

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALFONSO P. MONTANO and DEPARTMENT OF THE ARMY,
DUGWAY PROVING GROUND, Dugway, Utah

*Docket No. 97-997; Submitted on the Record;
Issued July 16, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's compensation claim for loss of hearing on the grounds that his claim was not filed within the applicable time limitation provisions of the Federal Employees' Compensation Act.

Appellant, a 65-year-old toxic material handler leader, filed a claim for occupational disease (Form CA-2) dated April 20, 1996, alleging that he sustained "hearing loss both ears." Appellant further stated that he first became aware of his hearing loss in July 1969 and first realized it was caused or aggravated by factors of his employment in April 1970. On the reverse side of the form, the employing establishment indicated that appellant was last exposed to the conditions alleged to have caused his hearing loss on July 22, 1970. Appellant retired effective July 31, 1970. His civil service disability retirement commenced August 1, 1970.

Accompanying the claim were the following: appellant's April 24, 1966¹ statement in which he indicated that "At the time of my medical retirement I was not advised that I had any other options or that I might be eligible for some type of monetary settlement on my hearing loss;"² a July 28, 1970 list of the type of employment noise to which appellant was exposed; appellant's supervisor's April 20, 1996 supplemental sheet to loss of hearing claim; appellant's April 20, 1996 supplemental statement; personnel papers; a July 29, 1971 Office request for additional information from the employing establishment; the employing establishment's August 16, 1971 response to the request for information; a July 22, 1970 statement by appellant's supervisor that he was advised by medical personnel that appellant cannot continue

¹ The statement is dated April 24, 1966, however, appellant stated that "at the time of my medical retirement" he was not advised of any options other than retirement. Appellant was not removed from the employment rolls until July 31, 1970 and his disability retirement was effective August 1, 1970.

² The Board has found that an employee's assertion that he was not aware that he could file a claim is unacceptable as sufficient cause or reason for failure to file a timely claim; *Roseanne S. Allexenberg*, 47 ECAB 498 (1996); *see Anthony J. Pusateri*, 36 ECAB 283 (1984).

to work in a noisy atmosphere and noting no comparable position can be located; a copy of the front of appellant's notice of injury or occupational disease, Form CA-1, dated July 22, 1970, which was assigned Office No. A13-348 745; a July 1, 1970 medical report by Dr. Michael S. Mishkin, a Board-certified internist, who had consulted with Dr. Robert Snow, a Board-certified otolaryngologist, on May 5, 1970 advising the employing establishment that appellant cannot continue in his present position; a February 9, 1971 audiogram; and a September 30, 1971 letter from the Office to appellant advising him to make an appointment with a named physician to determine the extent and degree of any disability remaining.

By letter dated October 9, 1996, the Office requested detailed factual information from appellant.

On October 21, 1996 the Office received appellant's claim for compensation (Form CA-7) indicating that he was filing a claim for a schedule award. Accompanying the claim was a Standard Form 50 indicating that appellant retired from the employing establishment effective July 31, 1970; a March 9, 1971 statement by appellant's supervisor; a September 16, 1970 notice of approval of disability retirement application indicating appellant's disability retirement had been approved; a December 21, 1970 civil service annuity statement indicating appellant's annuity commenced August 1, 1970; a monthly annuity statement; and appellant's October 17, 1996 statement explaining why he filed a claim for hearing loss in 1996.

By decision dated October 23, 1996, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that appellant's claim was timely filed.

By letter dated November 18, 1996, as a follow up to its October 23, 1996 decision, the Office notified appellant that, although he was not eligible for wage loss or a schedule award, he was eligible to receive medical expenses and hearing aids.³

The Board finds that the Office properly denied appellant's compensation claim for a hearing loss condition on the grounds that his claim was not filed within the applicable time limitation provisions of the Act.

The Act⁴ requires in cases of injury prior to September 7, 1974, that a claim for compensation be filed within one year of the date that the claimant was aware or reasonable should have been aware that the condition may have been caused by the employment factors. The one-year filing requirement may be waived if the claim is filed within five years and (1) it is found that such failure was due to circumstances beyond the control of the person claiming benefits; or (2) that such person has shown sufficient cause or reason in explanation thereof, and material prejudice to the interest of the United States has not resulted from such failure.⁵ The test for whether sufficient cause or reasons was shown to justify waiver of the one-year time limitation is whether a claimant prosecuted the claim with that degree of diligence which an

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time* (Chapter 2.801.3(b)(4)) (March 1993).

⁴ 5 U.S.C. § 8101.

⁵ *Edward Lewis Maslowski*, 42 ECAB 839 (1991); *Dorothy L. Sidwell*, 36 ECAB 699, 706 (1985).

ordinarily prudent person would have exercised in protecting his right under the same or similar circumstances.⁶

In a case involving a claim for an occupational illness, the time limitation does not begin to run until the claimant is aware, or reasonably should have been aware, of the causal relationship between his employment and the compensable disability.⁷ In situations where an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.⁸

In the present case, the evidence establishes that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment and the compensable disability by April 1970, when he stated that he first related his hearing problem to his federal employment. Appellant filed a claim for hearing loss (Form CA-1) on April 20, 1996 and it was noted his last date of exposure was July 22, 1970. As noted above, 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 this exposure. Therefore, the time limitation in appellant's case began to run no later than July 22, 1970. Since appellant did not file a claim for a schedule award until April 20, 1996, his claim was not filed within the one-year period of limitation.

Furthermore, appellant is not entitled to waiver of the one-year filing requirement because his claim was not filed within five years of the claimed injury; nor has he met the other requirements, as delineated above, for such waiver.⁹ The five-year time limitation is a maximum, mandatory period which neither the Office nor the Board has authority to waive.¹⁰

For these reasons, appellant has not established that his claim was filed within the applicable time-limitation provision of the Act.

⁶ *Maxine Leonard*, 39 ECAB 1180, 1184-85 (1988).

⁷ *William L. Gillard*, 33 ECAB 265, 268 (1981).

⁸ *Id.*

⁹ The Office attempted to retrieve appellant's records from the Federal Records Center (FRC), but without success.

¹⁰ *Gary W. Hudiburgh, Jr.*, 37 ECAB 423, 425 (1986)

Accordingly, the decisions of the Office of Workers' Compensation Programs dated November 18 and October 23, 1996 are affirmed.¹¹

Dated, Washington, D.C.
July 16, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

¹¹ The Board notes that the Office properly determined that appellant was entitled to medical treatment in accordance with the Federal Procedure Manual 2.801, 3.b(4).