United States Department of Labor
Employees' Compensation Appeals Board

ELEANOR T. HASEBE, Appellant	)	
and	)	**Docket No. 04-910**
	)	**Issued: December 17, 2004**
DEPARTMENT OF DEFENSE, INFORMATION SYSTEMS AGENCY, Pearl Harbor, HI, Employer	)	

Appearances:
David G. Jennings, Esq., for the appellant
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
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On February 23, 2004 appellant, through her attorney, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated January 20, 2004, denying her request for modification of the October 15, 2003 decision, which denied her occupational disease claim for a hearing loss on the grounds that it was not timely filed under 5 U.S.C. § 8122. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the timeliness issue.

ISSUE

The issue is whether the Office properly denied appellant's occupational disease claim for a hearing loss on the grounds that it was not timely filed under 5 U.S.C. § 8122.

FACTUAL HISTORY

On January 30, 2003 appellant, then a 75-year-old computer operator, filed an occupational disease claim alleging that on January 1, 1969 she first became aware of her

hearing loss in both ears and she first realized that her condition was caused by factors of her federal employment. Appellant stated that she was exposed to noise at the employing establishment. She noted: "[i]t could n[o]t be anything else." Appellant indicated that she did not file her claim within 30 days after realizing on January 1, 1969 that her hearing loss was work related because it only recently came to her attention that she could file a claim for her condition.

Appellant submitted employment records, which included a notification of personnel action document indicating that she retired from the employing establishment effective November 3, 1995 and, thus ceased to be exposed to the implicated employment condition by that date. She also submitted a Form CA-1032, authorization for representation by her attorney, a list of her federal noise exposure, a hearing loss questionnaire, correspondence between her attorney and the employing establishment, a December 23, 2002 audiogram and a January 30, 2003 claim for compensation (Form CA-7). In addition, appellant submitted her response to a Form CA-35B, indicating her federal and nonfederal employment. She stated that she was not involved in any hobbies which exposed her to loud noise. Appellant was last exposed to loud noise at work in July 1997,[1] she had not previously filed a claim for hearing loss and in 1969 she first noticed her hearing loss and first related her condition to her employment.

By letter dated May 28, 2003, the Office requested that the employing establishment submit factual and medical evidence regarding appellant's claim. By letter of the same date, the Office advised appellant that the evidence submitted was insufficient to establish that her claim was timely filed. The Office requested that appellant submit information regarding her supervisor's knowledge or notification to her supervisor of her claim and supportive medical records.

The employing establishment did not respond. Appellant, however, resubmitted several documents already of record. She also submitted correspondence between her attorney and the Office regarding the submission of her medical records, a list entitled "work performance," a June 12, 2003 statement indicating that hearing tests were performed by the employing establishment in 1969, 1970, 1971 and 1984, but that appellant did not receive the audiograms and that, in 1990, she had her hearing tested on her own because she did not know that hearing loss was covered by workers' compensation. In an undated letter, appellant requested that changes be made to her response to the Form CA-35B concerning her federal and nonfederal employment. She submitted correspondence between herself and her attorney relating to her claim, a list of her employment, a November 19, 2002 occupational disease claim for hearing loss indicating that she first became aware of her condition on October 11, 1969 and first realized that her condition was caused or aggravated by her employment on December 7, 1970 a blank attending physician's form report, audiograms performed on May 29, 1990 and December 14, 2002 and a newspaper advertisement for federal employees with work-related hearing loss.

By decision dated October 15, 2003, the Office denied appellant's claim on the grounds that it was not timely filed. The Office found that appellant's claim was not filed within three

[1] The record reveals that, in July 1997, appellant was not working at the employing establishment. Rather, she was employed at DITCH, a contract firm, from November 3, 1995 to July 25, 1997.

years from November 3, 1995, the date of her last federal employment exposure to hazardous noise. The Office stated that appellant should have been aware of a relationship between her federal employment and hearing loss by November 3, 1995. The Office further found no evidence establishing that appellant's immediate supervisor had actual knowledge of her hearing loss condition within 30 days of the date of injury.

In an October 20, 2003 letter, appellant, through her attorney, requested reconsideration. She submitted an undated letter from Donald L. Bartley, her former supervisor and coworker. In this letter, Mr. Bartley stated: "I can assure you [appellant] had a hearing problem from working in the data processing center. I was her immediate supervisor for approximately six years from (1987 to 1993) at the Navy Regional Data Automation Center, Pearl Harbor (NARDAC)." Mr. Bartley also stated that he was appellant's coworker at the Naval Ammunition Depot (Lualualei) from 1968 to 1973. He noted:

> "We both worked under the same conditions with the noise from the machines (*i.e*. collators, sorters, high speed disk drives, reproducers, high impact printers, *etc*.). We were all tested at the Lualualie facility and it was determined even at that time we had a hearing loss because of the noise. The Government never gave us any protective equipment to wear to cut down on the harmful noise. When [appellant] was working at the NARDAC facility Pearl Harbor, I had to install an amplifier for the operation telephone because of the noise from the machines (*i.e*., high speed disc drives, high impact printers, etc.) and trying to assist customers via the [tele]phone."

Mr. Bartley noted that he was currently working for the employing establishment, that he had to wear hearing aids and that his hearing loss was due to noisy conditions in the employing establishment's computer facilities.

By decision dated January 20, 2004, the Office denied appellant's request for modification based on a merit review of her claim. The Office found that the three-year time limitation for filing a claim began to run on November 3, 1995 the date of appellant's retirement and last exposure to noise at the employing establishment. The Office, thus, found that her occupational disease claim was not timely filed as she did not file her claim until January 30, 2003. The Office further found that appellant became aware of a connection between her claimed hearing loss and employment by December 7, 1970 and that Mr. Bartley's statement did not support actual knowledge within 30 days of the December 7, 1970 injury. The Office stated that Mr. Bartley did not supervise appellant until 1987, 17 years after appellant linked her hearing loss to her work exposure. The Office further stated that, although Mr. Bartley claimed to have undergone hearing tests as appellant's coworker, there was no such evidence in the record substantiating this contention.

LEGAL PRECEDENT

In cases of injury on or after September 7, 1974, section 8122(a) of the Federal Employees' Compensation Act states that "an original claim for compensation for disability or

death must be filed within three years after the injury or death."[2] Section 8122(b) of the Act provide 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 the employment and the compensable disability.[3] The Board has held that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.[4]

The claim would still be regarded as timely under section 8122(a)(1) of the Act if the claimant's immediate supervisor had actual knowledge of the injury within 30 days of injury.[5] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.[6] Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days pursuant to 5 U.S.C. § 8119.[7]

ANALYSIS

In this case, the Office found that appellant first became aware that her hearing loss was caused by noise exposure at the employing establishment on December 7, 1970. The record reveals that appellant stopped work at the employing establishment on November 3, 1995 due to retirement and thus, ceased to be exposed to the implicated employment condition by that date. Therefore, the time limitations began to run on November 3, 1995 her last day of work and exposure to the implicated employment factor. Since appellant did not file a claim until January 30, 2003, her claim was clearly filed outside the three-year time limitation period.

As noted above, appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act, if her immediate supervisor had actual knowledge of the injury within 30 days of her injury.[8] The date of her injury is November 3, 1995, the date she retired from the employing establishment and was last exposed to noise, the implicated employment factor.

In an undated letter, Mr. Bartley stated that he was appellant's supervisor for six years during the period 1987 through 1993 and that both he and appellant developed a hearing problem due to noise from certain machines while working at the employing establishment. He further stated that they were tested by the employing establishment and it was determined at that time that they suffered from hearing loss due to noise exposure. Although it appears that Mr. Bartley knew about appellant's hearing loss, the record is unclear as to whether he knew that appellant had a compensable hearing loss. Further, the record contains audiograms performed by the

[2] 5 U.S.C. § 8122(a).

[3] 5 U.S.C. § 8122(b).

[4] *Garylean A. Williams*, 44 ECAB 441 (1993).

[5] *Larry E. Young*, 52 ECAB 264 (2001).

[6] *Kathryn A. Bernal*, 38 ECAB 470 (1987).

[7] 5 U.S.C. §§ 8122(a)(1), 8122(a)(2).

[8] *Larry E. Young*, *supra* note 5.

employing establishment which may be sufficient to establish actual knowledge of appellant's hearing loss by the employing establishment. The Board has held that a program of annual audiometric examinations conducted by an employing establishment was sufficient to constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury based on audiograms obtained in conjunction with a testing program established under guidelines provided by the Office.[9] Because the issue of what type of knowledge the employing establishment had regarding appellant's hearing loss is unresolved, it is not possible for the Board to properly adjudicate whether appellant actually informed the employing establishment that she sustained an employment-related injury. The case must be resolved by remanding the case for additional factual and medical development.

CONCLUSION

The Board finds that the case is not in posture for a decision as to whether appellant has filed a timely occupational disease claim for a hearing loss under 5 U.S.C. § 8122 because the case requires further development regarding the issue of what type of knowledge the employing establishment had regarding appellant's occupational hearing loss. Following this and any other development deemed necessary, the Office shall issue a *de novo* decision in the case.

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time* Chapter 2.801.7(d) (September 1990); *John J. Sullivan*, 37 ECAB 526 (1986).

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2004 and October 15, 2003 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further development consistent with this decision.

Issued: December 17, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member