

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NICANOR AGUILAR and DEPARTMENT OF THE AIR FORCE,
KIRKLAND AIR FORCE BASE, N.M.

*Docket No. 96-1162; Submitted on the Record;
Issued February 12, 1998*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

On October 21, 1992 appellant, a retired 71-year-old flight line driver,¹ filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained a hearing loss causally related to factors of his federal employment, and that he first became aware of these injuries as of October 1969.

In a letter dated April 1, 1993, the Office referred appellant, his medical records, and the statement of facts to Dr. Karl L. Horn, a Board-certified otolaryngologist, for an otologic and audiologic examination. Dr. Horn examined appellant on April 27, 1993 and in a medical report dated May 20, 1993 found that appellant was exposed to loud noise at the employing establishment from 1952 to 1956 and from 1966 to 1970, and that he had a binaural hearing impairment of 65 percent. Dr. Horn stated that the hearing loss was causally related to noise exposure, both during his war service and during his employment with the employing establishment. However, Dr. Horn also stated that, as appellant was 71 years old, a significant portion of his hearing loss was due to presbycusis (old age).

In a letter dated August 3, 1993, the Office accepted appellant's claim for a binaural 65 percent hearing loss based on Dr. Horn's report, and indicated that appellant could file a Form CA-7 claim for a schedule award for permanent impairment.

In response to the Office's August 3, 1993 letter, appellant filed a Form CA-7 claim on September 13, 1993.

¹ Appellant retired from the employing establishment on January 3, 1986.

In a letter to appellant dated September 24, 1993, the Office requested additional factual and medical information in support of his claim. The Office indicated that the Federal Employees' Compensation Act required written notice of injury within five years of the date of injury or the date of last exposure to the employment factors alleged to have caused the injury, and it therefore requested appellant to submit information indicating whether he was exposed to hazardous noise while employed at the base commissary during the period of July 1970 through January 3, 1986, and to have the employing establishment submit results of any noise survey tests taken during that period.

By letter dated November 9, 1993, appellant responded to the Office's request. Appellant stated there was no record of a noise survey test conducted at his present employing establishment. Accompanying appellant's letter were letters from the employing establishment verifying his employment, but which failed to indicate whether he had been exposed to hazardous noise and tested for hearing loss.

By decision dated November 22, 1993, the Office rejected appellant's claim, finding that the evidence appellant submitted was not sufficient to establish that he had filed a timely claim. In an accompanying memorandum, the Office stated that appellant realized his hearing loss was caused by his employment in October 1969 and was last exposed to the employment factors alleged to have caused the hearing loss on July 25, 1970. Therefore, the Office found the maximum, mandatory five-year time limitation for filing his claim, based on the law in effect at that time, began to run on July 26, 1970.² The Office stated that, as of the date of its decision, evidence establishing that the claim was timely filed had not been received, and it therefore rescinded its acceptance of the claim.

Appellant's representative requested reconsideration of the Office's November 22, 1993 decision in a letter dated November 16, 1994. The letter indicated that the Office had failed to meet the strenuous burden imposed in terminating a claimant's benefits. Accompanying the letter was a June 11, 1992 letter from appellant's supervisor at the employing establishment indicating knowledge of appellant's exposure to hazardous noise and of his hearing loss, plus copies of records from the employing establishment's medical clinic showing that a March 28, 1967 audiogram performed by the clinic indicated a severe bilateral hearing loss. The letter also indicated that Dr. Horn had opined in his May 20, 1993 report that appellant's hearing loss may have been caused by employment factors.

In a decision dated February 17, 1995, the Office vacated its prior decision of November 22, 1993, finding that appellant submitted new and relevant evidence which warranted modification of the decision. In a memorandum to the Director, the claims examiner indicated that it had received audiograms from the employing establishment demonstrating a severe bilateral hearing loss. The claims examiner stated that the employing establishment was provided with an opportunity to respond to this new evidence, but failed to do so. The claims examiner concluded that "In reviewing the evidence of record it is clearly established that appellant was last exposed to hazardous noise on July 25, 1970, at which time he was transferred from the flight line to the commissary. It is also clearly established that [appellant] was aware of

² See 5 U.S.C. § 8122(c)(1), Act of July 4, 1966, 80 Stat. 254.

his hearing loss prior to his transfer from the flight line.... Evidence of file shows that he was required to use hearing aids while working on the flight line, ... that he was aware of his hearing problems prior to 1970, and that he either was or could reasonably have been expected to know of its relationship to his employment. Appellant has also provided sufficient evidence to show that his immediate supervisor had actual knowledge of the injury within 48 hours. The statement submitted in support of the request for reconsideration, as well as the agency dispensary records, constitute[s] actual knowledge.”

The claims examiner then stated:

“Prior to the 1974 amendments to the Act, written notice of injury had to be given within five years of the date of injury or date of last exposure. This is a mandatory time limitation that cannot be waived. Medical treatment for the results of an injury can be provided if the immediate supervisor had actual knowledge of the injury within 48 hours even if the claim for compensation was not timely filed so as to permit an award for monetary compensation.”

The claims examiner therefore concluded that, while the claim was not timely filed and appellant was thereby precluded from receipt of a monetary award, he was entitled to medical care for the effects of his hearing loss. Accordingly, the Office awarded appellant payment of medical expenses for evaluation of his hearing loss.

Appellant’s representative requested reconsideration of the Office’s February 17, 1995 decision in a letter dated January 25, 1996. Accompanying the request was an April 26, 1995 letter from Dr. Horn which indicated that appellant had been evaluated for sensorineural hearing loss in May 1993, and that this hearing loss was due to noise exposure at the job site. Dr. Horn stated that it was his understanding that appellant was not aware of the relationship of the hearing loss to his noise exposure until his examination in 1993. Appellant also submitted an April 25, 1995 letter from Mr. John Lionbarger, an audiologist, who stated that he had evaluated appellant’s hearing and had recommended a change of hearing aids.

By decision dated February 1, 1996, the Office denied appellant’s application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant’s case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

The only decision before the Board on this appeal is the February 1, 1996 Office decision which found that the letter submitted in support of appellant’s request for reconsideration was insufficient to warrant review of its prior decision. Since the February 1, 1996 decision is the only decision issued within one year of the date that appellant filed his appeal with the Board, May 1, 1996, this is the only decision over which the Board has jurisdiction.³

³ See 20 C.F.R. § 501.3(d)(2).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.⁴ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁵ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁶

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law, and has not advanced a point of law or fact not previously considered by the Office. Although appellant submitted the April 26, 1995 letter from Dr. Horn stating that it was his “understanding” that appellant was unaware of the relationship of his hearing loss until his examination in 1993, the Office properly found that this report had no probative value regarding the issue of whether or not appellant’s claim was timely filed. The Office further stated that Dr. Horn’s statement was not substantiated by the voluminous medical evidence in the record, in addition to appellant’s own factual statement, which had been fully considered and discussed in previous Office decisions. Appellant also submitted Mr. Lionbarger’s April 25, 1995 letter, but he is not a physician under section 8101(2), and his letter provided no evidence regarding whether appellant’s hearing loss claim was timely.

All the medical evidence submitted by appellant was either previously of record, and considered by the Office in reaching prior decisions, or it did not specifically address the issue of record in this case; *i.e.*, whether appellant filed a timely claim for benefits based on his hearing loss. Additionally, appellant’s January 25, 1996 letter did not show the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Appellant generally contended that he did not become aware of the precise nature of his condition until May 1993, the date Dr. Horn diagnosed a 65 percent hearing loss, and that therefore the statute of limitations did not begin to run until that date. Appellant stated in his November 16, 1994 request for reconsideration that, although an audiogram taken at the employing establishment on March 28, 1967⁷ indicated a severe bilateral hearing loss, Dr. Horn’s May 1993 report was the first medical diagnosis that related his condition to his employment. However, under the law in effect at that time, a claim for disability compensation was barred if a written claim was not filed within five years under the maximum, mandatory provision which could not be waived regardless of the reasons or circumstances for the failure to file a claim within the prescribed time.⁸ In the instant case, appellant stated on October 21, 1992 in his Form CA-2 that he was aware of the relationship between his hearing loss and his

⁴ 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ *Howard A. Williams*, 45 ECAB 853 (1994).

⁷ The letter erroneously states that the date was 1956.

⁸ *See James Stevenson Garner*, 26 ECAB 156 (1974).

employment in 1969. In addition, the Office stated in its February 17, 1995 decision that appellant was issued hearing aids by the employing establishment while working on the flight line prior to 1970 and that he either was or could reasonably have been expected to know of his condition's relationship to his employment. Further, the factual evidence of record indicated appellant was last exposed to hazardous noise in 1970. As appellant did not file a claim until 22 years had elapsed, the Office properly found that the claim was not timely filed under the law in effect at that time.⁹ Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

The February 1, 1996 Office of Workers' Compensation Programs' decision is affirmed.

Dated, Washington, D.C.
February 12, 1998

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ Although the Board does not have jurisdiction over the Office's February 17, 1995 decision, we note that the Office acted properly in finding that appellant is entitled to medical benefits in this case. Under the law in effect in 1969, a claimant might still be entitled to medical benefits under the Act for a condition causally related to his employment, even if he failed to file a timely claim for compensation, provided timely notice of injury was given or if the employee's immediate supervisor had actual knowledge within 48 hours. In the instant case, as appellant's supervisor had actual knowledge of his condition within 48 hours, the Office properly found in its February 17, 1995 decision that appellant was entitled to medical benefits related to his hearing loss condition. *Id.*