

his federal employment on December 20, 2002.¹ He noted that he was exposed to loud noises while working on and around turbines and while beating on metal and welding metal during his employment with the employing establishment. Appellant indicated that he first learned that his hearing loss was from noise on or about December 20, 2002, but he did not know that he could make a claim until July 10, 2003.

In support of his claim, appellant submitted a history of his employment with federal and nonfederal employers covering the period from 1953 through the time of filing his hearing loss claim and a narrative statement. He stated that at each job listed he was exposed to no less than 8 hours of noise as welder, sometimes for 12 hours, 5 to 7 days per week. Appellant stated that he was not given earplugs. He further indicated that he did not have any hobbies or other jobs that exposed him to excessive noise and that prior to working at the employing establishment as a welder, he did not have any problems with his hearing. Appellant indicated that he first noticed that he had hearing loss in the mid 1980's, but appellant did not seek medical attention until 2003, several years after he retired. He explained that he was first informed by his physician that the hearing loss and ringing in his ears was caused by noise exposure on or about December 20, 2002. Appellant also submitted audiograms conducted by the employing establishment dating from 1969 to 1979.²

By letter dated August 22, 2003, the employing establishment controverted appellant's claim and asserted that he worked for the employing establishment from March 18, 1969 through December 4, 1989. The employing establishment indicated that noise survey data revealed that, for "most of the work time, an ironworker would have no exposure to hazardous noise." It also noted that for approximately 10 hours a week, appellant could have been exposed to noise levels of 85 to 93 decibels.

Additional audiograms dating from 1974 to 1987 were received from the employing establishment. A June 4, 1974 audiogram indicated testing at 500, 1,000, 2,000, 3,000, 4,000 and 6,000 hertz (Hz) and revealed in the right ear losses of 5, 5, 5, 15 and 10 decibels; and in the left ear losses of 5, 5, -5, 5, 25 and 15 decibels respectively. A June 23, 1976 audiogram also indicated testing at the same Hz levels and revealed in the right ear losses of 20, 5, 15, 10, 20 and 20 decibels and losses of 5, 5, 15, 10, 20 and 15 decibels in the left ear respectively. A June 6, 1977 audiogram indicated thresholds for the right ear at the same Hz levels and losses of 10, 5, 5, 5, 20 and 10 decibels and in the left ear losses of 5, 5, 5, 10, 45 and 15 decibels respectively. An October 26, 1979 audiogram revealed losses in the right ear of 5, 5, 10, 10, 20 and 10 decibels and losses of 5, 5, 5, 10, 35 and 25 decibels in the left ear at the same Hz levels. A November 16, 1987 audiogram revealed losses in the right ear of 10, 15, 15, 15, 10 and 20 decibels and losses of 5, 15, 15, 15, 30 and 30 decibels in the left ear at the same Hz levels.

Additionally, appellant provided the Office with a December 20, 2002 audiological evaluation, a magnetic resonance image (MRI) scan of the brain and auditory canal and a May 1, 2003 pure tone audiogram with audiometric results. The Office also received copies of

¹ Appellant last worked for the employing establishment on December 4, 1989.

² These tests did not show any hearing loss.

employing establishment job descriptions with the physical requirements, including a November 13, 1989 medical examination record, in which Dr. F.H. Floyd, a physician of unknown specialty and employing establishment physician, noted that appellant “seems to have some difficulty with soft-spoken speech-hearing.” Appellant provided copies of a December 20, 2002 audiogram and new patient form, which were unsigned. In a June 18, 2003 report, Dr. Donald S. Keeble, a Board-certified family practitioner, noted his findings on examination. Regarding appellant’s hearing loss he indicated that “the pattern was typical for hearing damage caused by exposure to noise.”

By decision dated August 27, 2003, the Office denied appellant’s claim on the grounds that the evidence of record failed to demonstrate that his claim was timely filed in accordance with 5 U.S.C. § 8122. The Office found that his last federal employment exposure occurred on December 4, 1989 and his July 21, 2003 filing was, therefore, not within the three-year time limitation period. The Office also found that there was no medical evidence to support that appellant’s hearing loss was due to his federal employment since the last test taken in 1989 showed no hearing loss due to loud noises.

LEGAL PRECEDENT

Under the Federal Employees’ Compensation Act,³ as amended in 1974, a claimant has three years to file a claim for compensation.⁴ In a case of occupational disease, the Board has held that 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. When an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitation period even though he does not know the nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.⁵ 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.⁶ 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 his employment and the compensable disability.⁷ Even if the claim is not filed within the three-year period, it may be regarded as timely under section 8122(a)(1) if appellant’s immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days such that the immediate superior was put reasonably on notice of an on-the-job injury or death.⁸

³ 5 U.S.C. § 8122.

⁴ *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); see 20 C.F.R. § 10.101(b).

⁵ *Larry E. Young*, 52 ECAB 264 (2001); *Duet Brinson*, *supra* note 4.

⁶ See *Larry E. Young*, *supra* note 5; *William D. Goldsberry*, 32 ECAB 536, 540 (1981).

⁷ 5 U.S.C. § 8122(b); *Bennie L. McDonald*, 49 ECAB 509, 514 (1998).

⁸ *Duet Brinson*, *supra* note 4; *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

ANALYSIS

In this case, the Office denied appellant's occupational disease claim on the grounds that it was not timely filed. The Office found that appellant should have been aware of a relationship between his employment and the alleged condition by December 4, 1989, the date of his last exposure to the implicated employment condition. Appellant asserted that he did not have actual knowledge of the hearing loss until December 20, 2002, within three years of the date on which he filed his claim July 21, 2003. Although appellant indicated that he noticed hearing loss in the mid 1980's, he stated that he was unaware that it was employment related until Dr. Keeble informed him that his hearing loss was related to his noise exposure on December 20, 2002.

With regard to whether appellant, through the exercise of reasonable diligence, should have known of his hearing loss more than 3 years prior to the filing of his claim, the record reflects that the employing establishment indicated that an ironworker had about 10 hours of noise exposure weekly. Although the employing establishment audiograms dating from 1974 to 1987 showed losses at various thresholds, they did not contain any evidence to suggest that appellant was diagnosed with hearing loss, such as notations or remarks indicating that appellant was sustaining noise-induced hearing loss, nor do they indicate that any information was communicated to appellant indicating that he had a hearing loss or excessive noise exposure. While he had some noise exposure at work, this was on a limited basis and, coupled with the lack of contemporaneous indication that he had a noise-induced hearing loss, is insufficient to establish that he should have known earlier that he had an employment-related condition. Additionally, the November 13, 1989 medical examination from Dr. Floyd, while noting that appellant had difficulty with soft spoken speech, did not contain an opinion that appellant had noise-induced hearing loss. This evidence, therefore, is insufficient to show that appellant reasonably should have known that he had an employment-related hearing loss more than three years prior to the filing of his claim. No medical reports, audiograms or other evidence prior to December 20, 2002 suggested that appellant had noise-induced hearing loss. Additionally, the Office's decision did not cite any evidence or provide any reasoning to support a finding that appellant was aware, or reasonably should have been aware, of the relationship between his employment and his hearing loss on December 4, 1989 the date of last exposure to noise at work.

Since the record establishes that appellant first had knowledge that his hearing loss was an occupational disease resulting from exposure to noise at work on December 20, 2002 and this was the first time the record establishes that he reasonably should have been aware that his hearing loss was due to occupational exposure, his claim filed on July 21, 2003 was within three years of his date of awareness and is, therefore, timely. The case must, therefore, be remanded for the Office to address the merits of the claim. After any further development that it deems necessary, the Office should issue a *de novo* decision.

CONCLUSION

The Board finds that appellant's claim filed on July 21, 2003 is timely.

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2003 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further action consistent with this decision.

Issued: June 9, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member