United States Department of Labor
Employees' Compensation Appeals Board

ROBERT H. WALLER, Appellant	)	
	)	**Docket No. 05-162**
and	)	**Issued: April 8, 2005**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATIONS, Cocoa, FL, Employer	)	

Appearances:
Robert H. Waller, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 19, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated July 23, 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 September 25, 2003 and the filing of this appeal on October 19, 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 February 8, 2002 appellant, then a 64-year-old special agent, filed an occupational disease claim alleging that he developed a hearing loss as a result of performing his duties, which

included participating in intensive firearm training which occurred eight times a year. He retired on January 1, 1988.

On February 8, 2002 appellant filed a claim for a schedule award. He submitted various employing establishment audiograms from the 1960's to February 12, 1986, which noted progressive monaural hearing loss. A statement of accepted facts dated July 3, 2002 noted that from June 1963 to January 1988 appellant was exposed to hazardous noise from .38 caliber revolvers and shotguns during mandatory firearms training which occurred eight times a year. In 1965, appellant was provided with hearing protection in the form of cotton with petroleum jelly and in January 1974 he was provided with a headset.

By letter dated July 3, 2002, the Office referred appellant to Dr. Belinda Dickinson, a Board-certified otolaryngologist, for otology examination and audiological evaluation. She performed an otologic evaluation of him on August 13, 2002 and audiometric testing was conducted on her behalf on the same date. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 revealed the following: right ear 10, 15, 10 and 30 decibels; left ear 20, 20, 25 and 45 decibels. Dr. Dickinson determined that appellant sustained sensorineural hearing loss of the left ear due to successive employment noise trauma. She recommended that he use a hearing aid for the left ear.

On August 30, 2002 an Office medical adviser reviewed Dr. Dickinson's report and the audiometric test of August 13, 2002. The medical adviser concluded that in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, that appellant sustained a bilateral sensorineural hearing loss with a left monaural hearing loss of four percent. He recommended a hearing aid for the left ear.

By decision dated August 29, 2002, the Office accepted that appellant's sensorineural hearing loss was due to workplace exposure to noise.

In a decision dated September 25, 2003, the Office granted appellant an award for four percent monaural hearing loss of the left ear. The period of the award was from August 13 to 27, 2002. The record reflects that the compensation award with accompanying appeal rights were sent to appellant's address of record.

By letter dated November 6, 2003, appellant notified the Office that he received a benefit statement and a check dated October 3, 2003, in the amount of $1,887.97. He advised that there was no explanation as to what the check represented. Appellant contacted the Office and advised that he never received the September 25, 2003 decision.

In a letter dated March 31, 2004, the Office forwarded the decision letter dated September 25, 2003. The claims examiner advised appellant that he would not lose his appeal rights by cashing the check.

By a letter dated May 29, 2004 and postmarked June 3, 2004, appellant requested a review of the written record.

By decision dated July 23, 2004, the Office denied the request, finding that it was not timely filed. Appellant was informed that his case had been considered in relation to the issues

involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

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."[1] Section 10.617 and 10.618 of the federal regulations implementing this section of the Act provides 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.[2] 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.[3] 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 and review] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons."[4]

ANALYSIS

In the present case, appellant requested a review of the written record on May 29, 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."[5] As appellant's request was more than 30 days after issuance of the September 25, 2003 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. Although appellant indicated that there was a delay in receiving the September 25, 2003 decision, the record reflects

[1] 5 U.S.C. § 8124(b)(1).

[2] 20 C.F.R. §§ 10.616, 10.617.

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

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

[5] 20 C.F.R. § 10.616.

that it was properly mailed to his address of record on that date. Under the mailbox rule he is presumed to have received it.[6] Appellant's request for a review of the written record was dated May 29, 2004 and postmarked June 3, 2004 and outside the 30-day statutory time period. Since he did not request a review of the written record within 30 days of the Office's September 25, 2003 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 July 23, 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.[7] 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] In the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual. Under the mailbox rule, evidence of a properly addressed letter together with evidence of proper mailing may be used to establish receipt. *Joseph R. Giallanza*, 55 ECAB ___ (Docket No. 03-2024, issued December 23, 2003).

[7] *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED that the July 23, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 8, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member