

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STANLEY A. GILL and DEPARTMENT OF THE AIR FORCE,
UTAH AIR NATIONAL GUARD, Salt Lake City, UT

*Docket No. 97-2700; Submitted on the Record;
Issued November 9, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, 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.

On May 12, 1997 appellant, a 71-year-old aircraft mechanic, filed a claim for an occupational disease (Form CA-2), alleging that he sustained hearing loss "due to constant work relating to jet engine maintenance and repair." Appellant further stated that he first became aware of his hearing loss and related it to factors of his employment at the end of 1978. On the reverse side of the form it was indicated that appellant was last exposed to the conditions alleged to have caused his hearing loss on February 23, 1984.¹ Appellant retired effective May 21, 1982.

Accompanying the claim the employing establishment submitted various personnel papers and medical records. The medical records were form reports of physical examinations, some of which included audiometric test results.

By undated letter, the Office requested additional information from appellant.

On July 24, 1997 the record was supplemented to include appellant's response to the Office's request for additional information.

On July 28, 1997 the record was supplemented to include various personnel papers.

On July 31, 1997 the Office requested that a district medical adviser review the medical record to determine whether there was any evidence of a hearing loss. On the same day, a

¹ The form was signed by the retired directorate of maintenance on June 11, 1997. Not all items were completed and it is unclear who entered the last date of exposure on the form.

district medical adviser, after reviewing the record opined that “I find nothing in MAICO screening or in the Air Force routine check-off annual physical exam[ination]s.”

By decision dated August 4, 1997, the Office denied appellant’s claim on the grounds that the evidence of record failed to demonstrate that appellant’s claim was timely filed.

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 with the applicable time limitation provisions of the Act.

Section 8122 of the Act² states that an original claim for compensation must be filed within three years after the injury for which compensation is claimed.³ In the case of a latent disability, the time for filing the claim does not begin to run until the employee has a compensable disability and is aware, or reasonably should have been aware, that his disability is causally related to his employment.⁴ In such a case, the time for giving notice of injury begins to run when the employee knows, or reasonably should have known, that he has a condition causally related to his employment, whether or not there is a compensable disability.⁵

In the present case, appellant indicated that in 1978 he became aware of and related his hearing loss to occupational noise exposure. He, therefore, was aware of a causal relationship between his hearing loss and his work during his federal employment. The record indicates that appellant’s last exposure to noise in his employment was May 21, 1982, when he retired,⁶ therefore, the three-year limitation period began to run on that date. Since appellant did not file his claim until May 1997, it was not filed within the three-year limitation period provided in 5 U.S.C. § 8122.

A claim may be allowed notwithstanding the time limitation if the employee’s immediate supervisor had actual knowledge of the injury within 30 days of its occurrence, or if written notice of the injury was given within 30 days pursuant to 5 U.S.C. § 8119.⁷ There is no indication that appellant provided written notice of injury prior to May 12, 1997. With regard to hearing loss claims, the Board has held that, under certain circumstances, constructive actual knowledge by appellant’s supervisor may result from annual audiograms performed by the employing establishment.⁸ The Office’s procedures provide:

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8122(a).

⁴ 5 U.S.C. § 8122(b).

⁵ *Id.*

⁶ On appeal appellant stated that his last date of exposure was February 1984 where he was on active duty for the Air National Guard at Hill Air Force Base. However, even if 1984 was used as the date of last exposure, it would not make appellant’s claim timely under the three-year limitation period found in 5 U.S.C. § 8122.

⁷ 5 U.S.C. §§ 8122(a)(1), 8122(a)(2).

⁸ *See Joseph J. Sullivan*, 37 ECAB 526 (1986) (constructive knowledge of possible employment-related hearing

“If an agency, in connection with a recognized environmental hazard, has an employee testing program and a test shows the employee to have positive findings this should be accepted as constituting actual knowledge. For example, an agency where employees may be exposed to hazardous noise levels may give annual hearing tests for exposed employees. A hearing loss identified on such a test would constitute actual knowledge on the part of the agency of a possible work injury.”⁹

In this case, the record supports that audiometric testing was performed in connection with routine physical examinations. However, there is no evidence to support that appellant underwent annual hearing tests as part of an employing establishment program to monitor hearing loss among employees exposed to hazardous noise. Accordingly, the Board finds that the employing establishment did not have constructive knowledge of a possible employment-related hearing loss in this case.

The decision of the Office of Workers’ Compensation Programs dated August 4, 1997 is affirmed.

Dated, Washington, D.C.
November 9, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

loss provided by annual employing establishment audiograms).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(c) (March 1993).