

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA J. HASHEIDER and TENNESSEE VALLEY AUTHORITY,
Muscle Shoals, AL

*Docket No. 03-1987; Submitted on the Record;
Issued October 22, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant's March 1, 2003 claim for an occupational disease was timely filed pursuant to 5 U.S.C. § 8122; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124.

On March 1, 2003 appellant, then a 64-year-old operator, filed an occupational disease claim alleging that in 1986 she first realized that her hearing loss was due to factors of her federal employment. Appellant indicated that she was exposed to excessive noise. In support of her claim, appellant submitted factual and medical evidence.

In a March 20, 2003 letter, Aldora Bell, an employing establishment claims representative, controverted appellant's claim on the grounds that it was not timely filed. Ms. Bell noted that appellant last worked for the employing establishment on November 16, 1987 and that she was last exposed to the implicated employment factor on that date.¹ Ms. Bell contended that appellant's claim was untimely filed because she did not file her claim until 2003. She also stated that the employing establishment audiograms did not reveal any hearing loss or shift in appellant's hearing to signify an injury, and thus, it was impossible for the employing establishment to have any immediate actual knowledge of an injury. Ms. Bell noted that appellant was not exposed to noise in most of the work she performed. She stated, however, that infrequent and periodic work totaling no more than five to eight hours per week could have been done in areas with noise levels measuring up to 90 decibels according to industrial hygiene noise surveys.

By decision dated April 15, 2003, the Office denied appellant's claim on the grounds that it was not timely filed pursuant to 5 U.S.C. § 8122. The Office found that appellant should have

¹ In a statement accompanying her occupational disease claim, appellant indicated that she was last exposed to hazardous noise in 1986, the year she retired from the employing establishment.

been aware of a relationship between her hearing loss and federal employment by November 16, 1990.

In an undated letter received by the Office on May 13, 2003, appellant requested that the Office “review” its decision before she filed an appeal. In a response letter dated May 28, 2003, the Office advised appellant that it was unable to determine which appeal rights she wished to pursue. The Office further advised appellant to review the appeal rights attached to the April 15, 2003 decision and determine which process was best suited for her.

In a June 11, 2003 letter, appellant requested an oral hearing before an Office hearing representative. By decision dated July 17, 2003, the Office denied appellant’s request for a hearing as untimely filed. The Office explained that appellant’s request was received more than 30 days after the issuance of the April 15, 2003 decision denying her occupational disease claim for compensation and, therefore, she was not entitled to a hearing as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant’s request on the basis that the issue of whether her claim was timely filed could be addressed through the reconsideration process.

The Board finds that appellant’s March 1, 2003 claim for an occupational disease was not timely filed pursuant to 5 U.S.C. § 8122.

In cases of injury on or after September 7, 1974, section 8122(a) of the Federal Employees’ Compensation Act states that “an original claim for compensation for disability or death must be filed within three years after the injury or death.” Section 8122(b) of the Act provides that, in latent disability cases, the time limitation does not begin to run until the claimant is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between the employment and the compensable disability. The Board has held that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.²

Appellant indicated that she first became aware of a connection between her hearing loss and her employment in 1986. The record reveals that appellant was last exposed to hazardous noise at the employing establishment on November 16, 1987. Therefore, the time limitations began to run on November 16, 1987, appellant’s last exposure to the implicated employment factor. Since appellant did not file a claim until March 1, 2003 her claim was filed outside the three-year time limitation period under section 8122(b).

Appellant’s claim, however, would still be regarded as timely under section 8122(a)(1) of the Act if her immediate supervisor had actual knowledge of the injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job

² See *Garyleane A. Williams*, 44 ECAB 441 (1993); *Charlene B. Fenton*, 36 ECAB 151 (1984).

injury or death.³ Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days.⁴

The record contains no evidence that appellant's supervisor had actual knowledge of the injury or that written notice of the injury was given within 30 days. Ms. Bell indicated that the employing establishment audiograms did not demonstrate appellant's hearing loss or a change in her hearing. Moreover, the record is devoid of any indication that appellant's immediate supervisor had written notice of her injury within 30 days. The exceptions to the statute have not been met, and thus, appellant has failed to establish that she filed a timely claim on March 1, 2003.

The Board further finds that the Office properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124.

Section 8124(b) of the 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 her claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary.⁵ 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.⁶

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 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,⁷ when the request is made after the 30-day period established for requesting a hearing⁸ or when the request is for a second hearing on the same issue.⁹ 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.¹⁰

³ 5 U.S.C. § 8122(a)(1); *see Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

⁴ 5 U.S.C. §§ 8122(a)(1) and (2).

⁵ *See* 5 U.S.C. § 8124(b)(1).

⁶ *See* 20 C.F.R. § 10.616(a) (1999); *Charles J. Prudencio*, 41 ECAB 499, 501 (1990).

⁷ *Rudolph Bermann*, 26 ECAB 354 (1975).

⁸ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁹ *Johnny S. Henderson*, 34 ECAB 216 (1982).

¹⁰ *Sandra F. Powell*, 45 ECAB 877 (1994).

In this case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated April 15, 2003, thus appellant was not entitled to a hearing as a matter of right. She requested a hearing in a letter dated June 11, 2003. Hence, the Office was correct in stating in its July 17, 2003 decision that appellant was not entitled to a hearing as a matter of right because her hearing request was not made within 30 days of the Office's April 15, 2003 decision.

While the Office also 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 July 17, 2003 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by appellant requesting reconsideration and submitting evidence to support her contention that she filed a timely occupational disease claim. The Board has held that 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.¹¹ In this case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request, which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The July 17 and April 15, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
October 22, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ *Daniel J. Perea*, 42 ECAB 214 (1990).