

FACTUAL HISTORY

On November 20, 1991 appellant, then a 41-year-old inventory management specialist, filed a traumatic injury claim alleging that she sustained dizziness and a ringing sensation and pain in her left ear on October 25, 1991 after a supervisor loudly clapped his hands near her left ear.²

Appellant submitted reports of several attending physicians, including Dr. Carolyn A. Sharp, a Board-certified internist, and Dr. Robert P. Kaufman, a physician Board-certified in occupational medicine.

By decision April 27, 1992, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained an employment injury on October 25, 1991. The Office sent its decision to appellant's address of record at the time: P.O. Box 33369, Wright Patterson Air Force Base, OH 45433.

In a July 15, 1992 letter to appellant and her attorney, an Office claims examiner advised that appellant's "case has been denied on April 27, 1992."³

In letters dated September 22, 2002 and received by the Office *via* facsimile transmission on November 5, 2002, appellant requested an oral hearing before an Office hearing representative. She argued that the medical evidence showed that she sustained an employment-related injury on October 25, 1991.

By decision dated July 10, 2003, the Office denied appellant's request for a hearing before an Office hearing representative. The Office determined that appellant did not make a timely request for a hearing. It further stated that it had exercised its discretion and denied appellant's hearing request on the basis that the issue in the case could be resolved by requesting reconsideration and submitting additional medical evidence showing that her claimed October 25, 1991 injury was causally related to factors of employment.

LEGAL PRECEDENT

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "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."⁴ 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.⁵

² Appellant also filed a claim (file number A9-364226) concerning an alleged right leg injury which was denied by the Office. This claim is not the subject of the present appeal.

³ The Office also sent this letter to P.O. Box 33369, Wright Patterson Air Force Base, OH 45433

⁴ 5 U.S.C. § 8124(b)(1).

⁵ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

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.⁶ 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 for requesting a hearing,⁸ and when the request is for a second hearing on the same issue.⁹

It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.¹⁰

ANALYSIS

Appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated April 27, 1992 and, thus, she is not entitled to a hearing as a matter of right. Appellant requested a hearing before an Office representative in letters dated September 22, 2002 and received by the Office *via* facsimile transmission on November 5, 2002. The Office properly found that appellant was not entitled to a hearing as a matter of right because her November 5, 2002 hearing request was not made within 30 days of the Office's April 27, 1992 decision. Appellant alleged that she did not have an opportunity to file a timely hearing request because she did not receive a copy of the Office's April 27, 1992 decision. However, the April 27, 1992 decision was properly addressed and duly mailed and it is presumed that appellant received it.¹¹

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 10, 2003 decision, properly exercised its discretion by stating that it had denied appellant's hearing request on the basis that the issue in the case could be resolved by requesting reconsideration and submitting additional medical evidence showing that her claimed October 25, 1991 injury was causally related to factors of employment. 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

⁶ *Henry Moreno*, 39 ECAB 475, 482 (1988).

⁷ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁸ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

⁹ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

¹⁰ *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

¹¹ *See supra* note 10 and accompanying text. Moreover, the Office also sent appellant a July 15, 1992 letter to her address of record which advised her that her claim had been denied on April 27, 1992.

deduction from established facts.¹² In the present 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.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' July 30, 2003 decision is affirmed.

Issued: August 17, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹² *Daniel J. Perea*, 42 ECAB 214, 221 (1990).