United States Department of Labor
Employees' Compensation Appeals Board

F.B., Appellant	)	
and	)	**Docket No. 10-1532**
	)	**Issued: February 11, 2011**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 18, 2010 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated November 30, 2009 and April 6, 2010. 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 filed a timely claim for compensation under the Federal Employees' Compensation Act.[1]

On appeal appellant asserts that his supervisor had actual knowledge that he sustained an employment-related hearing loss.

FACTUAL HISTORY

On February 25, 2009 appellant, then a 69-year-old retired training instructor, filed an occupational disease claim alleging that exposure to loud noise during his federal employment

[1] 5 U.S.C. §§ 8101-8193.

caused severe hearing loss. He first became aware of the condition and its relationship to his employment on January 1, 1988 but was not aware that he could file a claim. Appellant attached employment histories showing that he was in the U.S. Marine Corps from 1958 to 1979 with three tours in Viet Nam where he was exposed to explosives and gunfire. His service computation date was listed as February 5, 1978. From 1980 to 1981, appellant worked in a machine shop where he was exposed to machinery noise and from 1981 to 1986 he worked in supply where he was exposed to the noise of forklifts and trucks. He retired in 2001 and had no previous ear or hearing problems.

In a March 3, 2009 report, Dr. Gerald G. Randolph, a Board-certified otolaryngologist, noted appellant's report of progressive hearing loss over 10 years with constant tinnitus in both ears. He reviewed appellant's military and civilian occupational history, stating that he was exposed to hazardous noise and that he retired in 2001. Dr. Randolph provided results of audiological testing of February 25, 2009 and diagnosed bilateral sensorineural hearing loss, stating that the audiogram was consistent with hearing loss due to a combination of noise, age and possibly some other undiagnosed problem.

On March 19, 2009 the employing establishment requested appellant's personnel folder from the National Archives and Records Administration. In a July 27, 2009 statement, appellant reported that the date of retirement on his claim form was in error and he retired on July 1, 1999. He reiterated that he first knew of his hearing loss in 1988, stating that he was tested at the employing establishment at about that time and hearing loss was diagnosed, which indicated that his supervisor would have been notified within 30 days and that he had no hearing conservation test reports.

By decision dated November 30, 2009, the Office denied appellant's claim on the grounds that it had not been timely filed.

On December 22, 2009 appellant requested a review of the written record, stating that he was employed at the employing establishment from 1980 to 1999 in various positions where he was exposed to noise. He recalled having two hearing tests, both shortly after he was hired. Appellant remembered speaking to supervisors about the level of noise in the classroom when he was a training instructor on the pier, which would be verbal notification of hearing loss.

In an April 6, 2010 decision, an Office hearing representative affirmed the November 30, 2009 decision.

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.[2] 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 or

[2] *Charles Walker*, 55 ECAB 238 (2004); *see Charles W. Bishop*, 6 ECAB 571 (1954)

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."[3]

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 notice.[4] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[5]

Section 8122(b) provides that the time for filing in latent disability cases 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, and the Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.[6] 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.[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 or she 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.[8] 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 federal employment, the time

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[3] 5 U.S.C. § 8122(a).

[4] *Id*. at § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

[5] *Laura L. Harrison*, 52 ECAB 515 (2001).

[6] *Delmont L. Thompson*, 51 ECAB 155 (1999).

[7] 5 U.S.C. § 8122(b); *Duet Brinson*, 52 ECAB 168 (2000).

[8] *Larry E. Young*, *supra* note 4.

limitation begins to run on the date of the last exposure to the implicated factors.[9] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[10]

In interpreting section 8122(a)(1) of the Act, the Office procedure manual states that, if the employing establishment gives regular physical examinations which might have detected signs of illness, such as hearing tests, it should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results.[11]

ANALYSIS

The Office found that appellant did not file a timely claim for compensation under the Act. On February 25, 2009 appellant indicated that he was first aware of his hearing loss and its relationship to his employment in 1988. In statements of record, he also advised that he was aware of its relationship to his employment at that time. Appellant maintained that in 1988 he was aware of the relationship between his hearing loss and factors of his federal employment.[12] 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 employment, such awareness is competent to start the running of the time limitations period even though he does not know the precise nature of the impairment or whether the ultimate result of such adverse effect would be temporary or permanent.[13]

If an employee continues to be exposed to injurious working conditions, the time limitation begins to run on the date of the last exposure.[14] Therefore, the time for filing appellant's claim did not begin to run until July 1, 1999, the date he retired. Accordingly, the three-year statute of limitations would have expired no later than July 1, 2002, and appellant's February 25, 2009 claim for compensation is barred by the statute of limitations.[15]

The record does not support that appellant's "immediate superior had actual knowledge of the injury or death within 30 days."[16] There is no evidence of record that establishes that appellant's supervisor had actual knowledge of any injury within 30 days or that written notice of the injury was given with 30 days. Appellant stated that he did not participate in an employing establishment hearing surveillance program, and the February 2009 audiological tests were performed by an audiologist at Dr. Randolph's clinic. It is not established that the

[9] *Id.*

[10] *Debra Young Bruce*, 52 ECAB 315 (2001).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6(c) (March 1993); *see James A. Sheppard*, 55 ECAB 515 (2004).

[12] *Larry E. Young*, *supra* note 4.

[13] *Richard Narvaez*, 55 ECAB 661 (2004).

[14] *Larry E. Young*, *supra* note 4.

[15] *Supra* note 4.

[16] 5 U.S.C. § 8122(a)(1); *see also Duet Brinson*, *supra* note 7.

employing establishment had constructive knowledge of an employment-related hearing loss through a program of routine audiometric testing.[17] A claimant has the burden to establish that his supervisors knew or reasonably should have known that this condition was caused by his employment.[18] The fact that appellant may have reported loud noise is not sufficient to put the employer on notice of any hearing loss. In this case, there is no probative evidence to establish that appellant's superior had constructive knowledge sufficient to be reasonably put on notice that his hearing loss was work related within 30 days of July 1, 1999, the date of last exposure. Accordingly, appellant's claim is untimely.[19]

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 decisions of the Office of Workers' Compensation Programs dated April 6, 2010 and November 30, 2009 be affirmed.

Issued: February 11, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[17] *Compare James A. Sheppard, supra* note 11.

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

[19] *See Richard Narvaez, supra* note 13.