

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

RALPH L. DILL, Appellant

and

**MISSISSIPPI NATIONAL GUARD,
ORGANIZATION MAINTENANCE
SHOP, Tupelo, MS, Employer**

)
)
)
)
)
)
)
)
)
)

**Docket No. 05-1620
Issued: December 6, 2005**

Appearances:
Ralph L. Dill, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 27, 2005 appellant filed a timely appeal from a June 13, 2005 merit decision of the Office of Workers' Compensation Programs, denying his hearing loss claim on the grounds that it was not timely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the time limitation issue in this case.

ISSUE

The issue is whether the Office properly denied appellant's hearing loss claim on the grounds that it was not timely filed within the applicable time limitation provisions of the Federal Employees' Compensation Act.

FACTUAL HISTORY

On April 4, 2005 appellant, then a 67-year-old retired heavy mobile equipment repairer, filed an occupational disease claim dated January 28, 2005 alleging that his hearing loss was causally related to noise exposure in his federal employment. He related his hearing loss to his employment on May 11, 1984. Regarding the delay in filing his claim, appellant explained that

he did not know he could file a hearing loss claim until years later. Appellant indicated that he first reported his condition to a supervisor on May 11, 1984, that he stopped work and his pay stopped on September 30, 1994, the date he retired from federal service.

Appellant submitted a narrative statement dated February 2, 2005, noting that, he started work in the organization and maintenance shop on August 22, 1965 as a mechanic. He worked on wheel and track vehicles and generators which were very noisy. Appellant was not provided with hearing protection during those years. He first joined the employing establishment on November 11, 1954 and was transferred to the maintenance section where he worked on M48 and M69 tanks with engines running without proper mufflers and in “torrents with engine excess plate off.” Appellant also worked close to the ferry line. He related that hearing protection became available in 1986. Appellant noted that background noise in his work area was loud and he was unable to hear the person across the table talking to him. He stated that his biggest problem was constant ringing in his ears. Appellant noted that his hearing problems interfered with his sleep pattern and that his treating physician told him that his hearing problems were due to the lack of hearing protection.

Appellant submitted a March 15, 1994 audiogram performed by the employing establishment. The audiogram also provided the results of audiometric testing performed by the employing establishment on October 29, 1985. Appellant also submitted an unsigned February 7, 1986 audiogram which found normal hearing in the right ear and a high frequency hearing loss in the left ear. Appellant submitted an unsigned December 28, 2000 audiogram listing that he had tinnitus in the right ear for two years and that he complained of ongoing pain in the right ear. Another unsigned treatment note dated January 4, 2001 recommended a magnetic resonance imaging (MRI) scan. An MRI scan report dated December 29, 2000 found no costophrenic angle masses, normal seventh and eighth nerves, no abnormal signal, mass or enhancement and no significant signal abnormalities involving the visualized pons or medulla in appellant’s head. The report also found cavernous sinuses enhanced symmetrically and a suggestion of an aneurysm of the siphonous portion of the right internal carotid artery that probably represented pneumatization of the sphenoid on the right side. There was no mass effect or hemorrhage in the super tentorial region, but there were a few tiny areas of signal increase in the white matter representing a very modest small vessel ischemic change. A January 12, 2001 magnetic resonance angiogram (MRA) of appellant’s neck and head was normal. There was no evidence of an aneurysm arising off the intracranial portion of the right internal carotid artery.

On June 6, 2005 the Office requested that an Office medical adviser review the audiograms of record and determine whether appellant sustained any hearing loss prior to his retirement from the employing establishment on September 30, 2004. On June 7, 2005 an Office medical adviser compared the results of the employing establishment’s March 15, 1994 and January 29, 1985 audiograms and found no evidence of a work-related hearing loss.¹

By decision dated June 13, 2005, the Office denied appellant’s hearing loss claim on the grounds that it was not timely filed pursuant to 5 U.S.C. § 8122. The Office found that his date

¹ The Board notes that it appears the Office medical adviser inadvertently stated that the employing establishment performed an audiogram on January 29, 1985 rather than on October 29, 1985 as there is no January 29, 1985 audiogram contained in the case record.

of injury was May 11, 1984 and that his claim for compensation was filed on January 28, 2005. The Office stated that appellant should have been aware of a relationship between his employment and the claimed hearing loss condition by May 11, 1987. The Office further found that the evidence of record did not support a finding that appellant's immediate supervisor had actual knowledge of the injury within 30 days of the date of injury.

LEGAL PRECEDENT

Under the Act,² as amended in 1974, a claimant has three years to file a claim for compensation.³ Section 8122(a) of the Act provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.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.⁵ 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 know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.⁶ The Board has held that, 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.⁷ Also, a claim would be regarded as timely under section 8122(a)(1), if the immediate supervisor, another employing establishment official or an employing establishment physician or dispensary had actual knowledge of the alleged employment-related injury within 30 days.⁸ This provision removes the bar of the three-year time limitation if met.⁹ The knowledge must be such as to put the immediate supervisor reasonably on notice of appellant's injury.¹⁰ 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. § 8119.¹¹

The Board has held that a program of annual audiometric examination conducted by an employing establishment in conjunction with an employee testing program is sufficient to

² 5 U.S.C. §§ 8101-8193.

³ *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dotson*, 47 ECAB 253 (1995); *see* 20 C.F.R. § 10.101(b).

⁴ 5 U.S.C. § 8122(a).

⁵ *Duet Brinson*, *supra* note 3.

⁶ *Larry E. Young*, 52 ECAB 264 (2002); *Duet Brinson*, *supra* note 3; *see also Leo Ferraro*, 47 ECAB 350 (1996).

⁷ *See Larry E. Young*, *supra* note 7; *Garyleane A. Williams*, 44 ECAB 441 (1993); *Charlene B. Fenton*, 36 ECAB 151 (1984).

⁸ 5 U.S.C. § 8122(a)(1); *Larry E. Young*, *supra* note 7; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

⁹ *Hugh Massengill*, 43 ECAB 475 (1992).

¹⁰ *Kathryn A. Bernal*, 38 ECAB 470 (1987).

¹¹ 5 U.S.C. §§ 8122(a)(1); 8122(a)(2).

constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury.¹² The Office procedure manual, interpreting section 8122(a) of the Act, states:

“In an agency, in connection with a recognized environmental hazard, has an employee testing program and a test shows that employee to have positive findings this should be accepted as constituting actual knowledge. For example, an agency where employees may be exposed to hazardous noise levels may give annual hearing tests for exposed employees. A hearing loss identified on such a test would constitute actual knowledge on the part of the agency of a possible work injury.”¹³

ANALYSIS

In this case, appellant filed a claim for compensation on April 4, 2005 alleging that on May 11, 1984 he became aware that his hearing loss was due to his exposure to loud noise in his federal employment. The record establishes that his last exposure to the implicated work factor was September 30, 1994, when he retired from his federal employment. The time limitation began to run on September 30, 1994 the date appellant was last exposed to the employment condition which he alleged caused his hearing loss. Since he did not file his claim for occupational disease until April 4, 2005, the Board finds that it was not filed within the three-year time limitation period.

As noted above, appellant’s claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor, another employing establishment official or an employing establishment physician or dispensary had actual knowledge of the injury within 30 days of his last exposure to noise *i.e.*, within 30 days of September 30, 1994.¹⁴ The Board finds that, while appellant’s Form CA-2 indicated that he first reported his hearing loss condition to his supervisor on May 11, 1994 this statement is, in and of itself, insufficient to establish that his supervisor was placed on notice. He did not submit evidence to establish that his supervisor, another employing establishment official or an employing establishment physician or dispensary, had actual knowledge of his claimed employment injury within 30 days after the date of his last exposure to the implicated employment factor.

Appellant submitted an unsigned February 7, 1986 audiogram which found normal hearing in the right ear and a high frequency hearing loss in the left ear. He also submitted an unsigned December 28, 2000 audiogram which found that he had tinnitus in the right ear for two years. However, these audiograms and treatment notes were from appellant’s private physicians, not an employing establishment physician as part of a hearing conservation program. Therefore, they do not provide any support for a finding that the employing establishment had actual

¹² See *James A. Sheppard*, 55 ECAB ____ (Docket No. 03-692, issued May 5, 2004); *Joseph J. Sullivan*, 37 ECAB 526, 527 (1986).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6(c) (March 1993).

¹⁴ See 5 U.S.C. § 8122(a)(1); Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 2.801(3); *Larry E. Young*, *supra* note 7.

knowledge of the injury. Further, the audiograms and treatment note do not address whether appellant's hearing loss was caused by his noise exposure while working at the employing establishment.¹⁵ The Board finds that the February 7, 1986 audiogram and December 28, 2000 audiogram and treatment note are insufficient to establish that the employing establishment had actual knowledge of appellant's claimed hearing loss within 30 days of September 30, 1994.

A January 4, 2001 treatment note recommended an MRI scan, obtained on December 29, 2000 and January 12, 2001. These diagnostic tests do not address the issue of whether appellant sustained an employment-related hearing loss and do not establish knowledge on the part of the employing establishment.

The Board finds that the record does not establish that appellant provided written notice of his hearing loss condition to his supervisor within 30 days pursuant to section 8119.¹⁶

Appellant submitted an audiogram performed by the employing establishment on March 15, 1994 which found that he sustained a bilateral hearing loss, but there is no indication that it was part of an annual testing program for employees exposed to hazardous noise.¹⁷ Further, an Office medical adviser compared the employing establishment's March 15, 1994 audiogram with a previous audiogram performed by the employing establishment on October 29, 1985 and found that appellant did not sustain a work-related hearing loss. The Board finds that the employing establishment did not have constructive knowledge of a possible employment-related hearing loss.

Section 8122(d)(3) of the Act¹⁸ provides that, time limitations for filing a claim "do not run against any individual whose failure to comply is excused by the Secretary on the grounds that such notice could not be given because of exceptional circumstances." Appellant's excuse for not filing a timely claim was that he was unaware that he could do so until years later. However, the Board has held that unawareness of possible entitlement,¹⁹ lack of access to information²⁰ and ignorance of the law or of one's obligations under it²¹ do not constitute exceptional circumstances that could excuse a failure to file a timely claim.²² Appellant has not established that he could not file a timely claim due to exceptional circumstances as that term is

¹⁵ An employee must show not only that his immediate supervisor knew that he was injured, but also that he knew or reasonably should have known of an on-the-job injury. *See, e.g., Charlene B. Fenton*, 36 ECAB 151 (1984).

¹⁶ *See cases cited, supra* note 13; Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 2.801.6(c).

¹⁷ The existence of annual audiograms, without evidence that appellant was participating in a hearing testing program as outlined in the procedure manual, is insufficient to put the immediate supervisor on notice of an employment-related hearing loss. *See Kathryn A. Bernal*, 38 ECAB 470 (1987).

¹⁸ 5 U.S.C. § 8122(d)(3).

¹⁹ *Roger W. Robinson*, 54 ECAB ____ (Docket No. 03-348, issued September 30, 2003).

²⁰ *Kathryn L. Cornett (Elmer Cornett)*, 54 ECAB ____ (Docket No. 03-989, issued September 23, 2003).

²¹ *George M. Dickerson*, 34 ECAB 135 (1982).

²² *Michael Thomas Plante*, 44 ECAB 510 (1993).

used in section 8122(d)(3) of the Act. The Board finds that appellant's failure to timely file his claim within three years after his retirement on September 30, 1994 precludes him from seeking compensation.

CONCLUSION

The Board finds that the Office properly denied appellant's hearing loss claim on the grounds that it was not timely filed within the applicable time limitation provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board