

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DEWITT STINNETT and DEPARTMENT OF ENERGY,  
BONNEVILLE POWER ADMINISTRATION, BONNEVILLE  
MAINTENANCE HEADQUARTERS, Pasco, WA

*Docket No. 98-519; Submitted on the Record;  
Issued August 18, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's claim for compensation is barred by the three-year time limitation provision of section 8122 of the Federal Employees' Compensation Act.

On March 20, 1997 appellant, then a retired electrical foreman, filed a claim for a hearing loss which he alleged occurred in the performance of duty due to prolonged exposure to hazardous levels of noise.<sup>1</sup> Appellant began work at the employing establishment on November 18, 1957 and retired effective April 15, 1978. He indicated he was aware of the hearing loss and related it to factors of his federal employment by June 1, 1963. Appellant noted that while working at the employing establishment, he "had hearing test by a registered nurse ...show[ing] hearing losses in high pitched sounds every year," but was never instructed to "follow up the loss of hearing ...." In an attached statement, appellant noted working in a hazardous noise environment for 18 years, that his former supervisors were either retired or deceased and that records from 1963 to 1965 might not be available.<sup>2</sup>

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<sup>1</sup> Appellant described his duties maintaining and overhauling "oil circuit air blast breakers which were very loud when operated. A job description provided by the employing establishment states that appellant would have been exposed to "high noise levels."

<sup>2</sup> In an April 11, 1997 letter, the employing establishment stated that as appellant retired in 1978, there was "no one currently employed ... who ha[s] the knowledge" to fully answer the Office's inquiries regarding appellant's noise exposure. Appellant stated that an April 11, 1997 audiogram showed a 54 percent hearing loss and was directed to purchase a hearing aid. Appellant did not submit a copy of this audiogram.

Appellant submitted November 8, 1974 and January 25, 1978 employing establishment audiograms, indicating a high frequency binaural hearing loss. These audiograms do not indicate that they were reviewed by appellant's supervisor.<sup>3</sup>

By decision dated October 1, 1997, the Office denied appellant's claim on the grounds that it was not timely filed within three years of the date of injury. The Office found that appellant stated that he was aware of a relationship between his job and the claimed hearing loss as of June 1, 1963, was last exposed to hazardous noise no later than his April 15, 1978 retirement, but did not file a compensation claim until March 20, 1997. The Office further found that the employing establishment audiograms did not establish that appellant notified his supervisor within 30 days of the possible relationship between work factors and the hearing loss, or that his supervisor otherwise had "actual knowledge of the injury within 30 days of the date of injury."

The Board finds that the Office properly determined that appellant's claim for compensation is barred by the three-year time limitation provisions of section 8122 of the Act.

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, unless the immediate superior had actual knowledge of the injury or death within 30 days, which knowledge "must be such to put the immediate superior reasonably on notice of an on-the-job injury or death, as provided by 5 U.S.C. § 8122(a)(1), or written notice of injury or death was given within 30 days. In a case of occupational disease, such as hearing loss, the Board has held that 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.<sup>4</sup>

When an employee becomes aware, or reasonable should have been aware that he has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitations period even though he does not know the precise nature of the impairment or whether the ultimate result of such adverse affect would be temporary or permanent.<sup>5</sup> Where the employee continues in the same employment, after such awareness, the time limitation begins to run on the date of his last exposure to the implicated factors.<sup>6</sup>

In his March 20, 1997 claim form, appellant indicated that he first realized his claimed condition was caused or aggravated by his employment in June 1963. This statement of awareness by appellant was competent to start the running of the limitations period under section 8122(a).<sup>7</sup> Thus, appellant admitted that he was aware of a possible causal relationship between his symptoms of hearing loss and factors of his federal employment more than 33 years before he

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<sup>3</sup> The audiograms were analyzed in a September 25, 1997 report, by an Office medical adviser, who also reviewed a statement of accepted facts.

<sup>4</sup> *William D. Goldsberry*, 32 ECAB 536, 540 (1981).

<sup>5</sup> *Leo Ferraro*, 47 ECAB 350 (1996); *Edward Lewis Maslowski*, 42 ECAB 839, 846 (1991).

<sup>6</sup> *William D. Goldsberry*, *supra* note 4.

<sup>7</sup> *See John Giovanni Carollo*, 41 ECAB 778, 794 (1990).

filed a claim on March 20, 1997. This interval is clearly outside the three-year time-limitation under section 8122 of the Act.

However, appellant's continued federal employment until April 15, 1978 tolled the start of the time-limitation period. As appellant continued to work at the employing establishment until his voluntary retirement on April 15, 1978 and he remained exposed to employment factors, the three-year time limitation did not begin to run until April 15, 1978. Nevertheless, appellant's March 20, 1997 claim was not filed within three years of April 15, 1978.

Appellant's claim would still be timely under 5 U.S.C. § 8122 if his immediate superior had actual knowledge of the injury or death within 30 days. However, there is no evidence of record indicating that appellant's supervisor had actual knowledge, sufficient to put him reasonably on notice of appellant's contention that his condition was work related, within 30 days of April 15, 1978. The November 8, 1974 and January 25, 1978 audiograms do not indicate that they were reviewed by appellant's supervisor. Also, there is no other documentation of record from an employing establishment supervisor establishing notice of the alleged hearing loss within 30 days of April 15, 1978. Thus, appellant did not submit sufficient evidence to establish that there was actual notice of a work-related injury.<sup>8</sup>

Consequently, the Office has met its burden of proof in establishing that appellant's claim was not timely filed within the three-year time limitation period under section 8122 of the Act.

The decision of the Office of Workers' Compensation Programs dated October 1, 1997 is hereby affirmed.

Dated, Washington, D.C.  
August 18, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>8</sup> See *John Giovanni Carollo*, *supra* note 7 at 795, where the Board held that the fact that the employee therein submitted medical evidence to his supervisor was insufficient to impute knowledge to the supervisor of an on-the-job injury.