United States Department of Labor
Employees' Compensation Appeals Board

CEZAR R. PADILLA, Appellant	)	
and	)	**Docket No. 05-302**
	)	**Issued: April 8, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Long Beach, CA, Employer	)	

Appearances:
Thomas Martin, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On November 15, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated August 23, 2004, denying his hearing loss claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the August 23, 2004 decision.

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 December 18, 2002 appellant, then a 57-year-old letter sorting machine (LSM) and distribution clerk, filed an occupational disease claim alleging that he sustained a hearing loss and Meniere's disease due to exposure to "loud metal to metal noise" while working for up to 10 hours a day in his federal employment. He indicated that he first became aware of his hearing

loss on February 15, 1996[1] and realized that his condition might be work related on October 2, 2002.[2] Appellant stated that even when he stopped working on an LSM he still worked in close proximity to the machine until his retirement on December 27, 2001.

In a written statement dated March 3, 2003, Beatrice Fletcher, supervisor of distributions and operations, indicated that the LSMs were removed from the employing establishment no later than September 1999.

In a March 24, 2003 statement, supervisor Bette Woodard noted that she had worked at the employing establishment since 1989 and appellant never complained of hearing loss from working on an LSM. She indicated that appellant had not worked on an LSM since April 26, 1988.

By decision dated October 2, 2003, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that he was exposed to hazardous noise while working at the employing establishment.

Appellant requested a hearing that was held on May 24, 2004. He appeared at the hearing and testified.

By decision dated August 23, 2004, an Office hearing representative affirmed the October 2, 2003 decision but modified the decision to reflect that appellant's claim was denied on the grounds that it was not timely filed.

LEGAL PRECEDENT

In cases of injury on and after September 7, 1974, section 8122(a) of the Federal Employees' Compensation Act provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.[3] Section 8122(b) of the Act 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 the employment and the compensable disability.[4] 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 exposure.[5]

ANALYSIS

Appellant indicated on his Form CA-2 that he first became aware of his hearing loss on February 15, 1996 and the causal relationship to his employment on October 2, 2002. He stated

[1] Appellant submitted a February 15, 1996 medical report regarding his hearing loss.

[2] Appellant submitted an October 2, 2002 medical report with a diagnosis of bilateral hearing loss and tinnitus.

[3] 5 U.S.C. § 8122(a).

[4] 5 U.S.C. § 8122(b).

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

that his hearing loss was caused by exposure to "loud metal to metal noise" from working on an LSM for up to 10 hours a day. The employing establishment indicated that appellant was last exposed to LSM noise on April 26, 1988. However, appellant alleged that, although he was not working on an LSM after 1988, he continued to work in close proximity to the LSMs. The employing establishment indicated that the LSMs were removed as of September 1999. Therefore, the time limitations period began to run no later than September 1999, appellant's last exposure to the implicated employment factor, noise from LSMs. Since appellant did not file a claim until December 18, 2002, his claim was filed outside the three-year time limitation period which ended September 2002.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate superior, another employing establishment official or an employing establishment physician or dispensary had actual knowledge of the injury within 30 days of his last exposure to noise *i.e.*, within 30 days of September 1999.[6] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.[7] The record shows that appellant submitted medical reports regarding his hearing loss and Meniere's disease dated November 7, 1995 to April 5, 1998. However, these reports were from appellant's private physicians, not an employing establishment physician and therefore do not provide any support for a finding that the employing establishment had actual knowledge of the injury. There is a report dated October 11, 2001, from one of his physicians to an employing establishment physician. However, this October 11, 2001 report does not meet the requirement in this case that the employing establishment physician had actual knowledge of appellant's condition within 30 days of September 1999. There is no indication that appellant's immediate superior, another employing establishment official or an employing establishment physician or dispensary had actual knowledge of his hearing loss within 30 days of his last exposure to the LSMs in September 1999. Appellant's claim would still be deemed timely if written notice of injury or death was provided within 30 days pursuant to 5 U.S.C. § 8119.[8] However, there is no indication that appellant provided written notice of injury prior to December 18, 2002, the date he filed his Form CA-2.

CONCLUSION

The Board finds that appellant has not filed a timely claim for compensation under the Act.

[6] *Larry E. Young*, 52 ECAB 264 (2001). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

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

[8] 5 U.S.C. §§ 8122(a)(1) and 8122(a)(2).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 23, 2004 is affirmed.

Issued: April 8, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member