United States Department of Labor
Employees' Compensation Appeals Board

P.S., Appellant	)	
and	)	**Docket No. 09-172**
	)	**Issued: July 17, 2009**
DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, Socorro, NM, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 22, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' schedule award decision dated September 12, 2008 finding that he had six percent monaural hearing loss of the left ear. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant's claim for an occupational hearing loss was timely filed pursuant to 5 U.S.C. § 8122(a).

FACTUAL HISTORY

On November 8, 2007 appellant, then a 72-year-old engineering equipment operator, filed an occupational disease claim alleging that he sustained hearing loss due to exposure to high noise levels while operating heavy equipment. He first became aware of his condition in October 1984 and first realized that his condition was caused by his federal employment in

November 1989. Appellant also noticed that his hearing loss became progressively worse. An employing establishment supervisor noted that it was unknown when appellant stopped work.

Appellant submitted an audiogram of July 31, 2007. In a statement dated October 11, 2007, he noted that he was employed at the employing establishment from January 25, 1967 to August 4, 1991.[1] Appellant noted difficulty hearing normal speech when conversing, which progressed over the years from working at the employing establishment. He stated that he had been given yearly audiograms due to the employing establishment's hearing conservation program. Appellant advised that he filed a hearing loss claim in May 1992 that was rejected on the basis that he did not have a ratable hearing loss.[2] He also noted undergoing an audiogram in July 2007 finding that he needed hearing aids.

On December 5, 2007 the Office requested additional evidence. Subsequently, appellant submitted evidence verifying his employment at the employing establishment between January 25, 1967 and August 4, 1991. He also provided a statement describing the type of positions he held at the employing establishment and the noise exposure of each position. The employing establishment also submitted a statement indicating that there was "no present supervisor knowledgeable about the occurrences regarding exposure to noise" concerning appellant. The employing establishment advised that, as appellant had been retired for approximately 20 years and was not on the employment rolls, it had no employment records or personnel files for him.

On January 10, 2008 the Office referred appellant to Dr. Peter Bailey, a Board-certified otolaryngologist, for a second opinion evaluation. In a February 11, 2008 report, Dr. Bailey opined that appellant's workplace noise exposure was sufficient to cause hearing loss. He found 24 percent hearing loss in each ear, which totaled 29 percent binaural hearing loss inclusive of 5 percent tinnitus impairment. On March 5, 2008 an Office medical adviser reviewed Dr. Bailey's report and a January 28, 2008 audiogram obtained on his behalf. He opined that appellant had six percent monaural hearing loss in the left ear and no ratable hearing loss in the right ear. The medical adviser recommended that Dr. Bailey provide a supplemental opinion. In an April 14, 2008 report, Dr. Bailey acknowledged that he had miscalculated appellant's hearing loss. He agreed with the Office medical adviser's calculation of 6 percent monaural hearing loss in the left ear but found 10 percent binaural impairment based on 5 percent for tinnitus. Dr. Bailey did not recommend hearing aids.

On April 22, 2008 the Office accepted appellant's claim for bilateral hearing loss.

On May 5, 2008 an Office medical adviser opined that there was no basis for impairment for tinnitus, as the record did not show that tinnitus had adversely affected appellant's activities of daily living. On May 23, 2008 appellant filed a claim for a schedule award.

[1] The record reflects that appellant's employment was terminated due to disability.

[2] The Board notes that the record on appeal contains no evidence of any prior hearing loss claim filed with the Office.

By decision dated September 12, 2008, the Office granted a schedule award for a six percent monaural hearing loss in the left ear. The period of the award ran for 3.12 weeks from January 28 to February 18, 2008.[3]

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim. The Board may raise the issue on appeal even if the Office did not base its decision on the time limitation provisions of the Federal Employees' Compensation Act.[4]

In cases of injury on or after September 7, 1974, section 8122(a) of the Act provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless:

> "(1) the immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death; or
>
> "(2) written notice of injury or death as specified in section 8119 was given within 30 days."[5]

The three-year time period begins to run from the time the employee is aware or by the exercise of reasonable diligence should have been aware, that his or her condition is causally related to the employment. For actual knowledge of a supervisor to be regarded as timely filing, an employee must show not only that the immediate superior knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.[6]

Even if an original claim for compensation for disability or death is not filed within three years after the injury or death, compensation for disability or death may be allowed if written notice of injury or death as specified in section 8119 was given within 30 days. Section 8119 provides that a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury or in the case of death, the employment factors believed to be the cause; and be signed by and contain the address of the individual giving the

[3] The Board notes that the award of compensation states "[six] percent-binaural hearing loss-left" but the number of weeks of compensation and the amount of money awarded reflects that the award was for a left ear monaural hearing loss.

[4] *David R. Morey*, 55 ECAB 642 (2004).

[5] 5 U.S.C. § 8122(a).

[6] *Morey*, *supra* note 4.

notice. Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[7]

In a case of occupational disease, the time for filing a claim begins to run when the employee first becomes aware or reasonably should have been aware, of a possible relationship between his condition and his employment. When an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitation period even though the employee does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent. Where the employee continues in the same employment after he or she reasonably should have been aware that he or she has a condition which has been adversely affected by factors of the federal employment awareness, the time limitation begins to run on the date of the last exposure to the implicated factors. The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[8]

ANALYSIS

Appellant indicated on his Form CA-2 that he first realized his condition was caused by his federal employment in November 1989. His exposure to the contributing employment factors ceased on August 4, 1991, his last date of employment with the employing establishment. Appellant stated his belief that the noise exposure at the employing establishment caused his hearing loss and continued through his last date of work on August 4, 1991. Therefore, the time limitation to file a claim began to run on August 4, 1991. However, appellant did not file a claim until November 8, 2007, which was beyond the three-year time limitation period.[9]

As noted, appellant's claim would still be considered timely if his immediate supervisor had actual knowledge of his injury within 30 days from his last exposure.[10] His claim would also be timely if he had provided written notice of the injury within 30 days pursuant to section 8119 of the Act.[11] However, the record does not reflect that appellant provided written notice of injury prior to filing the present claim. The employing establishment advised that, due to the passage of time, no current supervisor had any knowledge regarding appellant's noise exposure and that it no longer had any records regarding appellant's employment.

Appellant also asserts that he was given audiograms on a yearly basis as a part of the employing establishment's hearing conservation program. The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program is sufficient to constructively establish actual knowledge of a

[7] *Id.*

[8] *W.L.*, 59 ECAB ___ (Docket No. 07-1913, issued February 22, 2008).

[9] *See supra* note 2.

[10] 5 U.S.C. § 8122(a)(1).

[11] *Id.* at §§ 8122(a)(2), 8119.

hearing loss such as to put the immediate supervisor on notice of an on-the-job injury.[12] However, the record does not contain the results of any audiograms performed during the period of appellant's employment. The only audiograms of record were not conducted on behalf of the employing establishment but were administered many years after he stopped work at the employing establishment. Therefore, appellant has not established that the employing establishment had constructive actual knowledge of his hearing loss.

CONCLUSION

The Board finds that appellant's claim is barred by the applicable time limitation provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 12, 2008 schedule award be reversed. Appellant's claim is barred by the time limitation provisions of the Act.

Issued: July 17, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[12] *James A. Sheppard*, 55 ECAB 515 (2004). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(a)(3)(c) (March 1993).