

Appellant did not fill in any date in response to the question concerning the date that he first realized the disease or illness was caused or aggravated by his employment. He noted that his “work area [was] very noisy most of [the] time, after having hearing test learned of hearing loss.” Appellant explained that he did not file a claim within 30 days as he did not realize he had any hearing loss until after being tested. The employing establishment indicated that the condition was first reported to the supervisor on February 15, 2005. Appellant retired on January 11, 1987. In a separate undated statement, he described his employment history, which included various positions within the employing establishment and his noise exposure. The only safety equipment was “hard hats and safety glasses.” Appellant alleged that he had an ear infection in 1985 and that “a few years ago I noticed people having to repeat their statements.”

Appellant submitted employment records showing that he worked at the employing establishment from 1963 to 1987 and which described his various positions. Additionally, he submitted a July 16, 2004 audiogram and employing establishment audiograms dating from 1963 to 1987.

In a statement dated February 24, 2005, the employing establishment described appellant’s noise exposure and noted that hearing protection was provided since 1973, with mandatory use in noise areas.

On April 15, 2005 an Office medical adviser reviewed the employing establishment audiograms from 1963 to 1987 and responded “no” to the question inquiring as to whether appellant had any hearing loss during his federal employment. Furthermore, he noted that the audiograms did not show significant worsening of hearing. On April 28, 2005 the Office medical adviser explained that there was “no worsening that may be attributed to federal employment.”

By decision dated April 29, 2005, the Office denied the claim on the grounds that it was not timely filed. It advised him that his date of last exposure was January 11, 1987 and that his claim for compensation was filed on November 12, 2004. The Office found that appellant should have been aware of a relationship between his employment and the claimed condition by January 12, 1990. It further found that his immediate supervisor did not have actual knowledge of the injury within 30 days.

On May 12, 2005 the Office received appellant’s request for a hearing which was held on October 24, 2005. Appellant contended that he merely had an ear infection in 1985. He explained that “as time went on,” he began to frequently ask people to repeat what they had said and turn the television up louder. In July 2004, appellant had a hearing examination which revealed hearing loss and which led to the filing of his claim. He became aware of the hearing loss when he had his audiogram. When questioned by the Office hearing representative regarding whether employing establishment personnel had ever advised him that he had a hearing loss, appellant responded “no.”

By decision dated January 11, 2006, the Office hearing representative affirmed the April 29, 2005 Office decision.

By letter dated February 3, 2006, appellant requested reconsideration. He reiterated that he only had an ear infection in 1985. Appellant did not know that he had any hearing loss until he was given the audiogram on July 16, 2004.

By decision dated March 31, 2006, the Office denied appellant's request for reconsideration without a review of the merits, finding that it neither raised substantial legal questions, nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

In cases of injury on or after September 7, 1974, section 8122(a) of the Act¹ provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation for 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.”²

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.³ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.⁴

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.⁵ For actual knowledge of a supervisor to be regarded as timely filing, an employee must show not only that the immediate superior knew that

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8122(a).

³ 5 U.S.C. § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

⁴ *Laura L. Harrison*, 52 ECAB 515 (2001).

⁵ *Delmont L. Thompson*, 51 ECAB 155 (1999).

he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.⁶

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.⁷ 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,⁸ the time 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 -- ISSUE 1

In this case, the Office found that appellant did not file a timely claim for compensation for his hearing loss. The Office determined that appellant was last exposed to the employment conditions which he alleged aggravated his hearing loss on January 11, 1987, which was the date he retired. Since appellant did not file a claim until November 12, 2004, the Office concluded that his claim was not timely filed within the three-year period of limitation.

However, the Board notes that, when appellant filed his claim for compensation on November 12, 2004, he did not state the date that he first realized his hearing loss was caused or aggravated by his employment. Although he alleged that his work area was very noisy most of the time, appellant explained that he only became aware of a hearing loss after obtaining a hearing test, which accompanied his claim and was dated July 16, 2004. The Board notes that he filled in 1985 in response to a question regarding the date he first became aware of the disease or

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

⁷ *Larry E. Young*, *supra* note 3.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993); *see James A. Sheppard*, 55 ECAB ____ (Docket No. 03-692, issued May 5, 2004).

⁹ *Id.*

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

¹¹ Federal (FECA) Procedure Manual, at 2.801.6(c) (March 1993).

illness. In a statement accompanying his claim, appellant explained that in 1985 he had an ear infection. At the hearing, appellant explained that the first time he became aware of any hearing loss was when he had a hearing test and audiogram on July 16, 2004. Appellant alleged that he noticed that he began to frequently ask people to repeat what they had said and that he had to turn the television up louder. When asked by the hearing representative if he was told by anyone at the employing establishment that he had a hearing loss, appellant responded “no.” On April 15, 2005 an Office medical adviser reviewed the audiometric tests conducted during appellant’s employment and noted they did not reveal a hearing loss in 1985. The record reflects that on July 16, 2004 the date appellant received his audiogram results, he first became aware or reasonably should have been aware of a possible relationship between a diagnosed hearing loss and factors of his federal employment.

The Board has held that, 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.¹² Appellant became aware of his hearing loss and its relationship to his employment in 2004. The Office found that he had an ear infection in 1985 and stated this was the date that he became aware of his hearing loss. The Board finds, however, that the Office’s determination is in error. The medical evidence from the employing establishment does not contain any indication that appellant had a hearing loss in 1985. On April 15, 2005 the Office medical adviser opined that the employing establishment audiograms did not show any significant hearing loss. The diagnosis of an ear infection does not implicate any knowledge of a hearing loss caused by noise exposure. The Office medical adviser noted that there was no worsening that could be attributed to his federal employment. The Board finds that appellant became aware of a diagnosed hearing loss on July 16, 2004. This is more probative as the date he first became aware of his condition and its relationship to his federal employment. The mere fact that appellant had an ear infection in 1985 does not signify that he sustained any hearing loss.

The Board finds that the evidence does not establish that appellant was aware of the causal relationship between his federal employment and his hearing loss until July 16, 2004. There is no evidence that he was aware of a causal relationship or that he should have been aware of the relationship prior to that time. Therefore, the time limitations began to run at that time. As appellant filed his claim on November 12, 2004, the Board finds that his claim was timely filed within the three-year period after July 16, 2004.¹³

CONCLUSION

The Board finds that appellant’s claim for a hearing loss was timely filed.

¹² See *supra* note 3.

¹³ Due to the Board disposition of this issue, the second issue is moot and will not be addressed by the Board.

ORDER

IT IS HEREBY ORDERED THAT the March 31 and January 11, 2006 decisions of the Office of Workers' Compensation Programs are reversed. The case is remanded to the Office for further proceedings regarding the merits of his claim.

Issued: September 18, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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