U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM F. OGLE and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 03-1039; Submitted on the Record;
Issued January 9, 2004

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's compensation claim on the grounds that his claim was not filed within the applicable time limitation provisions of the Federal Employees' Compensation Act; and (2) whether the Office, by its January 27, 2003 decision, properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128.

On July 10, 2002 appellant, an 87-year-old retired engine and pump operator,[1] filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained hearing loss, causally related to noise exposure in his federal employment. He stated that he became aware of the disease and related it to his employment in 1967. The employing establishment stated that appellant was last exposed to the conditions alleged to have caused the disease on May 27, 1971, the date he retired.

By letter dated August 1, 2002, the Office requested detailed factual and medical information from appellant.

On August 5, 2002 the Office received a July 29, 2002 report of a hearing evaluation by Sidna Steedley, a hearing instrument specialist with Avada Hearing Care accompanied by a May 28, 2002 audiogram. Ms. Steedley stated that appellant was seen on May 28, 2002 due to difficulty understanding conversational speech. She found that testing at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz in the right ear decibel levels of 70, 65, 80 and 75, respectively; and in the left ear, decibel levels of 50, 60, 75 and 85, respectively. Ms. Steedley noted that the testing met the ANSI requirements. Ms. Steedley recommended full shell digital direct hearing aids.

[1] Appellant also held positions as a pipe fitter and engineman.

On August 19, 2002 the Office received appellant's response to the request for additional information. He provided a list of his jobs and a description of his exposure to noise and submitted an August 12, 2002 report by Ms. Steedley which provided the same inforamtion as contained in her July 29, 2002 report. Appellant also stated that he was aware of his condition and related it to his employment in 1967.

By letter dated December 2, 2002, the Office requested factual and medical information from the employing establishment.

On December 13, 2002 another copy of Ms. Steedley's August 12, 2002 report was received by the Office.

By decision dated January 3, 2003, 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 did not file the claim within one year and he did not provide his supervisor with knowledge of the injury within 48 hours.[2]

By letter dated January 9, 2003, appellant requested reconsideration of the January 3, 2003 decision. He stated that, "I was never informed that the government had a program that supplied hearing aids when one lost [his] hearing on the job." In support, appellant submitted a January 14, 2003 report by Ms. Steedley and the May 28, 2002 audiogram.

By decision dated January 27, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant review of its prior decision.

The Board finds that the Office 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 Act[3] requires, in cases of injury prior to September 7, 1974, that a claim for compensation be filed within one year of the date that the claimant was aware or reasonably should have been aware that the condition may have been caused by the employment factors. The one-year filing requirement may be waived if the claim is filed within five years: and (1) it is found that such failure was due to circumstances beyond the control of the person claiming benefits; or (2) that such person has shown sufficient cause or reason in explanation thereof; and material prejudice to the interest of the Untied States has not resulted from such failure.[4] The test for whether sufficient cause or reasons was shown to justify waiver of the one-year time

[2] The Board notes that the Office, in its decision, stated that an original claim must be filed within 3 years of the date of injury unless the immediate supervisor had actual knowledge of a work-related medical condition within 30 days. However, the statute applicable in this case provides that a claim must be file within 1 year of the date of injury unless the immediate supervisor had actual knowledge of a work-related medical condition within 48 hours.

[3] 5 U.S.C. § 8101.

[4] *Dorothy L. Sidwell*, 36 ECAB 699, 706 (1985); 5 U.S.C. § 8122(a)(c).

limitation is whether a claimant prosecuted the claim with that degree of diligence which an ordinarily prudent person would have exercised in protecting his right under the same or similar circumstances.[5]

In a case involving a claim for an occupational illness, the time limitation does not begin to run until the claimant is aware or reasonably should have been aware, of the causal relationship between his employment and the compensable disability.[6] In situations where 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.[7]

In the present case, the evidence establishes that appellant was aware or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment and the compensable disability on May 27, 1971, the date he retired and was last exposed to the implicated employment factor. On the Form CA-2 dated July 10, 2002, appellant indicated that he first realized that his claimed condition was caused or aggravated by employment factors in late 1967.[8]

Appellant's last exposure to the implicated employment factors, *i.e.*, steam boilers, air compressors and steam turbins, occurred no later than May 27, 1971. As noted above, 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. Therefore, the time limitation in appellant's case began to run no later than May 27, 1971. Since appellant did not file a claim until July 10, 2002, his claim was not filed within the one-year period of limitation.

Furthermore, appellant is not entitled to waiver of the one-year filing requirement because his claim was not filed within five years of the claimed injury; nor has he met the other requirements, as delineated above, for such waiver. The five-year time limitation is a maximum, mandatory period which neither the Office nor the Board has authority to waive.[9]

In addition, for injuries and death occurring between December 7, 1940 and September 6, 1974, the provisions of the Act, applicable in this case, provide that written notice of injury should be given within 48 hours as specified in section 8119 of the Act, 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 with 48 hours after the

[5] *Id.*

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

[7] *Id.*

[8] Appellant stated that he did not file his claim within 30 days of the date that he realized that he had an employment-related condition because he "[d]id [not] know it was possible until I read it in [the] newspaper." However, the Board has found that an employee's assertion that he was not aware that he could file a claim is unacceptable as sufficient cause or reason for failure to file a timely claim. *See Anthony J. Pusateri*, 36 ECAB 283, 286 (1984); *Union Small*, 25 ECAB 275 (1974).

[9] *Gary W. Hudiburgh, Jr.*, 37 ECAB 423, 425 (1986).

occurrence of the injury.[10] However, there is no evidence of record that appellant filed written notice within one year after the injury as specified in section 8119 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.

The Board also finds that the Office, in its January 27, 2003 decision, properly refused to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128 of the Act,[11] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[12] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[13] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.[14]

In support of his January 9, 2003 request for reconsideration, appellant stated that at his employment there was no hearing conservation program. He stated that, "I was never informed that the government had a program that supplied hearing aids when one lost [his] hearing on the job." Appellant also provided a January 14, 2003 report from Avada Hearing Care. As the relevant issue is timely filing of the claim, the medical report is irrelevant to that issue and insufficient to warrant reopening appellant's claim on the merits. Appellant's statement that he was never informed that he could file a claim was submitted at the time he filed his claim. Therefore, it is duplicative of evidence already of record and insufficient to warrant review of the prior decision.

As appellant's January 9, 2003 request for reconsideration does not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office properly denied that request.

[10] *Samuel Goodman*, 11 ECAB 222 (1955);5 U.S.C. § 8118(b) as it read in 1968.

[11] 5 U.S.C. § 8128, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[12] 20 C.F.R. §§ 10.606(b).

[13] 20 C.F.R. § 10.608(a).

[14] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

Accordingly, the January 27 2003 decision is affirmed as modified and the January 3, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.[15]

Dated, Washington, DC
January 9, 2004

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[15] On appeal appellant stated that, "I am requesting that I be given hearing aids." This matter is not presently before the Board as the Office has not issued a decision with regard to hearing aids.