

**United States Department of Labor
Employees' Compensation Appeals Board**

ALFRED SCHMIDT, Appellant

and

**DEPARTMENT OF AGRICULTURE,
OLYMPIC NATIONAL FORREST,
Olympia, WA, Employer**

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**Docket No. 04-1375
Issued: September 15, 2004**

Appearances:
Alfred Schmidt, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 28, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated March 18, 2004 and October 17, 2003 which denied his hearing loss claim as untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the time limitation issue of this case.

ISSUE

The issue is whether appellant's claim for an occupational hearing loss was timely filed pursuant to 5 U.S.C. § 8122(a).

FACTUAL HISTORY

On April 7, 2003 appellant, then an 82-year-old retired materials engineering technician, filed an occupational disease claim alleging that on January 1, 1983 he became aware of his loss of hearing and attributed this condition to his federal employment. This is also the date that

appellant retired. In support of his claim, appellant submitted audiograms dated April 11, 2001 and September 4, 2003.

The Office requested additional information from appellant and the employing establishment by letters dated June 26, 2003. Appellant stated that in January 1983 after a number of years of noise exposure that he thought his hearing loss was probably related to noise exposure at work. However, appellant stated that he did not know that he could file a claim for this condition.

The employing establishment's occupation safety and health officer, Deane A. Hess, submitted a letter dated November 6, 2001 noting in 1977 she instituted a program of training employees in the use of personal protective equipment including hearing protection. In a letter dated July 24, 2003, the employing establishment stated that appellant's supervisors had retired and that there was no evidence that appellant spoke to them regarding his condition.

The Office referred appellant for a second opinion examination on August 25, 2003. In a report dated September 29, 2003, Dr. Gerald G. Randolph, a Board-certified otolaryngologist, noted that appellant reported progressive hearing loss of 15 years and that there were no records of audiograms dating back to the years that he was employed. He diagnosed bilateral neurosensory hearing loss and opined that appellant's hearing loss was due to several underlying factors including the aging process, past noise exposure, hypertension, arteriosclerotic cardiovascular disease and the possible use of diuretics. Dr. Randolph stated that appellant had hearing loss which "may be partially related to past noise exposure."

By decision dated October 17, 2003, the Office denied appellant's claim for hearing loss on the grounds that it was not timely filed.

Appellant requested a review of the written record on October 21, 2003. By decision dated March 18, 2004, the hearing representative found that appellant's claim for a hearing loss was not timely filed and affirmed the Office's October 17, 2003 decision.

LEGAL PRECEDENT

In cases of injury on or after September 7, 1974, section 8122(a) of the Federal Employees' Compensation Act states that "an original claim for compensation or death must be filed within three years after the injury or death."¹ Section 8122(b) of the Act 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.²

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 limitations period event though he does not know the precise

¹ 5 U.S.C. § 8122(a).

² 5 U.S.C. § 8122(b).

nature of the impairment or whether the ultimate result of such adverse affect would be temporary or permanent.³

ANALYSIS

Appellant indicated on his claim form that he first became aware that his hearing loss was caused by his employment at the time of his retirement in January 1983. Appellant noted his belief that there was a relationship between his hearing loss and his noise exposure at the employing establishment in January 1983. Appellant's statement of awareness was competent to start running the limitations period under section 8122(a). Appellant by his own admission indicated that he was aware of a possible causal relationship between his symptoms and factors of his federal employment approximately 20 years before he filed his April 7, 2003 claim. This interval is clearly outside of the three-year time limitation under section 8122 of the Act.

Appellant's claim would still be regarded as timely under section 8122(a) of the Act if his immediate supervisor or agency physician or dispensary had actual knowledge of the injury within 30 days of his last noise exposure on January 1, 1983. The knowledge must be such as to put the immediate supervisor reasonably on notice of an on-the-job injury or death.⁴ The employing establishment denied that appellant's supervisor or other employing establishment official had actual knowledge of appellant's injury. There is no evidence of a program of annual audiometric examination conducted by the employing establishment.⁵ Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days pursuant to 5 U.S.C. § 8119.⁶ In the instant case, there is no indication that appellant provided written notice of injury prior to April 7, 2003, the date he filed his claim form.

Appellant has consistently asserted that his delay in filing his claim for hearing loss should be excused as he was not fully aware of his ability to file a claim with the Office for an occupational disease. The Board has held 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.⁷

CONCLUSION

The Board finds that appellant admitted that he was aware of his hearing loss and the possible relationship to his employment-related noise exposure in 1983 and that he failed to file his claim until 2003 approximately 20 years later and outside the 3-year time limitation under the Act. Therefore, appellant's claim was not timely filed.

³ *Larry E. Young*, 52 ECAB 264, 266 (2001).

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

⁵ *But see James A. Sheppard*, 55 ECAB ___ (Docket No. 03-692, issued May 5, 2004).

⁶ 5 U.S.C. §§ 8122(a)(1), 8122(a)(2).

⁷ *Albert K. Tsutsui*, 44 ECAB 1004, 1007 (1993).

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2004 and October 17, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 15, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member