

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MELVIN LLEWELLYN WILSON and DEPARTMENT OF THE NAVY,  
PORTSMOUTH NAVAL SHIPYARD, Portsmouth, NH

*Docket No. 99-513; Submitted on the Record;  
Issued July 13, 2000*

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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.

On January 26, 1998 appellant, then an 81-year-old retired machinist, filed a claim for occupational disease (Form CA-2), alleging that he sustained a hearing loss due to exposure to hazardous noise during his federal employment. Appellant stated that he first became aware of his hearing loss and its relationship to his employment in 1974. Appellant retired effective December 17, 1974.

Accompanying his claim, appellant submitted his service record card and four audiograms.<sup>1</sup> Appellant stated that as a machinist he worked in an area where he was subjected to chipping, grinding and pounding several hours a day. Appellant also noted that, while serving in the military service from May 24, 1945 to August 9, 1946, he experienced noise from 50 caliber machine guns, 81-millimeter mortars and flame throwers.

By letter dated March 13, 1998, the Office requested additional information from appellant and the employing establishment regarding appellant's 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 results.<sup>2</sup> Appellant submitted a letter dated March 17, 1998, summarizing his employment experience and hearing loss condition. However, appellant failed to note when he related his hearing loss to employment exposure.

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<sup>1</sup> The audiograms were dated July 7, 1987, March 22, 1991, July 17, 1992 and January 26, 1995 and were taken 13 to 21 years after appellant retired from the employing establishment.

<sup>2</sup> The audiograms were dated May 5, 1959, August 3, 1960, March 8, 1961 and March 28, 1974.

In a letter received April 6, 1998, the employing establishment acknowledged that appellant likely had at least some occasional exposure to loud noise at work.

On April 28, 1998 the Office, by letter, again asked appellant when he first related his hearing loss to conditions of his employment.

Appellant responded in a May 1, 1998 letter and noted that it was difficult to say when he first became aware of his hearing loss as it occurred over several decades.

By decision dated June 2, 1998, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that appellant's claim was timely filed in accordance with 5 U.S.C. § 8122. The Office found that appellant's last exposure was December 17, 1974 and his January 26, 1998 filing was therefore not within the three-year time limitation period.

The Board finds that appellant's claim for compensation is barred by the applicable time limitation provision of the Act.

Section 8122 of the Act<sup>3</sup> provides that an original claim for compensation must be filed within three years after the injury for which the compensation is claimed.<sup>4</sup> In the case of a latent disability or in cases of occupational disease, 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.<sup>5</sup> 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.<sup>6</sup>

In this case, the record indicates appellant's last exposure was December 17, 1974. Appellant indicated his first awareness of the relationship between his condition and employment in 1974. Appellant filed his claim on January 26, 1998, a date which is not within the three-year limitation provision of the Act.

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.<sup>7</sup> There is no indication that appellant provided written notice of injury prior to January 26, 1998 or that his supervisor had actual knowledge of an injury within 30 days of its occurrence. 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

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<sup>3</sup> 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8122.

<sup>4</sup> 5 U.S.C. § 8122(a).

<sup>5</sup> 5 U.S.C. § 8122(b).

<sup>6</sup> *Id.*

<sup>7</sup> 5 U.S.C. §§ 8122(a)(1), 8122(a)(2).

employing establishment.<sup>8</sup> While the record indicates that the employing establishment may have had an audiometry program, there is insufficient evidence to show that appellant participated in any such program. Accordingly, the Board finds that the employing establishment did not have constructive knowledge of a possible employment-related hearing loss in this case.

It is for the above reasons that the decision of the Office, finding that appellant's claim was not timely filed, will be affirmed.

The June 2, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
July 13, 2000

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>8</sup> See *Joseph J. Sullivan*, 37 ECAB 526 (1986) (constructive knowledge of possible employment-related hearing loss provided by annual employing establishment audiograms); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(c) (March 1993).