

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

WILLIAM P. MAHER, Appellant)	
)	
and)	Docket No. 06-122
)	Issued: June 12, 2006
DEPARTMENT OF THE ARMY, CORPUS)	
CHRISTI ARMY DEPOT, Corpus Christi, TX,)	
Employer)	
)	

Appearances:
William P. Maher, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 19, 2005 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated March 10, 2005 denying his claim as untimely, and a decision dated July 11, 2005 denying his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly denied appellant's occupational disease claim as untimely; and (2) whether the Office abused its discretion in denying appellant's request for a hearing.

FACTUAL HISTORY

The procedural history in this case indicates that on March 2, 1989 appellant, then a 52-year-old mechanic, filed an occupational disease claim for injuries resulting from chemical

exposure, including Agent Orange.¹ Appellant indicated that he first became aware of his illness and the fact that it was employment related in approximately February 1966. He retired on February 5, 1988. Appellant's claim was denied as untimely by decisions of the Office and Office hearing representative dated November 3, 1989 and February 21, 1991, respectively. By decision dated March 31, 1992, the Board affirmed the decision of the Office hearing representative.² By decision dated January 23, 1996, the Board affirmed the hearing representative's denial of appellant's request for a hearing.³

On January 7, 2005 appellant filed an occupational disease claim, Form CA-2, alleging that he developed Type II diabetes, skin cancers, weakness, body aches and tooth damage as a result of his exposure to Agent Orange. He indicated that he first became aware of his illness on or about February 19, 1966, when he "realized [they] were working in chemicals from Viet Nam, but at [that] time [he] did not know it was Agent Orange."

On January 11, 2005 the employing establishment controverted the claim, stating that it was not filed within three years of the date of injury and that his immediate supervisor did not have actual knowledge of his injury within 30 days of the date of injury.

Appellant submitted a letter dated December 27, 2004 addressed to Congressman Soloman P. Ortiz, in which he provided information regarding his unprotected exposure to harmful chemicals and asbestos from 1965 to 1975 at the employing establishment. A letter dated November 19, 2004 from the Veterans Administration New Jersey Health Care Team advised appellant of a scheduled appointment on December 17, 2004 to attend a diabetes education clinic.

By letter dated January 24, 2005, the Office notified appellant that the information submitted was insufficient to establish his claim and advised him to submit additional information describing the development of his claimed condition and a comprehensive medical report from his physician with a diagnosis and opinion, with medical reasons, on the cause of his condition.

Appellant submitted a narrative statement dated February 9, 2005 alleging that he was exposed on a daily basis to hazardous materials at the employing establishment, including asbestos, Agent Orange, rodenticides and insecticides. He claimed that, as a result of this exposure, he developed skin cancers on his face, arms, neck and hands, depression, insomnia, nausea, dizziness, testicular cancer and Type II diabetes. Appellant specifically stated that he was exposed to Agent Orange from 1966 until 1973.

In a letter dated February 15, 2005, the employing establishment stated that appellant's medical records from the date of his employment on January 19, 1966 through the date of his

¹ The March 2, 1989 claim was assigned file number 500040560. Appellant's alleged injuries included stomach problems, persistent sores, insomnia and depression.

² Docket No. 91-1047 (issued March 31, 1992).

³ Docket No. 95-700 (issued January 23, 1996).

retirement on February 5, 1988 did not reflect treatment for diabetes, skin cancers, damage to his teeth, weakness and/or body aches to his bones.

By decision dated March 10, 2005, the Office denied appellant's claim as untimely, stating that he should have been aware of his claimed condition by February 5, 1991, three years after the date of his last exposure.

Appellant submitted a report dated February 11, 2005 from Dr. Scott C. Woska, a Board-certified physiatrist, who treated him for neck and back pain, who indicated that appellant suffered from chronic diabetes, stroke and high blood pressure.

On March 26, 2005 appellant requested an oral hearing. In support of his request, appellant submitted a narrative statement indicating that "Agent Orange caused [his] diabetes Type II and [he] just found out about it within the last year." In a letter to the Office dated May 22, 2005, appellant reiterated his allegations that his Type II diabetes was caused by his exposure to Agent Orange and that he "just found out about it." He contended that he should be compensated in the same fashion as Viet Nam veterans, under the presumption that Agent Orange caused his illness.

By decision dated July 11, 2005, an Office hearing representative denied appellant's hearing request. The hearing representative stated that, although appellant had claimed new conditions, including Type II diabetes, the January 7, 2005 claim was duplicative of his March 2, 1989 claim, in that he had attributed his diabetes and other conditions to the same exposure alleged in his 1989 claim.

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 a decision, to a hearing on his claim before a representative of the Secretary.⁴ Sections 10.617 and 10.618 of the implementing federal regulations provide 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.⁵

ANALYSIS

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

In its July 11, 2005 decision, the Office found that appellant was not entitled to an oral hearing, in that his claim was duplicative of his 1989 claim. The Board has held that a claimant is not entitled to a second hearing on the same issue before the Office.⁶ However, the issue

⁴ 5 U.S.C. § 8124(b).

⁵ 20 C.F.R. §§ 10.616, 10.617.

⁶ See *Johnny S. Henderson*, 34 ECAB 216 (1982).

before the Office hearing representative was whether appellant's January 7, 2005 claim was timely filed. The January 7, 2005 claim was a new claim, with allegations which were distinct from the initial 1989 claim. Appellant has a statutory right to an oral hearing on the issue of timeliness. At the hearing, appellant may present additional evidence which should be considered in making a determination as to whether or not appellant's claim is duplicative of the 1989 claim.

Section 8124(b) of the Act provides that a claimant is entitled to an oral hearing, upon a request made within 30 days of the issuance of an adverse decision.⁷ Appellant requested an oral hearing on March 26, 2005, well within 30 days of the Office's March 10, 2005 decision. Accordingly, he was entitled to a hearing. The case must be remanded to the Office, so that appellant may be afforded the opportunity for an oral hearing.

CONCLUSION

The Board further finds that the Office abused its discretion in denying appellant's request for a hearing.⁸

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 10, 2005 is affirmed. The Office's July 11, 2005 decision is set aside and the case is remanded for action consistent with this decision.

Issued: June 12, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

⁷ 5 U.S.C. § 8124(b).

⁸ Due to the Board's disposition on appellant's entitlement to a hearing, it is premature for the Board to address the timeliness issue.