

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HOWARD P. BROADDUS and DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION, YORKTOWN, VA

*Docket No. 02-1041; Submitted on the Record;
Issued December 8, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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 October 23, 2000 appellant, a 69-year-old former heavy equipment operator, filed a claim for occupational disease (Form CA-2), alleging that he sustained a bilateral hearing loss. Appellant first became aware of his hearing loss and first realized it was caused or aggravated by factors of his employment on November 5, 1965. He explained that his exposure to noise was "fairly constant throughout the duration of my employment as a heavy equipment mechanic." He stated that he could not provide a specific time or date of injury because the loss "occurred as a result of cumulative noise exposure." On the reverse side of the form, the employing establishment indicated that appellant was last exposed to the conditions alleged to have caused his hearing loss in 1965. Appellant retired on disability in October 1986.

Accompanying the claim were personnel records, audiograms and medical records for 1991 and 1992. Also submitted was appellant's November 1, 2000 statement in response to specific questions posed by the Office, which noted that in 1985 he related his hearing loss to exposure to excessive noise from equipment. Appellant stated that in 1986 he was still performing jobs which exposed him to high "noise levels." A May 29, 1992 medical record/consultation sheet revealed that appellant was diagnosed with a bilateral hearing loss and was referred for an evaluation for hearing aids. Dr. J.S. Keyser noted an 18-year history of a chronic hearing loss and found moderate to severe high frequency hearing loss. Consequently, hearing aids were issued to appellant on September 23, 1992. The employing establishment controverted the claim based on untimeliness.

By letter dated January 4, 2001, the Office requested factual and medical evidence from the employing establishment. By letter dated February 22, 2001, the Office advised appellant that additional evidence was needed to establish that his claim was timely filed as evidence of

record demonstrates that he did not file within three years from the date of injury. The Office allotted appellant 30 days to provide information demonstrating that either his supervisor had knowledge of the injury or that “exceptional circumstances” precluded him from timely filing.

On March 12, 2001 the Office received appellant’s response to its February 22, 2001 request for additional information. Appellant stated that his supervisor at the time of his injury is now deceased. He also stated that he received hearing aids from the Portsmouth Navy Hospital in 1991.

By decision dated April 10, 2001, 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 Office found that appellant was aware or should have been reasonably aware of a relationship between his employment and the claimed condition by September 23, 1992, the date of an audiological evaluation at the Navy hospital. The Office stated that appellant did not provide any evidence that indicated that appellant informed his supervisor or the employing establishment of his hearing loss in 1965 or of the condition which was diagnosed in September 1992. Therefore, the evidence of record was not sufficient because documentation indicating that the employing establishment had actual or constructive knowledge of appellant’s hearing loss within the time limits required under the Act was not provided. The Office found that appellant’s claim filed in the year 2000 was not filed within three years of the date of injury as required by 5 U.S.C. § 8122 (for claims filed after September 7, 1974).

By letter dated April 24, 2001, appellant requested an oral hearing before an Office hearing representative, which was held on October 30, 2001.

By decision dated January 18, 2002, the hearing representative affirmed in part the April 10, 2001 Office decision denying appellant’s claim as untimely filed. She found that the time limitation period began to run no later than October 30, 1986, the date of retirement. The hearing representative concluded that the September 7, 1974 amendments to the Act did not apply in this case (as the date of injury was prior to September 7, 1974) and, therefore, appellant had a maximum of five years from the date of injury to file his claim, which was filed in the year 2000. She stated that “Whether it is accepted that the date [appellant] should have been aware or reasonably of a relationship between the employment and the hearing loss was October 1986, the retirement, or September 1992, the date of the audiogram, the claim was filed more than five years after the time for filing began to run and, therefore, it is barred by the applicable time limitation of the Act.”

The Board finds that the Office hearing representative properly denied appellant’s compensation claim for a hearing loss condition on the grounds that his claim was not filed within the applicable time limitation provisions of the Act.

The Board notes that, while the hearing representative correctly found that appellant’s claim was untimely filed, and that the September 7, 1974 amendments of the time limitation provision of the Act do not apply in this case, she incorrectly found that the time limitation period began to run no later than October 30, 1986, the date of retirement.

Section 20 of the Act,¹ requires that for injuries occurring prior to September 7, 1974, which is the situation in appellant's case, the applicable time period for filing a claim for compensation is not later than five years from the date when the time limitation period began to run. This requirement is a maximum mandatory one which may not be waived by either the Office or the Board regardless of the reason for, or the circumstances surrounding, the failure to file a claim within the prescribed time.²

In a claim, such as the instant one, which is based on allegations of occupational disease, the applicable time limitation of the Act³ begins to run when the employee becomes aware or reasonably should have been aware of a possible relationship between the condition for which he claims compensation and his employment.⁴ In situations where the exposure to the implicated employment factors continues after such knowledge, the time for filing begins on the date of the employee's last exposure to such factors.⁵

In his claim for compensation filed on October 23, 2000, appellant listed his date of injury, the date that he became aware that he had hearing loss, as November 5, 1965. Appellant also stated that he related his condition to his employment on that date. On the reverse side of appellant's claim form, the employing establishment stated that appellant's last day of exposure to the conditions alleged to have caused his hearing loss was 1965.⁶ The evidence of record, therefore, shows that appellant was aware of a possible relationship between his hearing loss and his employment on December 31, 1965 and was last exposed to the conditions alleged to have caused his hearing loss on that date.⁷ Accordingly, the time limitation period for appellant began to run no later than December 31, 1965. The hearing representative found that appellant was last exposed to hazardous noise in 1965 but stated that the time limitation period began to run on October 30, 1986, the date appellant retired on disability. Since time begins to run on the date of last exposure, *i.e.*, December 31, 1965, that is the date time begins to run in this case. Since appellant's claim was not filed until October 23, 2000, more than five years after December 31, 1965, his claim is barred by the applicable time limitation provisions.⁸

In addition, for injuries and death occurring between December 7, 1940 and September 6, 1974, the provisions of the Act applicable in this case provides that written notice of injury

¹ 5 U.S.C. § 20 (1949).

² *William S. Meyers*, 24 ECAB 194 (1973); *Veston H. Casey*, 9 ECAB 901, 902 (1958).

³ 5 U.S.C. §§ 8101-8193.

⁴ *See Vernon R. Ellis*, 32 ECAB 1518, 1522 (1981).

⁵ *See Robert Shelton*, 28 ECAB 11, 12 (1976).

⁶ Since the employing establishment did not provide a date certain in 1965 when appellant's exposure to hazardous noise ceased, the Board will use December 31, 1965 for this purpose.

⁷ The hearing representative found that the evidence of record established that appellant was last exposed to the conditions alleged to have caused his hearing loss in 1965.

⁸ *Chester T. DeMent*, 25 ECAB 230 (1974).

should be given within 48 hours as specified in sections 15 and 17, but that this requirement would be automatically waived if the employee filed written notice within one year after the injury or if the immediate superior had actual knowledge of the injury within 48 hours after the occurrence of the injury.⁹

However, there is no evidence of record that appellant filed written notice within one year after the injury as specified in sections 15 and 17 or that his immediate superior had actual knowledge of the injury within 48 hours after the occurrence of the injury.

For these reasons, appellant has not established that his claim was filed within the applicable time limitation provision of the Act.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated January 18, 2002 and April 10, 2001 are affirmed as modified.

Dated, Washington, DC
December 8, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁹ 5 U.S.C. §§ 15 and 17 (1949); *Samuel Goodman*, 11 ECAB 222 (1955).