

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

HARRY C. THOMPSON, Appellant)	
)	
and)	Docket No. 05-525
)	Issued: May 19, 2005
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Johnstown, PA, Employer)	
)	

Appearances:
Harry C. Thompson, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On December 27, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated November 12, 2004, which denied his request for a review of the written record. Because more than one year has elapsed between the most recent merit decision dated March 29, 1988 and the filing of this appeal on December 27, 2004, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2 and 501.3.

ISSUE

The issue on appeal is whether the Office properly denied appellant's request for review of the written record.

FACTUAL HISTORY

On April 28, 1987 appellant, then a 59-year-old supervisor, filed an occupational disease claim alleging that his hearing loss was sustained in the performance of duty.

On February 6, 1988 the Office accepted appellant's claim for a seven percent binaural hearing loss. On March 29, 1988 the Office awarded appellant's schedule award payment for a period of 12 weeks, from December 18, 1987 to March 24, 1988. On March 21, 1988 appellant appealed the March 29, 1988 decision to the Employees' Compensation Appeals Board and, by decision dated August 19, 1988, the Board affirmed as modified the Office's February 6 and March 29, 1988 decisions to reflect an eight percent binaural hearing loss.¹ In a subsequent order granting petition for reconsideration dated July 7, 1989, the Board modified its August 19, 1988 decision and affirmed the Office's February 8 and March 29, 1988 decisions finding that appellant sustained no more than a seven percent binaural hearing loss.²

On August 27, 1990 appellant, through a congressional office, requested reconsideration. On September 24, 1990 the Office denied appellant's request for reconsideration. On October 22, 2004 appellant requested review of the written record.

By decision dated November 12, 2004, the Office denied appellant's request for review of the written record on the grounds that it was untimely filed. The Office further considered the matter in relation to the issue involved and found that appellant's concerns could be equally well addressed by pursuing the reconsideration process before the Office.

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."³ Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provides that a hearing is available in two formats and that the claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.⁴ 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.⁵ 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.*), [hearing or review] will

¹ Docket No. 88-933 (issued August 19, 1988).

² Docket No. 88-933, *petition for recon. granted* (issued July 7, 1989).

³ 5 U.S.C. § 8124 (b)(1). This provision also indicates that a request for a hearing must come before a request for reconsideration under 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. §§ 10.616, 10.617.

⁵ *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons.”⁶

ANALYSIS

In the present case, appellant requested a review of the written record on October 22, 2004. Section 10.616 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.”⁷ As appellant’s request was more than 30 days after issuance of the March 29, 1988 Office decision, it was untimely filed. Therefore, the Office properly found that he was not entitled to a review of the written record as a matter of right. Appellant’s request for a review of the written record was dated October 22, 2004 and outside the 30-day statutory time period.⁸ Since he did not request a review of the written record within 30 days of the Office’s March 29, 1988 decision, he was not entitled to a review of the written record under section 8124 as a matter of right.

The Office 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 November 12, 2004 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant’s request on the basis that the issue could be pursued by submitting additional evidence to the Office in a reconsideration request. 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.⁹ In the present case, the evidence of record does not indicate that the Office abused discretion. For these reasons, the Office properly denied appellant’s request for a review of the written record under section 8124 of the Act.

CONCLUSION

The Board finds that the Office properly denied appellant’s request for a review of the written record as untimely.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

⁷ 20 C.F.R. § 10.616.

⁸ The Board notes that appellant was also not entitled to a hearing as a matter of right because the hearing request was made after appellant sought reconsideration under 5 U.S.C. § 8128(a). *See* 5 U.S.C. § 8124(a); 20 C.F.R. § 10.616(a).

⁹ *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the November 12, 2004 decision of the Office of Workers' Compensation Programs is affirmed.¹⁰

Issued: May 19, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ The Board notes that the record contains evidence which was submitted subsequent to the Office's November 12, 2004 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).