U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID G. EVANS and NATIONAL AERONAUTICS SPACE ADMINISTRATION, LEWIS RESEARCH CENTER, Cleveland, OH

Docket No. 00-2788; Submitted on the Record;
Issued August 1, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's claim for compensation is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act.

On December 12, 1998 appellant, then a 68-year-old retired engineer, filed an occupational disease claim alleging that he sustained employment-related hearing loss due to a two-week period of intermittent noise exposure in 1957, while he was conducting tests on a transonic air jet. Appellant worked as an engineer for the employing establishment from June 10, 1952 until his retirement on January 3, 1986. On his claim form, appellant indicated that he first became aware of his hearing loss and of its possible relationship to his employment in January 1982, when he had his first hearing test following his 1957 noise exposure. Appellant noted that he did not file his claim within 30 days of January 1982 because his hearing loss did not become acute enough to necessitate the purchase of hearing aids until 1992, when he required an aid for the left ear, and 1997, when he required an aid for the right ear. In additional narrative statements, appellant indicated that his right and left hearing aids cost him more than $800.00 each, and in 1996 his physician suggested that he apply for disability coverage. He stated that even then he decided to wait to report his condition as he knew it might be a while before he needed to replace his hearing aids. Appellant stated that he was now seeking compensation benefits in order to cover the cost of his prior and possible future purchases.[1]

[1] In narrative statements submitted subsequent to his initial claim, appellant additionally asserted that in 1961 he was involved in an additional employment incident when he was accidentally sprayed with five pounds of mercury in 1961, and that this exposure led to his development of a host of neurological problems, including seizures and possible dementia. In its decision dated March 27, 2000, the Office specifically declined to address these additional allegations, as appellant's 1998 claim was specifically limited to employment-related hearing loss. The Office advised appellant to file a separate claim for this incident, and further advised him of the type of evidence necessary to establish such a claim. As the Office did not render a final decision on the issue of appellant's alleged mercury exposure, the Board has no jurisdiction to review appellant's additional allegations or additional evidence; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

In a decision dated March 27, 2000, the Office found that appellant was aware or reasonably should have been aware that he had a hearing loss that was causally related to conditions of his federal employment by January 1982, the date he acknowledged being told of his hearing loss by the employing establishment physician, and that his claim for compensation benefits was barred by the time limitations of the Act.[2]

By letter dated April 7, 2000, appellant requested a review of the written record. Appellant stated that the employing establishment was aware that he had sustained a hearing loss because they had informed him of his abnormal hearing test results, and further provided him with data regarding noise levels. Appellant further reiterated that his hearing loss was not noticeable to him for many years, but emphasized that he did file his claim within three years of his physician's 1996 recommendation that he do so. Appellant submitted numerous medical reports and audiograms in support of his claim, including an audiogram dated September 27, 1983, the first audiogram kept by appellant, which contains a notation that appellant's 1981 and 1982 audiogram results were the same. Also included in the medical evidence are several reports from Dr. Gordon B. Hughes, appellant's treating Board-certified otolaryngologist, who, in a report dated March 28, 1996, noted appellant's history of exposure to supersonic jet engine noise for several weeks many years prior and diagnosed underlying chronic severe high tone sensorineural hearing loss due to noise damage.

In a decision dated August 16, 2000, an Office hearing representative affirmed the Office's March 27, 2000 decision.

The Board finds that appellant's entitlement to wage-loss compensation for loss of hearing is barred by the applicable time limitation provision of the Act.

In a case involving a claim for an occupational hearing loss, the time limitation of the Act begins to run when the injured employee becomes aware, or reasonably should have been aware, of a possible relationship between his hearing loss and his employment.[3] In situations where the exposure to noise in the employment continues after such knowledge, the time for filing begins to run on the date of the employee's last exposure to such noise.[4]

In the present case, appellant acknowledges that he was aware of his hearing loss and its possible relationship to his employment by January 1982, when he was informed of the abnormal results of his hearing test. The time limitation of the Act thus began to run no later than January 1982.

[2] The Office found that appellant's claim was barred as he had not filed within three years after he was aware of the relationship between his hearing loss and his employment. The Board notes, however, that appellant's injury occurred in 1957, prior to September 7, 1974, the effective date of the amendments which provided a three year, rather than a five-year time limitation. Therefore, a five-year limitation, rather than a three-year limitation, applies to appellant's claim; *see Albert K. Tsutsui*, 44 ECAB 1004 (1993).

[3] *Union Small*, 25 ECAB 275 (1974); *Chester T. Dement*, 25 ECAB 230 (1974).

[4] *Henry Epps*, 28 ECAB 498 (1977).

The Act, as applicable to this case, provides that a claim for compensation must be filed within five years from the date when the period of limitations begins to run. This provision is a maximum, mandatory requirement which may not be waived regardless of the reasons for, or the circumstances surrounding, the failure to file a claim within the prescribed time.[5]

Appellant did not file a claim for his loss of hearing until December 12, 1998. This is the first document filed by appellant containing words that reasonably may be construed or accepted as a claim for compensation. Notice without words of claim cannot, by any permissible construction, toll the running of the statutory period for filing a written claim for compensation.[6] As appellant's claim was filed more than five years after the time for filing began to run, it is barred by the applicable time limitation of the Act.

The Board further finds that the issue of whether appellant's claim to medical benefits is barred by the applicable time limitation provisions of the Act is not in posture for decision. Further development of the factual record is necessary.

The Act was amended in 1974 to provide a three year rather than a five-year maximum limitation period and to allow a claim not filed within that time if "the immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury."[7] The statute, however, specifically provides that the amendment to the time-limitation provision shall be applicable only to injuries occurring on or after the effective date of the amendments, September 7, 1974.[8] As appellant's injury occurred over a period of time in 1957, the 1974 amendments do not apply to his case.[9] Therefore, such knowledge by a supervisor would not fulfill the statutory requirement placed on appellant to file a claim so as to entitle him to compensation benefits.[10] However, timely knowledge by appellant's superior would satisfy the notice requirement of the Act and entitle appellant to medical benefits for employment-related hearing loss.[11] Appellant asserts that the employing establishment was aware of appellant's noise-induced hearing loss, as the employing establishment was the one to inform him of his abnormal hearing test results. By letter dated September 22, 1999, the Office requested that the employing establishment provide the decibel and frequency levels of the noise appellant was exposed to, the source of exposure, the period of exposure, the types of hearing protection provided and copies of all medical examinations pertaining to hearing or ear problems, including preemployment examinations and all audiograms. There is no evidence in the record, however, that the employing establishment responded to the Office's request, nor is there evidence in the record that the Office made a

[5] *Marion H. Salerni*, 24 ECAB 300 (1973).

[6] *Samuel A. Kelly*, 25 ECAB 309 (1974).

[7] 5 U.S.C. § 8122(a)(1).

[8] 88 Stat. 1151; *Robert L. Mumaw*, 31 ECAB 1682 (1980).

[9] *Arielle B. Bates*, 31 ECAB 1687 (1980).

[10] *Percey W. Whitley*, 29 ECAB 663 (1978).

[11] *Id.*

second attempt to obtain this relevant information. Proceedings under the Act[12] are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[13] Although it is the burden of an employee to establish his or her claim, the Office also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source, as in the instant case, the evidence was contained in an Office file.[14] Therefore, the Board will remand the case to the Office to make a second attempt to obtain the relevant information from the employing establishment, to be followed by a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated August 16 and March 27, 2000 are affirmed in part and set aside in part, and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC
August 1, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[12] 5 U.S.C. §§ 8101-8193.

[13] *See Claudia A. Dixon*, 47 ECAB 168 (1995).

[14] *See Carol Cherry (Donald Cherry)*, 47 ECAB 658 (1996).