

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

B.H., Appellant)
and) Docket No. 18-0874
TENNESSEE VALLEY AUTHORITY,) Issued: October 10, 2018
BROWNS FERRY NUCLEAR PLANT,)
Decatur, AL, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 19, 2018 appellant filed a timely appeal from a March 9, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than one year has elapsed from the last merit decision dated June 7, 2002, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of the case.¹

ISSUE

The issue is whether OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).

¹ For final 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). An appeal of final OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On September 28, 2001 appellant, then a 48-year-old painter, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss causally related to noise exposure in the course of his federal employment. He was last exposed to the conditions alleged to have resulted in his condition on August 10, 1987.²

By decision dated June 7, 2002, OWCP denied appellant's occupational disease claim. It found that the report from the second opinion physician constituted the weight of the evidence and established that his hearing loss was not noise related, but instead attributable to age.

Appellant, on January 21, 2018, requested that OWCP reopen his case. He asserted that multiple physicians found that he had noise-related hearing loss and questioned why OWCP's referral physician found age-related hearing loss given that he was not old. Appellant further disputed the employing establishment's assertion that he was only exposed to noise 10 hours per week.

In a January 29, 2018 response, OWCP instructed appellant to follow the appeal rights accompanying its prior decision.

Appellant, in an undated letter postmarked February 16, 2017, requested an oral hearing before an OWCP hearing representative.

By decision dated March 9, 2018, OWCP's hearing representative determined that appellant was not entitled to a hearing as a matter of right under section 8124(b) because his February 16, 2017 oral hearing request was not made within 30 days of its June 7, 2002 merit decision. She considered whether to grant a discretionary hearing, but determined that the matter could be equally well addressed by appellant requesting reconsideration and providing new evidence supporting that he sustained an employment-related condition.

On appeal appellant relates that he received a copy of his case record in January 2018. He questions why OWCP's referral physician found that he hearing loss resulted from age. Appellant also asserts that he had significantly greater noise exposure than the levels provided by the employing establishment and was exposed to noise at additional federal facilities.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP hearing representative, provides: "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

² Appellant advised that he first became aware of his condition and its relationship to his federal employment on August 20, 1987. OWCP determined that his claim was timely as the employing establishment had actual knowledge of his hearing loss through audiograms obtained from its testing program.

this section 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

A hearing is a review of an adverse decision by an OWCP hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.⁴ A request for either an oral hearing or a review of the written record must be sent, in writing, within 30 days of the date of the decision for which the hearing is sought.⁵ A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision.⁶

OWCP has discretion to grant or deny a request that is made after the 30-day period for requesting an oral hearing or review of the written record and must properly exercise such discretion.⁷

ANALYSIS

The Board finds that OWCP properly determined that appellant’s request for an oral hearing was untimely filed. OWCP’s regulations provide that the hearing request must be sent within 30 days of the date of the decision for which a hearing is sought.⁸ As his request was postmarked February 16, 2017, more than 30 days after OWCP’s June 7, 2002 decision, it was untimely filed and he was not entitled to an oral hearing as a matter of right.⁹

The Board further finds that OWCP’s hearing representative properly exercised her discretion in denying appellant’s request for an oral hearing by determining that the issue in the case could be addressed equally well through a request for reconsideration and the submission of new evidence relevant to the issue at hand.¹⁰ The Board has held that the only limitation on OWCP’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.¹¹ In this case, the evidence of record does not establish that OWCP abused its discretion in denying appellant’s

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. § 10.615.

⁵ *Id.* at § 10.616(a); *G.W.*, Docket No. 10-0782 (issued April 23, 2010); *James Smith*, 53 ECAB 188 (2001).

⁶ See *S.M.*, Docket No. 17-1876 (issued January 24, 2018); *R.T.*, Docket No. 08-0408 (issued December 16, 2008).

⁷ 20 C.F.R. § 10.616(b); see also *F.M.*, Docket No. 18-0161 (issued May 18, 2018).

⁸ See *supra* note 6.

⁹ See *J.A.*, Docket No. 17-1744 (issued January 9, 2018).

¹⁰ See *D.P.*, Docket No. 14-0308 (issued April 21, 2014); *D.J.*, Docket No. 12-1332 (issued June 21, 2013).

¹¹ See *R.G.*, Docket No. 16-0994 (issued September 9, 2016); *Teresa M. Valle*, 57 ECAB 542 (2006).

request for an oral hearing. Accordingly, the Board finds that OWCP properly denied his oral hearing request.¹²

On appeal appellant raises arguments relevant to the merits of his claim. The only issue before the Board, however, is whether OWCP properly denied his request for an oral hearing as untimely filed. As the Board lacks jurisdiction to review the underlying merits of appellant's claim, it cannot review his arguments regarding his occupational disease claim.¹³

CONCLUSION

The Board finds that OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 9, 2018 is affirmed.

Issued: October 10, 2018
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹² See J.O., Docket No. 17-0789 (issued May 15, 2018).

¹³ See G.S., Docket No. 18-0388 (issued July 19, 2018).