

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

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T.C., Appellant	)	
	)	
and	)	<b>Docket No. 20-0090</b>
	)	<b>Issued: February 13, 2020</b>
<b>DEPARTMENT OF THE NAVY, NORFOLK</b>	)	
<b>NAVAL SHIPYARD, Portsmouth, VA, Employer</b>	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 16, 2019 appellant filed a timely appeal from an October 1, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days has elapsed from the last merit decision dated July 8, 2011 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for review of the written record by an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).

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<sup>1</sup> Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated February 6, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed in a decision based on the case record. *Order Denying Request for Oral Argument*, Docket No. 20-0090 (issued February 6, 2020).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On January 28, 2011 appellant, then a 60-year-old ship fitter supervisor, filed an occupational disease claim (Form CA-2) alleging that on April 15, 1980 he first became aware that he had sustained hearing loss while in the performance of duty due to factors of his federal employment.

In support of his claim, appellant submitted a December 14, 2010 report from Dr. Ryan P. Hester, a Board-certified otolaryngologist. Dr. Hester noted that appellant's hearing loss symptoms were associated with occupational noise exposure at the employing establishment. He diagnosed sensorineural hearing loss and tinnitus.

On March 23, 2011 OWCP received employing establishment audiogram reports, dating from March 29, 1985.

By letter dated March 28, 2011, OWCP referred appellant, together with a statement of accepted facts, a list of specific questions, and the case record to Dr. L. Frederick Lassen, a Board-certified otolaryngologist, for a second opinion audiologic and otologic evaluation to determine the extent and degree of any employment-related hearing loss.

In an April 15, 2011 report, Dr. Lassen diagnosed bilateral sensorineural hearing loss and noise-induced hearing loss. He determined that appellant had a rating of zero percent binaural hearing loss.

By decision dated June 9, 2011, OWCP accepted appellant's claim for bilateral sensorineural hearing loss.

In a June 16, 2011 report, Dr. Duane J. Taylor, a Board-certified otolaryngologist and OWCP's district medical adviser (DMA) concurred with Dr. Lassen's rating of zero percent binaural hearing loss.

By decision dated July 8, 2011, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish that his accepted hearing loss condition was severe enough to be considered ratable.

Appellant disagreed with the decision and requested review of the written record by a representative of OWCP's Branch of Hearings and Review on March 1, 2016 and April 27, 2017.<sup>3</sup>

By decision dated June 1, 2017, OWCP's hearing representative denied appellant's request for a review of the written record as the request was untimely filed. She informed appellant that his case had been considered in relation to the issues involved, and that the issues could be equally addressed by requesting reconsideration and submitting evidence not previously considered.

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<sup>3</sup> In support of his request, appellant submitted a February 26, 2016 report from Dr. Jeffrey D. Powell, a Board-certified otolaryngologist, finding a 3.75 percent monaural left ear hearing loss. On June 21, 2017 OWCP received an audiogram dated February 26, 2016.

In a form dated and postmarked August 30, 2019, appellant again requested review of the written record by an OWCP hearing representative.<sup>4</sup>

By decision dated October 1, 2019, the Branch of Hearings and Review denied appellant's request for a review of the written record as the request was untimely filed. It noted that he had previously requested review of the written record, with a postmark of April 27, 2017, which had been denied as untimely by a representative of the Branch of Hearings and Review in a June 1, 2017 decision. The Branch of Hearings and Review also related that appellant was informed of his appeal rights in the June 1, 2017 decision, and if he disagreed with the decision he should follow the appeal rights outlined in the prior decision.

### **LEGAL PRECEDENT**

Section 8124 of FECA, concerning a claimant's entitlement to a hearing before an OWCP hearing representative, provides that a claimant is entitled to a hearing before an OWCP representative when a request is made 30 days after issuance of an OWCP final decision.<sup>5</sup>

A hearing is a review by an OWCP hearing representative of a final adverse decision issued by an OWCP district office.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

### **ANALYSIS**

The Board finds that OWCP properly denied appellant's August 30, 2019 request for review of the written record before an OWCP hearing representative pursuant to 5 U.S.C. § 8124(b).

Appellant had 30 days following OWCP's July 8, 2011 merit decision to request a review of the written record before a representative of OWCP's Branch of Hearings and Review. As his most recent request for review of the written record was postmarked August 30, 2019, more than 30 days after OWCP's July 8, 2011 decision, it was untimely filed and he was, therefore, not

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<sup>4</sup> Appellant also submitted an audiogram dated August 27, 2019.

<sup>5</sup> 5 U.S.C. § 8124(b)(1).

<sup>6</sup> 20 C.F.R. § 10.616.

<sup>7</sup> *Id.* at § 10.615.

<sup>8</sup> *Id.* at § 10.616(a); *M.H.*, Docket No. 19-1087 (issued October 17, 2019); *B.V.*, Docket No. 18-1473 (issued April 23, 2019).

<sup>9</sup> *M.H.*, *id.*; *K.L.*, Docket No. 19-0480 (issued August 23, 2019).

entitled to a review of the written record as a matter of right.<sup>10</sup> Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.<sup>11</sup>

OWCP's regulations further provide that a claimant has a right to a hearing/review of the written record by an OWCP hearing representative following a final adverse decision by an OWCP district Office.<sup>12</sup> The last decision of record however was the June 1, 2017 decision by a representative of the Branch of Hearings and Review, which denied appellant's prior request for review of the written record. This decision was not a final adverse decision issued by an OWCP district office. OWCP properly advised appellant that he had been informed of his appeal rights in the June 1, 2017 decision, and that if he disagreed with the current decision he should follow the appeal rights outlined in the June 1, 2017 decision.<sup>13</sup> Accordingly, the Board finds that OWCP properly denied appellant's August 30, 2019 request for a review of the written record.<sup>14</sup>

On appeal appellant asserts that the evidence establishes entitlement to a schedule award. As explained above, the Board lacks jurisdiction over the merits of the case.

### CONCLUSION

The Board finds that OWCP properly denied appellant's September 4, 2019 request for a review of the written record before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).

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<sup>10</sup> Under OWCP's regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011); *see also G.S.*, Docket No. 18-0388 (issued July 19, 2018).

<sup>11</sup> 5 U.S.C. § 8124(b)(1); *see M.K.*, Docket No. 19-0428 (issued July 15, 2019); *R.H.*, Docket No. 18-1602 (issued February 22, 2019); *William F. Osborne*, 46 ECAB 198 (1994).

<sup>12</sup> *Supra* note 6.

<sup>13</sup> On June 1, 2017 OWCP advised appellant that he could have the schedule award issue reconsidered by requesting reconsideration before OWCP or he could file an appeal to the Board. Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

<sup>14</sup> *E.A.*, Docket No. 19-0747 (issued September 16, 2019); *T.L.*, Docket No. 19-0028 (issued April 26, 2019); *R.P.*, Docket No. 16-0554 (issued May 17, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 1, 2019 is affirmed.

Issued: February 13, 2020  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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