

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**RAMIRO C. GARZA, Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE, KELLY  
AIR FORCE BASE, San Antonio, TX, Employer**

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**Docket No. 04-1831  
Issued: May 12, 2005**

*Appearances:*  
*Ramiro C. Garza, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
COLLEEN DUFFY KIKO, Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On July 13, 2004 appellant filed a timely appeal from an April 6, 2004 decision of the Office of Workers' Compensation Programs which denied his request for a hearing before an Office hearing representative. Because more than one year elapsed between the date of the appeal request and the last merit decision on the claim issued on July 17, 2000, the Board does not have jurisdiction over the merits of the claim under 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

**ISSUE**

The issue is whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b)(1).

**FACTUAL HISTORY**

On February 2, 2000 appellant, then a 45-year-old engine mechanic, filed a claim for a hearing loss which he attributed to factors of his federal employment. The record reflects that appellant was employed as a ground power equipment repairer from November 2, 1981 to January 22, 1983 and as an aircraft mechanic from January 23, 1983 to September 11, 1999. It

was noted that appellant was last exposed to noise at the employing establishment on September 11, 1999 and that he was subsequently laid off due to closure of the base on March 10, 2000.

The Office developed the claim and referred appellant for examination by Dr. Charles A. Syms, III, a Board-certified otolaryngologist. Following review of audiometric testing conducted on his behalf, the Office denied appellant's claim for a schedule award by decision dated July 17, 2000, finding that the extent of hearing loss was not ratable under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

By letter postmarked September 6, 2000, appellant requested a hearing before the Branch of Hearings and Review. By decision dated October 23, 2000, the Office denied appellant's request, finding that it was untimely filed and that the issue could be equally addressed by seeking reconsideration before the district Office and submitting evidence which established that he sustained a ratable hearing loss.

In a letter received by the Office on November 27, 2001, appellant inquired as to information regarding the reopening of his claim. No evidence was submitted.

On November 4, 2003 appellant submitted a CA-7 claim, again requesting a schedule award.<sup>1</sup> He submitted an October 21, 2003 report from Dr. Alan H. Dinesman addressed to the employing establishment. Dr. Dinesman noted that he treated appellant for complaints of vertigo and tinnitus. He commented that, under the A.M.A., *Guides*, the extent of appellant's hearing loss was zero percent.

By letter dated January 7, 2004, the Office referred appellant to the July 17, 2000 decision denying his schedule award claim. It was noted that he could exercise his appeal rights as indicated in the decision.

By letter dated February 12, 2004, appellant requested a hearing on his claim.

In an April 6, 2004 decision, the Office denied appellant's request, finding that as it was untimely filed he was not entitled to a hearing as a matter of right. The Office further advised that appellant could submit additional evidence to the district Office establishing that he had a ratable hearing loss.

### **LEGAL PRECEDENT**

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that a claimant for compensation not satisfied with the decision of the Office is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Director.<sup>2</sup> The Board has noted that this section of the Act is unequivocal in

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<sup>1</sup> Appellant indicated that he last worked on March 10, 2000.

<sup>2</sup> See 5 U.S.C. § 8124(b)(1).

setting forth the time limitations for requesting a hearing.<sup>3</sup> A claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.

The implementing federal regulations provide that any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing, or, in lieu thereof, a review of the written record by the Branch of Hearings and Review.<sup>4</sup> A request for either an oral hearing or a review of the written record must be submitted in writing within 30 days of the date of the decision for which a hearing is sought.<sup>5</sup> A claimant is not entitled to a hearing or review of the written record if the request is not made within 30 days of the date of the decision for which review is sought.<sup>6</sup> The Office has the discretion to grant or deny a hearing request that is made after the 30-day period. In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.<sup>7</sup>

### ANALYSIS

The Office issued a decision on July 17, 2000 denying appellant's claim for a schedule award for his accepted occupational hearing loss. The decision found that the extent of appellant's hearing loss was not ratable for schedule award purposes. The record reflects that appellant sought a hearing from this decision by letter postmarked September 6, 2000. This hearing request was denied as untimely on October 23, 2000 and appellant was properly advised that he could seek further reconsideration before the district Office.

No further action was taken by appellant until November 4, 2003 when he submitted another CA-7 claim for a schedule award and submitted a medical report related to treatment by Dr. Dinesman.<sup>8</sup> On January 7, 2004 the Office advised appellant that he could pursue further review of his claim for a schedule award by following the appeal rights addressed in the July 17, 2000 decision. On February 12, 2004 appellant again requested a hearing before the Branch of Hearings and Review.

Appellant's request of February 12, 2004 is dated more than 30 days following the July 17, 2000 Office decision. The Office properly found that appellant did not timely request an oral hearing before the Branch of Hearings and Review and that he was not entitled to a hearing as a matter of right under section 8124. The Office exercised its discretionary authority by stating that it had considered the matter in relation to the issue involved and denied appellant's request because the schedule award claim could be addressed through an application for

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<sup>3</sup> See *Delmont L. Thompson*, 51 ECAB 155, 157 (1999).

<sup>4</sup> 20 C.F.R. § 10.615.

<sup>5</sup> 20 C.F.R. § 10.616(a).

<sup>6</sup> See *James Smith*, 53 ECAB 188, 192 (2001).

<sup>7</sup> 20 C.F.R. § 10.616(b). See *Herbert C. Holley*, 33 ECAB 140 (1981); *Rudolf Bermann*, 26 ECAB 354 (1975).

<sup>8</sup> Since appellant's 2000 hearing loss claim had been accepted by the Office and there was no additional noise exposure, it was not necessary to submit a new claim. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7(b)(3) (November 1998).

reconsideration before the district Office and the submission of medical evidence indicating that the extent of hearing loss was ratable. The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to logic and probable deduction from established facts.<sup>9</sup> In the present case, the evidence of record does not establish that the Office abused its discretion in denying appellant's hearing request.

**CONCLUSION**

The Board finds that the Office properly denied appellant's request for an oral hearing under section 8124(b)(1).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 6, 2004 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: May 12, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member

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<sup>9</sup> See *Bonnie Goodman*, 50 ECAB 139, 145 (1998).