United States Department of Labor
Employees' Compensation Appeals Board

HUMBERTO GARZA, Appellant	)	
and	)	**Docket No. 04-368**
	)	**Issued: April 15, 2004**
CORPUS CHRISTI ARMY DEPOT, Corpus Christi, TX, Employer	)	

Appearances:
Humberto Garza, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

Appellant filed an appeal on November 24, 2003 of an October 21, 2003 decision of the Office of Workers' Compensation Programs finding that he had not timely filed his claim for hearing loss within the applicable three-year time limitation under section 8122 of the Federal Employees' Compensation Act. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether appellant filed a timely claim under the three-year time limitation of section 8122 of the Act. On appeal, appellant asserts that he did not file his claim within three years of his retirement as he was unaware that he could file a claim.

FACTUAL HISTORY

On June 19, 2003 appellant, then a 62-year-old retired helicopter electrician, filed a claim for hearing loss claim which he attributed to exposure to hazardous noise from helicopters and metal working tools at the employing establishment from 1968 until his retirement on

June 3, 1993.[1] He noted that he was unaware that he could file a claim until informed by a coworker. Appellant stated that he first became aware of his hearing loss and its relationship to work factors in either 1969, 1993, January 2003 or on an unspecified date when he had difficulty hearing his wife's voice. The employing establishment controverted the claim as it was not filed within the applicable three-year time limit.

Appellant also submitted periodic employing establishment audiograms dated from June 24, 1968 to February 2, 1993 showing a progressive loss of hearing. An October 28, 1989 audiogram was reviewed by Dr. Larry Fenick, an employing establishment physician. The form on which the audiogram appears is titled "Hearing Conservation Data." This audiogram showed the following thresholds at 500, 1,000, 2,000 and 3,000 cycles per second (cps): on the left -- 35, 20, 15 and 35 decibels; on the right -- 20, 15, 10 and 25 decibels.[2]

By decision dated October 21, 2003, the Office denied appellant's claim on the grounds that it was not timely filed within the applicable three-year time limitation and there was no evidence that his immediate superior had actual knowledge of the injury within 30 days. The Office found that appellant was aware of a relationship between his employment and the claimed hearing loss since 1993. However, he did not file his claim until June 19, 2003, well beyond the three-year time limitation that began to run as of his last exposure to the alleged work factors on June 3, 1993.

LEGAL PRECEDENT

Section 8122(a) of the Act states than an "original claim for compensation for disability or death must be filed within three years after the injury or death."[3] 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 the employment and the compensable disability.

The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program was sufficient to

[1] In a July 31, 2003 letter, the Office advised appellant as to the type of medical and factual evidence needed to establish his claim.

[2] This audiogram constitutes medical evidence as it was reviewed by a physician. *Vickey C. Randall*, 51 ECAB 357 (2000). Appellant also submitted a June 12, 2003 audiogram which does not appear to have been reviewed or signed by a physician.

[3] 5 U.S.C. § 8122(a).

constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury.[4] The Office's procedures provide:

> "If an agency, in connection with a recognized environmental hazard, has an employee testing program and a test shows the employee to have positive findings this should be accepted as constituting actual knowledge. For example, an agency where employees may be exposed to hazardous noise levels may give annual hearing tests for exposed employees. A hearing loss identified on such a test would constitute actual knowledge on the part of the agency of a possible work injury."[5]

ANALYSIS

On his June 19, 2003 claim form and an August 21, 2003 letter, appellant indicated that he first realized on various dates from 1969 to January 2003 that he had a hearing loss and that it was caused or aggravated by his federal employment. Appellant retired from the employing establishment on June 3, 1993.

Appellant's claim would still be regarded as timely under 5 U.S.C. § 8122 if his immediate supervisor had actual knowledge of the injury within 30 days. This provision removes the bar of the three-year time limitation if met.[6] In this case, this provision would mean that the claim would be regarded as timely if the immediate superior knew of the injury within 30 days of appellant's last exposure to the implicated employment factors on June 3, 1993. The provision further provides that knowledge of the injury must be such as to put the immediate supervisor reasonably on notice of appellant's injury.[7]

The Board finds that there is no evidence of record from which to conclude that appellant's supervisor had actual knowledge of the claimed hearing loss within 30 days after appellant's last exposure to the implicated factors on June 3, 1993. The employing establishment did not indicate that it received notice of appellant's hearing loss prior to filing his claim on June 19, 2003.

[4] *See Joseph J. Sullivan*, 37 ECAB 526, 527 (1986) (constructive knowledge of possible employment-related hearing loss provided by annual employing establishment audiograms); *see also* Federal (FECA) Procedural Manual, Part 2 -- *Claims*, Time, Chapter 2.801.3(c) (April 1995).

[5] *Id*.

[6] *Hugh Massengill*, 43 ECAB 475 (1992).

[7] *Larry E. Young*, 52 ECAB 264 (2001).

Appellant did submit a series of employing establishment audiograms, including the October 28, 1989 audiogram which was entered on a form titled "Hearing Conservation Data." As set forth above, employing establishment audiograms may constitute "actual knowledge" to the employing establishment of a hearing loss.[8] However, the existence of annual audiograms, without evidence that appellant was participating in a hearing testing program as outlined in the Office's procedure manual, is insufficient to put the immediate supervisor on notice of an employment-related hearing loss.[9] In this case, there is insufficient evidence that the audiograms were obtained as part of a testing program for employees identified as having hazardous noise exposure. Although the October 28, 1989 audiogram appears on a form titled "Hearing Conservation Data," this phrase on its own is insufficient to establish either the existence of an annual testing program or that appellant was enrolled in it. Also, there is no evidence that the employing establishment identified appellant as possibly being exposed to hazardous noise. Furthermore, there are no industrial noise surveys of record documenting the extent of appellant's occupational noise exposure or that it was classified as hazardous. Accordingly, the Board finds that the employing establishment did not have "actual knowledge" of a possible employment-related hearing loss in this case, as the audiograms submitted are insufficient by themselves to establish appellant's participation in an annual testing program as contemplated by the Office's procedures.

Section 8122(d)(3) of the Act[10] provides that time limitations for filing a claim "do not run against any individual whose failure to comply is excused by the Secretary, on the grounds that such notice could not be given because of exceptional circumstances." Appellant's excuse for not filing a timely claim was that he was unaware that he could do so. However, the Board has held that unawareness of possible entitlement,[11] lack of access to information[12] and ignorance of the law or of one's obligations under it[13] do not constitute exceptional circumstances that could excuse a failure to file a timely claim.[14] Appellant has not established that he could not file a timely claim due to exceptional circumstances, as that term is used in section 8122(d)(3) of the Act. Thus, appellant's failure to timely file his claim within three years of his retirement precludes him from seeking compensation.

CONCLUSION

The Board finds that appellant did not timely file his June 19, 2003 claim under the three-year time limitation of section 8122 of the Act, as he has not demonstrated that his immediate

[8] Federal (FECA) Procedural Manual, Part 2 -- *Claims*, Time, Chapter 2.801.3(c) (April 1995).

[9] *Kathryn A. Bernal*, 38 ECAB 470 (1987).

[10] 5 U.S.C. § 8122(d)(3).

[11] *Roger W. Robinson*, 54 ECAB ___ (Docket No. 03-348, issued September 30, 2003).

[12] *Kathryn L. Cornett (Elmer Cornett)*, 54 ECAB ___ (Docket No. 03-989, issued September 23, 2003).

[13] *George M. Dickerson*, 34 ECAB 135 (1982).

[14] *Michael Thomas Plante*, 44 ECAB 510 (1993).

superior had actual knowledge of the claimed hearing loss within 30 days of appellant's retirement on June 3, 1993, or that he could not file a timely claim due to exceptional circumstances as the term is used under section 8122(d)(3).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 21, 2003 is affirmed.

Issued: April 15, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member