United States Department of Labor
Employees' Compensation Appeals Board

J.T., Appellant	)	
and	)	**Docket No. 09-827**
	)	**Issued: October 19, 2009**
DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Albuquerque, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 5, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 6, 2008. The record also contains a November 17, 2008 Office decision denying further merit review of the claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant timely filed his claim for an employment-related hearing loss under 5 U.S.C. § 8122; and (2) whether the Office properly refused to reopen the case for merit review pursuant to 5 U.S.C. § 8128.

FACTUAL HISTORY

On November 16, 2007 appellant, then 65-year-old retired forestry technician, filed an occupational claim (Form CA-2) alleging that he sustained hearing loss causally related to his federal employment. He was exposed to noise from chainsaws, drills, snowmobiles and other equipment. In response to a question as to the date he first realized his condition was caused or

aggravated by his federal employment, appellant reported "approx[imately] 1986." The reverse of the claim form indicated that he retired from federal employment in 1997.

By letter dated February 1, 2008, the Office requested additional information, including the date appellant first realized his hearing loss was related to work exposure, with explanation. In a February 7, 2008 response, appellant indicated that he worked until December 9, 1984 as a forestry technician and then worked as a forester. His work as a forester involved little or no noise exposure and field crews were provided with hearing protection. Appellant retired on January 2, 1997. In a response received on May 1, 2008, he stated, "By the 1980's, hearing loss due to loud noise was being discussed at safety meetings and hearing protection was provided for workers. I realized then that loud noise exposure at work was responsible for part of my hearing loss." Appellant also noted that his hearing aid provider told him that, since he had been exposed to loud noise at work, he may be entitled to compensation.

In a decision dated May 6, 2008, the Office denied the claim for compensation on the grounds that it was not timely filed under 5 U.S.C. § 8122.

Appellant requested reconsideration by letter dated October 21, 2008. He stated that he was not told he could file a hearing loss claim or he would have done so earlier. Appellant stated that he knew of two other federal employees who had retired and successfully filed claims for hearing loss. He submitted a December 21, 2008 audiogram and an October 21, 2008 report from Dr. Colin Doyle, an otolaryngologist, who noted that appellant had known for years that he had a hearing problem, and was exposed to chainsaw noise while in federal employment.

By decision dated November 17, 2008, the Office determined appellant's reconsideration request was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

Section 8122(a) of the Federal Employees' Compensation Act states, "An original claim for compensation for disability or death must be filed within three years after the injury or death." Under 5 U.S.C. § 8122(b), 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. 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.[1]

The statute provides an exception to the three-year limit for filing, which states that a claim may be regarded timely if an immediate superior had actual knowledge of the injury within 30 days, or if written notice of injury as specified in section 8119 was given within 30 days.[2] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.[3] The Board has held that a program of annual audiometric examinations

[1] *Garyleane A. Williams*, 44 ECAB 441 (1993).

[2] 5 U.S.C. § 8122(a)(1) and (2).

[3] *Id*. at § 8122(a)(1); *Eddie L. Morgan*, 45 ECAB 600 (1994).

conducted by an employing establishment may constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury.[4]

ANALYSIS -- ISSUE 1

Appellant filed his claim for compensation on November 16, 2007. As noted, he must file a claim within three years of the injury. As to when the time limitation period began to run, the initial question is when appellant knew or should have known of causal relationship between a hearing loss and his noise exposure at work. He advised that he was aware of such causal relationship in approximately 1986, explaining that the issue was discussed in safety meetings and he realized his hearing loss was employment related. As noted, if there is continued noise exposure after such awareness, the time limitation period does not begin to run until the date of last exposure. In this case, there is little evidence regarding noise exposure after December 9, 1984. Appellant reported "little or no" noise exposure as a forester and the employing establishment did not appear to have additional information. Even if it is accepted that some noise exposure continued, he retired on January 2, 1997 and the three-year time limitation would expire on January 2, 2000.

With respect to a supervisor's knowledge of the injury, no evidence was presented that a supervisor had actual knowledge within 30 days or written notice was provided within 30 days. In hearing loss cases, as noted above, there may be constructive knowledge if a pattern of the employing establishment audiograms showed a progressive loss of hearing acuity. However, here an employing establishment supervisor indicated that he was not aware of annual hearing tests and the record contains only one audiogram dated prior to January 2, 1997. It is not clear whether this audiogram was performed by the employing establishment. The Board finds that the evidence does not establish constructive knowledge by an employing establishment supervisor in this case.

On appeal, appellant contends that he does have hearing loss and that he is aware of other federal employees who had claims for hearing loss accepted when filed after retirement. However, each claim is determined by the specific factual circumstances and all employees filing a claim under the Act are subject to the relevant time limitation period. Based on the facts in this case, appellant's claim was not filed within three years after the injury and, therefore, it is not timely filed pursuant to 5 U.S.C. § 8122. The Office properly denied the November 16, 2007 claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[5] the Office's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains

[4] *Jose Salaz,* 41 ECAB 743 (1990); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time,* Chapter 2.801.6(c) (February 2000).

[5] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

evidence that either "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."[6] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[7]

ANALYSIS -- ISSUE 2

On reconsideration, appellant stated that it did not seem right that his claim was found untimely and he did not know he could have filed a claim for hearing loss. He did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. With respect to new evidence, appellant submitted a medical report from Dr. Doyle with a diagnosis of binaural hearing loss. Dr. Doyle noted that he had been exposed to noise in federal employment and had been aware of hearing problems for years, without further explanation. He did not provide any new evidence as to when appellant knew or should have known of an employment-related hearing loss. The underlying issue was the timeliness of the filing of the claim and appellant did not submit any new and relevant evidence on this issue.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a new and relevant legal argument or submit relevant and pertinent evidence not previously considered by the Office. Pursuant to 20 C.F.R. § 10.608(b), the Office properly denied merit review of the claim.

CONCLUSION

The Board finds that appellant's claim for an employment-related hearing loss was untimely filed. The application for reconsideration was not sufficient to warrant reopening the claim for review of the merits.

[6] 20 C.F.R. § 10.606(b)(2).

[7] *Id*. at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 17 and May 6, 2008 are affirmed.

Issued: October 19, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board