United States Department of Labor
Employees' Compensation Appeals Board

RICHARD T. SCHNETTLER, Appellant	)	
and	)	**Docket No. 03-1182**
	)	**Issued: January 12, 2004**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
Richard T. Schnettler, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On April 7, 2003 appellant filed a timely appeal from the July 1 and October 22, 2002 decisions of the Office of Workers' Compensation Programs, which denied his claim for compensation as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over appellant's claim.

ISSUES

The issues are: (1) whether appellant's claim for compensation for disability is barred by the applicable statute of limitations; and if so, (2) whether he is nonetheless entitled to medical benefits.

FACTUAL HISTORY

On May 22, 2002 appellant, then an 86-year-old retired shipfitter, filed a notice of occupational disease and claim for compensation alleging that his progressive hearing loss was a result of his federal employment: "Noisy shop with machinery all the time, hammering, riveters,

metal saws, noise exposure." He first realized in the 1960s that his employment had caused or aggravated his hearing loss. He was last exposed to occupational noise when he retired on May 17, 1971.

In a decision dated July 1, 2002, the Office denied appellant's claim on the grounds that he did not file it in a timely manner. Appellant requested reconsideration and explained as follows:

> "I did not report my hearing loss, because no one informed me that it was required. We did n[o]t have a conservation program back then and hearing protection was not always available. My hearing loss was gradual so it did n[o]t seem that bad to me at the time. I was told in the 1960's that I had some hearing loss because of my job, but I did n[o]t know that I could get help for it. Please reconsider your decision. I have n[o]t been around loud noises since I retired, I would greatly benefit from hearing aids."

On August 26, 2002 the Office responded that there were a couple of exceptions to the timeliness requirement: "(1) If your immediate supervisor, at the time you retired, was aware of your hearing loss and knew that you believed that it was due to your exposure at the shipyard, then a signed statement from him attesting to that fact would establish timeliness. (2) If the shipyard had a noise conservation program while you were working there and had medical evidence that you had a hearing loss at the time you retired, then that documentation would also establish timeliness." The Office advised appellant that it would contact the employer in an attempt to obtain his medical file. The Office asked appellant to contact his immediate supervisor for a written statement.

The employing establishment advised that there was "no doubt" that appellant was exposed to hazardous noise during his 20-year career and added: "Hearing protection during most of [his] employment was not taken as seriously as it is now. Little is known of the effectiveness of the hearing protection that may have been available." The employing establishment submitted appellant's preemployment physical examination and a January 3, 1966 treatment note from its medical unit. Appellant presented for medical attention complaining that when he blew his nose he felt the flow of air in his right ear. He stated that "right ear has been ringing more lately." There was no history of previous ear disease. Findings were reported as a perforation of the right tympanic membrane. A checkmark designated the type of case as "nonoccupational."

Because it did not apprise appellant of the exceptions to the timeliness rule in its July 1, 2002 decision, the Office reopened appellant's claim on its own motion to conduct a merit review. In a decision dated October 22, 2002, the Office denied appellant's claim as untimely. The Office found that the evidence submitted failed to document a work-related noise-induced hearing loss prior to appellant's retirement.

LEGAL PRECEDENT -- Issue 1

Prior to the September 7, 1974 amendments, section 8122 of the Federal Employees' Compensation Act ("Act") provided a maximum five-year limitation for making a claim for compensation:

"Section. 8122. Time for making claim

(a) An original claim for compensation--

(1) for death shall be made within 1 year after the death; and
(2) for disability shall be made within 60 days after the injury.

However, the Secretary of Labor may allow an original claim for disability to be made within 1 year after the injury for reasonable cause shown.

(b) In a case of latent disability, the time for filing claim does not begin to run until the employee has a compensable disability and is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment. In such a case, the time for giving notice of injury begins to run when the employee is aware, or by the exercise of reasonable diligence should have been aware, that his condition is causally related to his employment, whether or not there is a compensable disability.

(c) The Secretary may waive compliance with the requirements of this subchapter for giving notice of injury and for filing claim for compensation for disability or death if--

(1) a claim is filed within 5 years after the injury or death; and

(2) the Secretary finds--

(A) that the failure to comply was due to circumstances beyond the control of the individual claiming benefits; or

(B) that the individual claiming benefits has shown sufficient cause or reason in explanation of, and material prejudice to the interest of the United States has not resulted from the failure.

(d) The time limitations in subsections (a)-(c) of this section do not--

(1) begin to run against a minor until he reaches 21 years of age or has had a legal representative appointed; or

(2) run against an incompetent individual while he is incompetent and has not duly appointed legal representative…."[1]

In cases involving a claim for an occupational hearing loss where the exposure to injurious noise levels continues after the employee first becomes aware, or reasonably should have been aware, of a possible relationship between his hearing loss and conditions of his employment, the time for filing a claim begins to run on the date of the employee's last exposure to such noise.[2]

ANALYSIS -- Issue 1

When he filed his claim for compensation on May 22, 2002, appellant indicated it was in the 1960s that he first realized his employment had caused or aggravated his hearing loss. He was at that time aware, or reasonably should have been aware, of a possible relationship between his hearing loss and conditions of his employment. As he was still working as a shipfitter, however, and continued to be exposed to hazardous noise in the course of his employment, the time for filing a claim did not begin to run until the date of his last injurious exposure. Appellant retired on May 17, 1971. Accordingly, the statute of limitations expired no later than May 17, 1976.[3] Appellant's May 22, 2002 claim for compensation, filed more than 25 years later, is barred by the statute of limitations.

Appellant has explained his reasons for the delay in filing his claim, but the five-year time limitation is a maximum, mandatory period that neither the Office nor the Board can waive regardless of the reasons for, or the circumstances surrounding, the failure to file a claim within the prescribed time.[4] As a statute of limitations, section 8122 of the Act encourages diligence on the part of claimants and tempers injustice. It prevents as a matter of public policy the investigation and determination of stale claims where evidence might be destroyed or difficult to produce. It puts to rest claims that would otherwise live in perpetuity.[5]

LEGAL PRECEDENT -- Issue 2

Section 8103 of the Act requires the United States to furnish an employee who is injured while in the performance of duty "the services, appliances and supplies prescribed or

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[1] 5 U.S.C. § 8122 (1966).

[2] *E.g., Robert Shelton*, 28 ECAB 11 (1976).

[3] Appellant makes no allegation of incompetence.

[4] *Carmelo C. Laveres*, 29 ECAB 97 (1977).

[5] *See* 100 C.J.S. *Workmen's Compensation* § 436, n.13 (1958). When Congress tempered the one-year time limitation of the original Act with a conditional five-year waiver, it sought to stop the filing of many private bills and to help those war-time employees whose circumstances made compliance impossible. S. Rep. No. 421, 79th Cong., 1st Sess. 1 (1945). Congress later eliminated the five-year waiver because its latitude often created inequity. *See* H.R. Rep. No. 93-1025, 93d Cong., 2d Sess. 5 (1974); *Amending Federal Employees' Compensation Act: Hearing on H.R. 9118 Before the Select Subcommittee on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 17 (1973) (statement of Bernard E. Delury, Assistant Secretary of Labor for Employment Standards).

recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."[6] The obligation of the United States to furnish medical treatment exists regardless of whether any disability (inability to work) has arisen; that is, regardless of whether it is appropriate to file a claim for compensation for disability.[7] Thus, an employee's failure to file a timely claim for compensation for disability does not foreclose his right to medical benefits under the Act for a condition causally related to his employment, provided timely notice of injury was given or the employee's immediate superior had actual knowledge of the injury.[8]

Prior to September 7, 1974, section 8119(b) of the Act provided that compensation may be allowed only if notice of injury was given within 48 hours after the injury or if the immediate superior of the employee had actual knowledge of the injury. The Secretary of Labor, however, could allow compensation if the notice was filed within one year after the injury and reasonable cause for the delay was shown, or the requirement for 48 hours' notice was waived under section 8122.[9]

ANALYSIS -- Issue 2

With reasonable cause for delay, appellant could have given timely notice of injury by May 17, 1972, one year after his latest possible injurious exposure to noise at work. His May 22, 2002 notice of occupational disease, given 30 years later, is therefore untimely. The Board has found that dispensary records may suffice to establish timely written notice of a work injury,[10] but the record in this case shows no such notice. The Office requested that the employing establishment provide a copy of all medical examinations pertaining to hearing or ear problems, including the preemployment examination and all audiograms. Appellant explained that the employing establishment had no hearing conservation program, and the employing establishment provided no audiograms. A January 3, 1966 treatment note from the employing establishment medical unit, the only dispensary record submitted, found a perforation in appellant's right tympanic membrane, but the condition was noted to be "nonoccupational." The record contains no evidence of a timely written notice of injury.

[6] 5 U.S.C. § 8103(a) (1966).

[7] *Id*. § 8103(a)(1); *Edward T. Lowery*, 8 ECAB 745, 749 (1956) (providing an in-depth analysis of the Act's notice provision and its relation to the provision for making a claim for compensation for disability).

[8] *E.g., Nathan J. Bryant*, 20 ECAB 192 (1969); *see generally* 5 U.S.C. 8119(a)(3) (1966) (providing that the notice shall be in writing; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; state the name and address of the employee; state the year, month, day, and hour when and the particular locality where the injury occurred; state the cause and nature of the injury; and be signed by and contain the address of the individual giving the notice).

[9] 5 U.S.C. § 8119(b) (1966). Section 8122(c) of the Act, allowing the Secretary of Labor to waive compliance with the requirements for giving notice of injury only if a claim was filed within five years after the injury or death and other conditions were met, does not apply in this case, as appellant filed no claim within five years after the injury.

[10] *Nathan J. Bryant*, *supra* note 8 at 195; *Maurice J. Dayton*, 11 ECAB 139 (1959).

The Office requested that appellant contact his immediate supervisor for a written statement, but no statement was forthcoming. According to the employing establishment, appellant first reported his condition to a supervisor on June 14, 2002. The record contains no evidence that appellant's immediate superior had actual knowledge of the injury. Because timely notice of injury or the immediate superior's actual knowledge of the injury is a prerequisite to the medical benefits provided under section 8103 of the Act, appellant is not entitled to medical benefits for his claimed hearing loss.

CONCLUSION

The Board finds that appellant's claim for compensation for disability is barred by the applicable statute of limitations. While entitlement to medical benefits under the Act is a separate question, the Board also finds that appellant is entitled to no medical benefits, including hearing aids, for want of timely notice of injury and failure to establish his immediate superior's actual knowledge of the injury.

ORDER

IT IS HEREBY ORDERED THAT the October 22 and July 1, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 12, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member