

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

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G.B., Appellant

and

DEPARTMENT OF HOMELAND SECURITY,  
CUSTOMS & BORDER PROTECTION, PORT  
OF SEATTLE, Imperial, CA, Employer

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**Docket No. 10-1873  
Issued: June 7, 2011**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On July 8, 2010 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated February 26, 2010 denying his claim for an employment-related hearing loss. Pursuant to the Federal Employees' Compensation Act (the Act)<sup>1</sup> and 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 a hearing loss is barred by the applicable time limitation provisions of the Act.

**FACTUAL HISTORY**

On June 21, 2009 appellant, then a 77-year-old former customs inspector, filed an occupational disease claim (Form CA-2) alleging that on April 1, 2009 he first realized that he had hearing loss that was caused or aggravated by working in close proximity to jet engines over

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

long periods of time. He first became aware of his hearing loss on or about February 1, 1993 but did not relate it to his federal employment until 2009. On the reserve of the claim form, appellant indicated that he was last exposed to the implicated employment factors on August 2, 1987, which is the date he retired. He explained that he did not know he was entitled to benefits and had to obtain records in order to complete the claim form. Appellant submitted factual and medical evidence in support of his claim, including statements of his medical history, medications, work history, audiograms and medical reports concerning his hearing aids.

On July 23, 2009 the Office requested additional medical and factual information from appellant, including how he came to realize he had hearing loss in 1993 and why he did not connect it to his federal employment until 2009.

In an August 15, 2009 narrative statement, appellant responded to the Office's inquiries. He explained that, when he went to the doctor for a hearing check up, they made him aware of the possibility of compensation for an employment-related injury.

In a statement received on August 21, 2009, the employing establishment noted that appellant was not in a hearing conservation program and there were no noise survey reports available as they were not conducted until after appellant retired on August 2, 1987. It reported that he was exposed to noise eight hours a day, five days a week and was not provided with ear protection.

By decision dated October 7, 2009, the Office denied appellant's claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. It found that he had failed to file a claim within three years of the date of injury, August 2, 1987, the date of his retirement. The Office further noted that appellant did not file his claim within three years of February 1, 1993, the date he indicated that he first became aware of his hearing loss, that he should have been aware of an employment relationship by February 1, 1996. There was no evidence that a supervisor had actual knowledge of his claim within 30 days of the date of injury.

On November 10, 2009 appellant requested a review of the written record. In an October 30, 2009 narrative statement, he advised that he retired in 1987, that he first sought treatment for hearing loss in 1993, and was not aware of the connection to his federal employment until March 5, 2009 when a physician's assistant first told him that his hearing loss was likely related to his work in close proximity to jet engines. Appellant had attributed his hearing loss to age and did not understand why he should have been aware of a causal relationship by February 1, 1996 absent a physician's opinion.

By decision dated February 26, 2010, an Office hearing representative affirmed the October 7, 2009 decision on the grounds that the evidence was not sufficient to support that appellant's claim was timely filed and was barred by the time limitation of the Act.

## LEGAL PRECEDENT

Under the Act,<sup>2</sup> as amended in 1974, a claimant has three years to file a claim for compensation.<sup>3</sup> In a case of occupational disease, the Board has held that 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.<sup>4</sup> Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of his last exposure to the implicated factors.<sup>5</sup> Section 8122(b) provides that, in latent disability cases the time limitation does not begin to run until the claimant is aware or by the exercise of reasonable diligence, should have been aware, of the causal relationship between his employment and the compensable disability.<sup>6</sup> Even if the claim is not filed within the three-year period, it may be regarded as timely under section 8122(a)(1) if appellant's immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days such that the immediate superior was put reasonably on notice of an on-the-job injury or death.<sup>7</sup>

## ANALYSIS

The Office denied appellant's occupational disease claim on the grounds that it was not timely filed. It found that he should have been aware of a relationship between his employment and the alleged condition by February 1, 1996, three years from the date he indicated he first became aware of his hearing loss. Although appellant noticed a hearing loss on February 1, 1993, he stated that he was unaware that it was employment related until March 5, 2009 when a physician's assistant first told him that his hearing loss was likely related to his work in close proximity to jet engines.

With regard to whether appellant, through the exercise of reasonable diligence, should have known of his hearing loss within three years of February 1, 1993, the record reflects that he had worked as a customs inspector and was exposed to noise eight hours a day, five days a week without ear protection. Further, appellant was not part of a hearing conservation program. He did not undergo annual audiometric testing by the employing establishment. Although appellant may have been generally aware that he had some hearing loss as of February 1, 1993, there is no contemporaneous evidence that he was aware of any noise-induced hearing loss. The record does not establish that he should have known earlier than March 5, 2009 that he had an employment-related hearing loss. The March 5, 2009 physician's assistant statement that appellant's hearing loss may have been caused by his employment, which appellant reported in his October 30, 2009 narrative statement, was the first notification that he may have sustained a noise-induced hearing loss due to noise exposure as a customs inspector. The Board finds that

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<sup>2</sup> 5 U.S.C. § 8122.

<sup>3</sup> See *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); see also 20 C.F.R. § 10.101(b).

<sup>4</sup> See *William C. Oakley*, 56 ECAB 519 (2005).

<sup>5</sup> See *Larry E. Young*, 52 ECAB 264 (2001); *William D. Goldsberry*, 32 ECAB 536, 540 (1981).

<sup>6</sup> 5 U.S.C. § 8122(b); see also *Bennie L. McDonald*, 49 ECAB 509, 514 (1998).

<sup>7</sup> See *Duet Brinson*, *supra*, note 3; *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

the evidence is insufficient to establish that appellant was aware or reasonably should have been aware of an employment-related hearing loss within three years of February 1, 1993.<sup>8</sup> There are no other medical reports, audiograms or other evidence prior to the physicians assistant's March 5, 2009 statement to establish that appellant had a noise-induced hearing loss.

The Board finds that appellant first became aware that his hearing loss was an occupational disease resulting from exposure to noise at work on or about March 5, 2009. This was the first evidence to establish that he reasonably should have been aware that his hearing loss was due to occupational exposure. The Board finds that his claim filed on June 21, 2009 was within three years of his March 5, 2009 date of awareness and was, therefore, timely. The case will be remanded for the Office to address the merits of the claim. After any further development that it deems necessary, the Office should issue a *de novo* decision.

### **CONCLUSION**

The Board finds that appellant's claim for a hearing loss is not barred by the applicable time limitation provisions of the Act and is timely.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 26, 2010 is reversed and the case remanded for further action consistent with this decision.

Issued: June 7, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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<sup>8</sup> See *William C. Oakley, supra* note 4.