

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEONARD E. VINKENES and DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

*Docket No. 99-99; Submitted on the Record;
Issued May 8, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

On October 18, 1996 appellant, then a 76-year-old retired outside machinist, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained a sensorineural hearing loss. In answer to standard questions on the form, appellant indicated that he first became aware of the disease or illness and first realized that it was caused or aggravated by his employment on December 4, 1995. He stated that the form was not filed within 30 days of that date, as it was "unknown at the time that my hearing [loss] was or may have been caused by occupational noise exposure."

Appellant submitted with his claim a June 28, 1996 medical report by Dr. Stephen A. Habener, an otolaryngologist, in which Dr. Habener indicated that appellant noticed his hearing loss becoming bothersome in December 1995. Dr. Habener conducted an audiogram on December 4, 1995 and found a sensorineural hearing loss bilateral and symmetrical of about 30 to 40 decibels.

In response to a December 19, 1996 request from the Office for further information, appellant wrote that when he was employed as an outside machinist, he was exposed to excessive noise from numerous sources including chipping paint or riveting steel to steel, and running machinery such as diesel engines. He further noted that he was not issued earplugs. Appellant retired from the employing establishment on July 31, 1960 and has not been exposed to any excessive noise since that time.

In response to a letter from the Office dated April 24, 1997 requesting additional information, appellant noted that he first noticed a hearing loss in the 1960s when he had trouble hearing his wife speak around the house.

By decision dated July 3, 1997, the Office accepted appellant's claim for hearing loss as a result of exposure to noise in the workplace and noted that he was entitled to hearing aids and annual hearing examinations.

By decision dated July 9, 1998, the Office denied appellant a schedule award based on the fact that the claim was not timely filed. The Office noted as a reason that appellant was "reasonably aware" of hearing loss in the 1960s but did not file before the expiration of the maximum five-year period allowed. The Office did not indicate what information led it to conclude that appellant should have been reasonably aware that his hearing loss was causally related to his employment." The only explanation given for this conclusion was "It is reasonable to assume that you should have been aware of your hearing loss prior to 1974 and by your own statement you were aware in the 1960s." The Office at no time addressed the requirement of being aware of the hearing loss and causally relating it or connecting it to one's employment before concluding that appellant knew or should reasonably have known that his specific job caused his hearing loss during his employment.

The Board finds that appellant's claim for a hearing loss was timely filed.

The Act¹ requires, in cases of injury prior to September 7, 1974, that a claim for compensation be filed within a year of the date that the claimant was aware or reasonably 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.² The test for whether sufficient cause or reason was shown to justify the waiver of the one-year time limitation is whether a claimant prosecuted the claim with the degree of diligence which an ordinary prudent person would have exercised in protecting his right under the same or similar circumstances.³

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.⁴ 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 exposure.⁵ The Board notes that an employee need

¹ 5 U.S.C. § 8101 *et seq.*

² *Albert K. Tsutsui*, 44 ECAB 1004, 1006-07 (1993).

³ *Id.* at 1007.

⁴ *Emanuel T. Posluszny*, 47 ECAB 651, 654 (1996).

⁵ *See William A. West*, 36 ECAB 525, 528-29 (1985).

only be aware of a possible relationship between his “condition” and his employment to commence the running of the applicable statute of limitations.⁶

The Office found in its July 9, 1998 decision that the claim was not timely filed for schedule award purposes because appellant was reasonably aware of his hearing loss in the 1960s. However, the Office did not consider the second element regarding timeliness, *i.e.*, when appellant knew or should have known about the potential relationship between his hearing loss and his employment. The Board further notes that the evidence in the record is insufficient to establish that appellant was aware or reasonably should have been aware of his hearing loss prior to the date he states in his claim, *i.e.*, December 4, 1995. Accordingly, as less than one year elapsed from the time appellant knew or should have known about the relationship, December 4, 1995, and the date appellant filed his claim, October 18, 1996, the claim was timely filed within the provisions of the Act.

The decision of the Office of Workers’ Compensation Programs dated July 9, 1998 is hereby reversed; the case is remanded to the Office for further development and consideration of a schedule award.

Dated, Washington, D.C.
May 8, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁶ *Edward C. Hornor*, 43 ECAB 834, 840 (1992).