

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

D.D., Appellant

and

**TENNESSEE VALLEY AUTHORITY,
Chattanooga, TN, Employer**

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**Docket No. 13-1576
Issued: November 18, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 20, 2013 appellant filed a timely appeal from a May 30, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for a review of the written record as untimely filed under 5 U.S.C. § 8124.

¹ The last merit decision in this case was the November 6, 2012 decision denying appellant's hearing loss claim. For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. 20 C.F.R. § 501.3(d)(2). For final adverse decisions of OWCP issued on or after November 19, 2008, a claimant must file an appeal within 180 days of the decision. 20 C.F.R. § 501.3(e). Because more than 180 days has elapsed between the most recent merit decision dated November 6, 2012 to the filing of this appeal on June 20, 2013 the Board lacks jurisdiction to review the merits of this case.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 3, 2012 appellant, then a 61-year-old laborer, filed an occupational disease claim alleging that he suffered from hearing loss and tinnitus as a result of working around chipping guns, boiler feed pumps, pulverizers, condensers and sweepers throughout the plant at the employing establishment.

In a decision dated November 6, 2012, OWCP denied appellant's occupational disease claim finding insufficient medical evidence to establish that his hearing loss was causally related to his employment.

On April 19, 2013 appellant requested a review of the written record. He explained that when he started working for the employing establishment he could hear very well on both sides but over the years of employment his hearing got worse. Appellant noted that the ringing in his ears worsened and that the employing establishment was the only loud noise that he was around.

By decision dated May 30, 2013, OWCP denied appellant's request for a review of the written record as untimely filed. It exercised its discretion and determined that the issue could be equally well addressed by appellant requesting reconsideration before OWCP and submitting evidence not previously considered in support of his claim.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA 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 or her claim before a representative of the Secretary.³ Section 10.615 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record.⁴ The 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.⁵ A claimant is entitled to a hearing or review of the written record as a matter of right if the request is filed within 30 days.⁶

While a claimant may not be entitled to a hearing or review of the written record as a matter of right if the request is untimely, OWCP has the discretionary authority to grant the request and must properly exercise such discretion.⁷

³ *Id.* at § 8124(b)(1).

⁴ 20 C.F.R. § 10.615.

⁵ *Id.* at § 10.616(a).

⁶ *See Leona B. Jacobs*, 55 ECAB 753 (2004).

⁷ 20 C.F.R. § 10.616(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

ANALYSIS

In its November 6, 2012 decision, OWCP denied appellant's hearing loss claim finding that the medical evidence was insufficient to establish that his hearing loss was causally related to factors of his employment. By appeal request form dated and postmarked April 19, 2013, appellant requested a review of the written record. The Board notes that his request was postmarked more than 30 days after the November 6, 2012 decision. Consequently, appellant's request was not timely filed and he was not entitled to a review of the record as a matter of right.⁸

OWCP has the discretionary authority to grant a review of the written record even though a claimant is not entitled to such as a matter of right. In its May 30, 2013 decision, it properly exercised its discretion by notifying appellant that it had considered the matter in relation to the issue involved and determined that additional argument and evidence could be submitted with a request for reconsideration. The Board has held that the only limitation on OWCP'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 The Board finds that OWCP did not abuse its discretion in this case by denying appellant's request for a review of the written record.

On appeal, appellant alleged that he did not receive the November 6, 2012 decision denying his claim and allowing 30 days to request review of the written record. The case record shows, however, that the November 6, 2012 denial decision was to his mailing address of record. The Board has held that a notice properly addressed and duly mailed to an individual in the ordinary course of business is presumed to have been received by that individual.¹⁰ In addition, appellant did not present any evidence showing that the decision was not properly delivered to rebut this presumption.¹¹

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a review of the written record as untimely filed under section 8124.

⁸ *Supra* note 5.

⁹ See *Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).

¹⁰ *Marilyn K. Webb*, Docket No. 00-747 (issued September 19, 2001); *Newton D. Lashmett*, 45 ECAB 181 (1993) (mailbox rule).

¹¹ See *E.C.*, Docket No. 11-510 (issued September 8, 2011).

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 18, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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