

FACTUAL HISTORY

On October 11, 2001 appellant, then a 68-year-old carpenter, filed an occupational disease claim alleging that he developed hearing loss as a result of being exposed to hazardous noise at the employing establishment. Appellant became aware of his hearing loss on August 31, 2001. Appellant retired in September 1995.¹

In support of his claim, appellant submitted a report from Dr. John P. Arrowood, a Board-certified otolaryngologist. He noted that, upon review of the past audiograms and the most recent audiogram of August 31, 2001, appellant has sustained a middle and high frequency sensorineural hearing loss due to exposure to loud noises and as part of the normal aging process. The physician advised that the audiograms from 1974 revealed some element of mild high frequency sensorineural hearing loss.

By letter dated January 7, 2002, the Office referred appellant to Dr. Michael Johnson, a Board-certified otolaryngologist, for otologic examination and audiological evaluation. Dr. Johnson performed an otologic evaluation of appellant on January 23, 2002 and audiometric testing was conducted on the doctor's behalf on the same date. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed the following: right ear 25, 45, 55 and 70 decibels; left ear 25, 25, 50 and 70 decibels. Dr. Johnson determined that appellant sustained bilateral sensorineural hearing loss due to aging and noise exposure over a lifetime. He recommended that appellant use hearing aids.

By decision dated March 5, 2002, the Office accepted that appellant's binaural hearing loss was due to workplace exposure to noise.

On April 21, 2002 appellant filed a claim for a schedule award.

On May 8, 2002 an Office medical adviser reviewed Dr. Johnson's report and the audiometric test of January 23, 2002. The medical adviser concluded that, in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (A.M.A., *Guides*), appellant had bilateral sensorineural hearing loss of 28 percent.

In a compensation award dated January 7, 2003, the Office denied appellant's claim for a schedule award. The Office noted that in claim number 06-0730842 appellant was granted an award for 20 percent binaural hearing loss on October 14, 1993 and an increased award of 11 percent on February 14, 2000 for a total award of 31 percent binaural hearing loss. The Office noted that appellant retired in 1995. The Office advised that there was no further entitlement to a schedule award.

In a letter dated May 12, 2004, appellant requested that his claim be reopened because his hearing loss had worsened. By letter dated June 7, 2004, the Office responded to appellant's correspondence and advised that appellant's claim was never closed and was open for medical

¹ The record reflects that appellant filed another claim for bilateral hearing loss which was accepted by the Office, claim number 06-0730842. Appellant was granted a schedule award of 31 percent binaural hearing loss in that claim.

benefits and lost wages resulting from his work-related hearing loss. The Office recommended that appellant exercise his appeal rights as set forth in the decision dated January 7, 2003.

By letter dated July 21, 2004 and postmarked on July 22, 2004, appellant requested an oral hearing.

By decision dated September 8, 2004, the Office denied appellant's request for an oral hearing. The Office found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved, and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

LEGAL PRECEDENT

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "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."² Section 10.617 and 10.618 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.³ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.⁴ The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

"If the claimant is not entitled to a hearing or review (*i.e.*, the request was untimely, the claim was previously reconsidered, etc.), H&R [Hearings and Review] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons."⁵

ANALYSIS

Appellant requested an oral hearing by an Office hearing representative on July 21, 2004 which was postmarked on July 22, 2004. Section 10.616(a) of the federal regulations provides: "The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."⁶ As the postmark date

² 5 U.S.C. § 8124(b)(1).

³ 20 C.F.R. §§ 10.616, 10.617.

⁴ *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4 (b)(3) (October 1992).

⁶ 20 C.F.R. § 10.616(a).

of the request was more than 30 days after issuance of the January 7, 2003 Office decision, appellant's request for an oral hearing was untimely filed. Therefore, the Office was correct in finding in its September 8, 2004 decision that appellant was not entitled to an oral hearing as a matter of right because his request was not made within 30 days of the Office's January 7, 2003 decision.

While the Office also has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right, the Office, in its September 8, 2004 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for an oral hearing on the basis that the case could be resolved by submitting additional evidence to establish that a diagnosed condition was causally related to his 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 deduction from established facts.⁷ 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 request for an oral hearing, which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for an oral hearing under section 8124 of the Act.

CONCLUSION

The Board finds that the Office properly denied appellant's request for an oral hearing as untimely.

⁷ *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the September 8, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 25, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board