justify waiver of the one-year time limitation is whether a claimant prosecuted the claim with that degree of diligence which an ordinary prudent person would have exercised in protecting his right under the same or similar circumstances.<sup>10</sup>

In this case, appellant stated on his August 19, 1999 claim form that he first became aware of his hearing loss and its relationship to his employment in 1970. He stated that he first noticed ringing in his ears in 1959 and that his coworkers told him he needed a hearing aide around 1969 or 1970. His supervisor indicated that appellant was last exposed to noise conditions on November 17, 1972. Therefore, the Board finds that appellant had knowledge of his hearing loss and its possible work relationship at least by 1973. However, appellant did not file his claim until August 19, 1999. Therefore, his claim was clearly outside the one-year limitation period.

Further, appellant is not entitled to waiver of the one-year filing requirement because his claim was not filed within five years of the claimed hearing loss, nor has he met any of the other requirements for such waiver. The five-year time limitation is a maximum mandatory period, which neither the Office nor the Board has the power to waive.<sup>11</sup>

In addition, for injuries occurring between December 7, 1940 and September 6, 1974, the Office procedure manual indicates that written notice of the injury should be given within 48 hours as specified in section 8119 of the Act,<sup>12</sup> but that this requirement will be waived if the

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<sup>7</sup> Cf. *Charles R. Hibbs*, 43 ECAB 699, 701 (1992) (finding that Office's failure to consider letter from appellant's attorney requesting a hearing constituted an abuse of discretion).

<sup>8</sup> *Eugene L. Turchin*, 48 ECAB 391, 395 (1997).

<sup>9</sup> *Edward Lewis Maslowski*, 42 ECAB 839 (1991); *Dorothy L. Sidwell*, 36 ECAB 699, 706 (1985).

<sup>10</sup> *Roseanne S. Allexenberg*, 47 ECAB 498, 500 (1996).

<sup>11</sup> *Albert K. Tsutsui*, 44 ECAB 1004, 1008 (1993).

<sup>12</sup> 5 U.S.C. § 8119(b).

employee filed written notice within one year after the injury or if the immediate superior had actual knowledge of the injury within 48 hours after the occurrence of the injury.<sup>13</sup>

There is, however, no evidence that appellant filed written notice within one year after the injury as specified in section 8119. Moreover, the record is devoid of any evidence that appellant's immediate supervisor had actual knowledge of any hearing loss within 48 hours after its occurrence. Appellant's statement that he was told by coworkers that he needed a hearing aide is insufficient to establish that appellant's immediate supervisor knew of his hearing loss. Consequently, appellant has not established that his claim was filed within the applicable time limitation provisions of the Act.

The August 28, 2001 and December 18, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
May 6, 2002

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2 801.3.b.1 (March 1993).