United States Department of Labor
Employees' Compensation Appeals Board

WAYNE D. STONE, Appellant	)	
and	)	**Docket No. 04-542**
	)	**Issued: April 14, 2004**
DEPARTMENT OF THE INTERIOR, FISH & WILDLIFE SERVICE, Cook, WA, Employer	)	

Appearances:
Wayne D. Stone, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 22, 2003 appellant filed a timely appeal of a merit decision of the Office of Workers' Compensation Programs dated December 8, 2003. 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 is whether appellant's claim for a loss of hearing was timely filed.

FACTUAL HISTORY

On July 11, 2003 appellant, then a 65-year-old former animal caretaker, filed a claim for a profound hearing loss. Appellant indicated that he first became aware of this condition in 1980 to 1985 and first realized his condition was caused or aggravated by his employment in 1980. He noted that he had increased difficulty hearing when working around running water. Appellant retired from the employing establishment in October 1994.

In a July 31, 2001 statement, appellant's former supervisor described the hatchery building in which appellant worked, stating that hearing protection was available but not mandatory, and added, "Although towards retirement [appellant] did show symptoms of being hard of hearing, I am unable to assume that the cause was his work environment, I am not a hearing professional." In an undated statement received by the Office on August 1, 2003 appellant described the sources of noise in the hatchery building, and stated, "Over a period of almost 30 years I could notice a loss in hearing that became extreme shortly before retirement in 1994."

In response to an Office request for further information on his noise exposure and when he first became aware his hearing loss was related to his employment, appellant described his noise exposure in the U.S. Air Force and in private employment before he began working at the employing establishment in 1966. Appellant attributed his hearing loss to the sound of constant pouring water in the hatchery building and to noise encountered during facility maintenance. Appellant stated that he noticed his loss of hearing about 1980, that the loss was steady and constant until his retirement, that he did not recall receiving information on hearing protection during 28 years of safety meetings, and that in the last few years of his employment there was one pair of over-the-ear protectors to be shared by a crew of five or six.

In response to an Office request for further information on appellant's noise exposure and on any testing of his hearing, appellant's former supervisor[1] stated that the hatchery had no noise survey report, that earmuffs were provided, and that, other than regular physical examinations, he had no knowledge of appellant having any medical examinations pertaining to hearing.

By decision dated December 8, 2003, the Office found that appellant's claim for loss of hearing was not filed within the three-year time limit of the Federal Employees' Compensation Act, and that the evidence did not support a finding that his immediate supervisor had actual knowledge within 30 days of the date of injury.

LEGAL PRECEDENT

Section 8122 of the Act[2] provides that "an original claim for compensation for disability or death must be filed within three years after the injury or death." Subsection (b) of this section adds that, in latent disability cases or in cases of occupational disease, the time for filing a claim begins to run when the employee first becomes aware, or reasonably should have been aware, of a possible relationship between his condition and his employment. Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of his last exposure to the implicated factors.[3]

Even if not filed within the three-year time limit, appellant's claim would be regarded as timely under 5 U.S.C. § 8122(a)(1) if his immediate superior had actual knowledge of the injury

[1] The former supervisor stated that he supervised appellant from October 1990 until his retirement in October 1994, and that he could speak only to that period.

[2] 5 U.S.C. § 8122.

[3] *Jose Salaz*, 41 ECAB 743 (1990).

or death 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] The Board has also held that a program of annual audiometric examinations conducted by an employing establishment was sufficient to constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury based on audiograms obtained in conjunction with a testing program established under guidelines provided by the Office.[5]

ANALYSIS

Appellant indicated on his claim form that he first became aware that his loss of hearing was caused or aggravated by his employment in 1980, and stated that he noticed increased hearing difficulty around running water at work. These statements are sufficient to establish that appellant was aware of the possible relationship between his loss of hearing and his employment prior to his retirement in October 1994. As his employment-related noise exposure ceased upon his retirement, the time limit of section 8122 of the Act began to run in October 1994. As appellant did not file his claim until July 11, 2003,[6] the claim was not filed within the three-year time limit of section 8122 of the Act.[7]

Appellant's former supervisor stated that appellant showed symptoms of being hard of hearing towards retirement, but that he was "unable to assume that the cause was his work environment." The evidence does not establish that appellant's immediate supervisor was aware that appellant's hearing loss was related to his employment prior to or within 30 days after appellant's retirement. The former supervisor also stated that he was not aware that appellant underwent any hearing examinations, and appellant stated that he did not recall hearing information on hearing protection in 28 years of safety meetings. The evidence does not support that the employing establishment performed audiometric testing in conjunction with a hearing conservation program.

CONCLUSION

Appellant's claim for a loss of hearing was not filed within the three-year time limit of section 8122 of the Act. His claim cannot be considered timely filed on the basis that his supervisor was aware of the injury within 30 days, either by actual knowledge or by the existence of a hearing testing program.

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

[5] *John J. Sullivan*, 37 ECAB 526 (1986).

[6] On appeal, appellant contends that he received no response to claims he filed in September 2001 and August 2002. Such claims are not in the case record, but even if they were located, they would be beyond the three-year time limit of section 8122 of the Act.

[7] On appeal, appellant states that he was never aware of the three-year time limit to file. However, ignorance of the law does not excuse failure to file a timely claim. *Emma L. Brooks*, 37 ECAB 407 (1986).

ORDER

IT IS HEREBY ORDERED THAT the December 8, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 14, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member