

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERT L. COLLINS and DEPARTMENT OF DEFENSE,
DEFENSE LOGISTICS AGENCY, DEFENSE DISTRIBUTION DEPOT, OK

*Docket No. 02-1664; Submitted on the Record;
Issued April 29, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant's claim for a hearing loss is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing as untimely filed.

On February 1, 2001 appellant, then a retired 57-year-old materials handler, filed a claim for a loss of hearing that he attributed to noise while working in and around aircraft at Tinker Air Force Base.

On his claim form, appellant stated that he first became aware of his condition on January 4, 1984, and became aware that his condition was caused or aggravated by his employment on September 6, 1988. Appellant alleged that he did not file the claim in a timely manner because he was not aware of the proper procedure for filing a claim until approximately January 2001.

In response to appellant's claim, the employing establishment submitted a statement explaining that appellant was an employee of the Defense Logistics Agency from August 7, 1992 through December 31, 1996, and that his prior employment was with the Department of the Air Force. The employing establishment stated that it had provided appellant with assistance in filing his claim but noted that he was not exposed to noise while working at the employing establishment, and, in fact, was not claiming that noise exposure occurred at the employing establishment, but rather was alleging noise exposure during his prior employment at Tinker Air Force Base.

Following an August 24, 1999 inquiry from the Office regarding when he first became aware of his hearing loss and its relation to his employment, appellant stated that he first noticed hearing loss in approximately January 1984, and developed ringing in his left ear in December 1995, for which he sought medical treatment. Appellant further stated that he had no previous hearing problems and had no hobbies or other employment involving noise exposure.

By decision dated September 17, 2001, the Office denied appellant's claim on the grounds that it was not timely filed in accordance with the Act. The Office stated that written notice of a claim for compensation was given on February 1, 2001, more than four years after appellant stopped working at the employing establishment on December 31, 1996, when he reasonably should have been aware of a relationship between his employment and the claimed condition.

By letter dated December 14, 2001 and received by the Office on December 27, 2001, appellant requested an oral hearing before an Office representative. In a decision dated March 25, 2002, the Office denied appellant's request for a hearing as untimely filed. The Office also noted that appellant was not entitled to a hearing because the issue in the case could be equally well addressed through the reconsideration process.

The Board finds that appellant's claim was untimely filed under the applicable time limitation provision of the Act.

Section 8122(a) of the Act states: "An original claim for compensation for disability or death must be filed within three years after the injury or death."¹ Section 8122(b) provides that in latent disability cases, the time limitation does not begin to run until the claimant is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment and the compensable disability.² The Board has held that, 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.³

In this case, appellant stated that he first became aware of hearing loss around January 1984, and first became aware of the causal relationship between his hearing loss and his employment on September 6, 1988. However, he continued to be exposed to noise while employed at Tinker Air Force Base, and as he alleged that exposure to noise continued until January 1996. The time limitation for filing a claim began to run on December 31, 1996, when he was last exposed to the employment conditions that he alleged caused his hearing loss. Appellant did not file his claim until February 1, 2001, beyond the three-year time limitation, which ended on December 31, 1999.

However, appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor had actual knowledge of the injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.⁴ Thus, appellant's claim would be timely if his immediate supervisor had actual knowledge of the injury no more than 30 days after he retired on December 31, 1996. The

¹ 5 U.S.C. § 8122(a).

² 5 U.S.C. § 8122(b).

³ *Linda J. Reeves*, 48 ECAB 373 (1997); *Charlene B. Fenton*, 36 ECAB 151, 157 (1984); *Gladys E. Olney*, 32 ECAB 1643, 1645 (1982).

⁴ 5 U.S.C. § 8122(a)(1); see *Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

employing establishment provided a statement asserting that all noise exposure occurred during appellant's previous employment, and while appellant stated that his immediate supervisor at Tinker Air Force Base concurred with his allegations, he provided no evidence that the employing establishment was aware of his hearing loss and its relationship to work at that time.

It is appellant's burden to submit the evidence necessary to adjudicate his claim, in hearing loss cases. The most recent employing establishment stated that appellant was not exposed to injurious noise levels, and appellant alleged that his noise exposure occurred during prior employment with the Air Force. Appellant stated that he first noticed his hearing loss in 1984, and that his hearing was checked by the Veterans Administration in 1995, but he provided no further evidence that his supervisor or the employing establishment had notice at that time that he considered his hearing loss to be work related.

Since appellant did not file his claim within the three-year time limit and failed to establish that the employing establishment had notice of an occupational hearing loss, the Board finds that the Office properly denied his claim as untimely filed.

The Board further finds that the Office properly denied appellant's request for a hearing as untimely filed

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁵

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.⁶

Appellant's request for an oral hearing was dated and postmarked December 17, 2001, more than 30 days after the issuance of the Office's September 17, 2001 decision. For this reason, appellant was not entitled to a hearing as a matter of right. In addition, the Office properly exercised its discretion and found that appellant could advance the relevant issue equally well on reconsideration. The Office explained that appellant should submit new

⁵ 5 U.S.C. § 8124(b)(1).

⁶ *Henry Moreno*, 39 ECAB 475 (1988).

evidence establishing that his claim was filed in a timely manner. Therefore, the Board finds that the March 25, 2002 decision was proper.

The March 25, 2002 and September 17, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 29, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member