

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

P.H., widow of R.H., Appellant

and

**DEPARTMENT OF ENERGY, MOUND
PLANT, Miamisburg, OH, Employer**

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**Docket No. 17-0978
Issued: August 29, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 4, 2017 appellant, through counsel, filed a timely appeal from a November 2, 2016 merit decision and a February 21, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for a hearing before an OWCP hearing representative; and (2) whether appellant established that the employee's death was causally related to factors of his federal employment.

FACTUAL HISTORY

Appellant, widow of the deceased employee, filed a claim for death benefits on August 19, 2016.³ The claim alleged that exposure to hazardous material while in federal employment contributed to the employee's death. The employee had worked from January 22, 1984 to March 31, 1996 at the employing establishment's facility in Miamisburg, Ohio as a health and safety inspector. The employee died on August 16, 2013.

An autopsy report dated August 19, 2013 indicated that the employee's final clinical diagnoses included malignant mesothelioma, pneumonia, status post left pneumectomy, a history of asbestos expose, a history of plutonium exposure, fluid overload, and seizures. The death certificate indicated that the cause of death was malignant mesothelioma.

By decision dated November 2, 2016, OWCP denied appellant's claim as untimely filed. It found that the claim had been filed more than three years after the employee's death on August 16, 2013.

On November 8, 2016 appellant, through counsel, requested a telephonic hearing before a hearing representative of OWCP's Branch of Hearings and Review.

By decision dated February 21, 2017, OWCP's Branch of Hearings and Review denied appellant's request for a hearing. The decision found that 5 U.S.C. § 8124 applied to injuries after July 4, 1966, and "[s]ince the injury under consideration in the present case occurred on March 31, 1996, the day of [the employee's] last day in federal employment, you are not, as a matter of right, entitled to an oral hearing nor a review of the written record on this claim." The Branch of Hearings and Review held that it had exercised its discretion and further denied the hearing request as appellant could equally well request reconsideration.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8124(b)(1) provides in pertinent part:

"Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this title 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."⁴

³ The claim was dated August 4, 2016.

⁴ 5 U.S.C. § 8124(b)(1).

As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁵

ANALYSIS -- ISSUE 1

OWCP's merit decision was dated November 2, 2016. Counsel filed a hearing request on November 8, 2016. Since the hearing request was filed within 30 days of the November 2, 2016 OWCP decision, appellant was entitled to a hearing as a matter of right.

The February 21, 2017 OWCP decision referred to section 8124 as applying to injuries after July 4, 1966,⁶ and then erroneously found that it therefore did not apply to the current claim. The claim in this case is for death benefits, and the employee's death occurred on August 16, 2013,⁷ but even if the date of the employee's last exposure in federal employment, March 31, 1996, was used as a date of injury, this was clearly after July 4, 1966.⁸

Since appellant filed a timely hearing request, she is entitled to a hearing pursuant to 5 U.S.C. § 8124(b)(1). The case will be remanded for a hearing before an OWCP hearing representative. The Board will not address the merits of the November 2, 2016 OWCP decision on this appeal.⁹

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for a hearing.

⁵ See *William F. Osborne*, 46 ECAB 198 (1994).

⁶ 5 U.S.C. § 8124 was enacted as part of the 1966 amendments to FECA, and was applicable to injuries occurring after July 4, 1966, the date of enactment. See *David M. Spencer*, 24 ECAB 251 (1973).

⁷ In *Nellie V. Vanoy (Martin D. Vanoy)*, 32 ECAB 1924 (1981), the Board used the date of death as the applicable date of injury under 5 U.S.C. § 8124, finding that there was no hearing as a matter of right because the employee's death occurred in 1950.

⁸ The February 21, 2017 decision may have erroneously read July 4, 1966 as July 4, 1996.

⁹ When a claimant is entitled to a hearing before an OWCP hearing representative, the Board will not address the underlying merit decision. The merits are subject to further adjudication pursuant to the hearing before an OWCP hearing representative, and therefore are not in posture for review by the Board. See *Gary W. Cooper*, Docket No. 97-0518 (issued March 5, 1999); see also 20 C.F.R. § 501.2(c)(2) (the Board will not review interlocutory matters during the pendency of a case).

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2017 decision of the Office of Workers' Compensation Programs is reversed. The November 2, 2016 decision is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 29, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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