

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

MARVIN J. SHOLLENBERGER, Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Walla Walla, WA, Employer**

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**Docket No. 05-346
Issued: June 8, 2005**

Appearances:
Marvin J. Shollenberger, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 23, 2004 appellant filed a timely appeal from the October 27, 2004 merit decision of the Office of Workers' Compensation Programs, which modified a May 26, 2004 decision to reflect the denial of 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.

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 January 28, 2004 appellant, then a 74-year-old retired office worker, filed an occupational disease claim alleging that his hearing loss was causally related to noise exposure in his federal employment. He related his hearing loss to his employment in 1975. Appellant

stated that, in the early days of his employment, he worked around earth moving equipment as a construction surveyor and later as an inspector for the Department of the Interior, Bureau of Reclamation and then the employing establishment. He worked 12-hour shifts on a dredging rig where he was exposed to severe high-pitched noise from diesel powered engines. Appellant was never informed about wearing earplugs or the potential for hearing problems. According to the employing establishment, he retired on June 1, 1984.

By letter dated February 17, 2004, the Office requested that the employing establishment submit detailed factual and medical information regarding appellant's noise exposure, the positions held and all medical records pertaining to his hearing or ear problems. By letter of the same date, the Office requested that he submit information regarding testing of his hearing at the employing establishment, his exposure to noise at work and in his hobbies, the date he first noticed his hearing loss and its relationship to his employment, whether he provided written notification of his hearing loss prior to February 5, 2004, filed any previous claims for hearing loss or ear problems and received medical treatment for hearing loss or ear problems within 30 days. Appellant did not respond within the allotted time period.

In a March 4, 2004 letter, the employing establishment stated that specifics about appellant's career could not be ascertained and that his claim would have to largely depend on his statement. It indicated that, in the early years of appellant's employment, he worked around heavy construction sites during the construction of hydroelectric dams and locks, fish hatcheries and other large civil works projects. The employing establishment could substantiate that appellant was most likely exposed to high noise levels exceeding 85 decibel average while working as a surveyor and construction inspector and that he was not afforded hearing protection. The employing establishment noted a 1977 audiogram which revealed that appellant had already incurred some substantial hearing loss between 2,000 hertz (Hz) and 6,000 Hz. The employing establishment also noted that during the latter half of appellant's career from 1969 through 1984, he worked primarily in an office setting free from excessive noise exposure.

The employing establishment submitted appellant's service record card which indicated that he was assigned office duty in 1968 and thereafter he worked in the construction field periodically. The employing establishment also submitted a medical report with an illegible date in the 1950s from a physician who noted, among other things, evidence that appellant had disease or injury in his right and left ears. An April 22, 1958 medical report of Dr. Albert V. Mills, a general practitioner, indicated that appellant had did not have any evidence of disease or injury of his right and left ears. The 1977 audiogram indicated testing of the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibels losses of 15, 10, 65 and 85, respectively for a total of 175 decibels. Testing of the left ear at the same above-noted frequency levels, revealed decibel losses of 10, 10, 70 and 85, respectively, for a total of 185 decibels.

By decision dated May 26, 2004, the Office found the evidence of record insufficient to establish that appellant sustained hearing loss while in the performance of duty. The Office stated that appellant did not submit the necessary factual and medical evidence sufficient to establish his claim.

The Office received a July 16, 2004 letter from the employing establishment which noted appellant's exposure to noise from 1951 through 1968.

In an August 9, 2004 letter, appellant requested reconsideration and provided a description of his noise exposure while working at the Bureau of Reclamation from 1951 through 1958 and at the employing establishment from 1958 until 1968. Although he was assigned to office duty, his supervisor was aware of his construction survey and inspection experience and gave him assignments to fill in as an extra inspector during staff shortages. He noted that at no time did the employing establishment express any caution about hearing injuries. Appellant accepted the inherent noise level as a condition of employment and noted that an inspector could not wear earplugs as he was required to stay alert to operate equipment. He became aware of his hearing problem around 1965 and that he tried to hide his condition. Appellant noted that, "[i]n about 1968, I moved into an office job which required frequent telephone discussions and at that time I started getting over my self-denial of the problem." He stated that he had seen many hearing specialists who had concluded that the pattern of his injury could only have occurred with severe noise damage.

By letter dated September 9, 2004, the Office advised appellant to submit additional factual information regarding the filing of his occupational disease claim to determine whether it was timely filed. In a September 14, 2004 letter, he stated that his hearing loss was "a rather subtle happening occurring over a period between about 1951 to 1965 from job[-]related excessive noise exposure while performing part-time construction inspection duties for civil works agencies." He did not report his condition to his supervisors because the change in his condition was so gradual in the beginning that it was barely discernible to him. After 10 years of work as a construction inspector, appellant stated that "it became apparent that I was suffering from a hearing loss but I did not want to accept it." He hid his disability for fear it would hinder his job promotion opportunities. Appellant accepted his hearing loss as a condition of employment and that the employing establishment did not inform him about the potential injury or entitlement to compensation under the Act. He noted that it was not until two years ago that "I [saw] information by newspaper advertisements that a job[-]related noise injury was claimable under workers['] compensation." He concluded that his failure to timely file his claim under section 8119 of the Act was due to the employing establishment's failure to provide information which constituted circumstances beyond his control.

In a decision dated October 27, 2004, the Office denied appellant's hearing loss claim on the grounds that it was not timely filed. The Office found that his last federal employment noise exposure occurred from 1951 to 1968 and that he worked without exposure to noise until his voluntary retirement on June 1, 1984. As the claimed period of appellant's last exposure to noise occurred before 1974, the Office found that he failed to file his claim within one year of the date he became aware or reasonably should have been aware of his hearing loss and he did not file his claim within five years after his alleged injury pursuant to section 8119.

LEGAL PRECEDENT

Where an employee has sustained a loss of hearing as a result of excessive noise at work over a period of time, the date of injury is determined to be the date of the last noise exposure that adversely affected his hearing.¹

The Act² 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 United States has not resulted from such failure.³ The test for whether sufficient cause or reasons was shown to justify waiver of the one-year time 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.⁴

ANALYSIS

In this case, appellant was exposed to excessive noise from 1951 until 1968 when he was assigned to work in an office setting. However, he occasionally filled in as an extra inspector during staff shortages. Appellant retired from the employing establishment on June 1, 1984. Inasmuch as the record indicates that appellant was exposed to work-related noise at least until 1968, the Board finds that year to be the date of injury.

Appellant filed a claim for his loss of hearing on January 28, 2004. He initially stated that he first realized his hearing loss was work related in 1975. Appellant later stated that his hearing loss was due to work-related noise exposure from 1951 to 1965. He stated that he accepted the “noise injury potential as a condition of employment” while working at the employing establishment and the employing establishment did not inform him about this potential injury and entitlement to compensation under the Act. Appellant noted that he did not report his condition to his supervisors because the change in his condition was initially gradual as it was barely discernible to him. He further stated that after working 10 years as a fill-in construction inspector “it became apparent that I was suffering a hearing loss but I did not want to accept it” until 1968 when “I moved into an office job which required frequent telephone discussions and at that time I started getting over my self-denial of the problem.” Appellant’s contention that he did not file his claim in a timely manner because he did not know it was possible until “I [saw] information by newspaper advertisements that a job[-]related noise injury

¹ *Solomon R. Stone*, 32 ECAB 150, 151 (1980).

² 5 U.S.C. § 8101.

³ *Dorothy L. Sidwell*, 36 ECAB 699, 706 (1985); 5 U.S.C. § 8122(a)(c).

⁴ *Id.*

was claimable under workers' compensation" is not persuasive. 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.⁵ Further, the Board has held that neither failure of the employing establishment to assist a claimant in filing for compensation, nor the claimant's ignorance of the possible entitlement to compensation is sufficient cause for waiving the one-year time limitation period.⁶

The Board finds that appellant should have been aware of his hearing loss and its relationship to work within one year of 1968, when he was last exposed to work-related noise. By his own admission, he was aware of the relationship between his hearing loss and employment-related noise exposure since at least 1968, yet he did not report this condition to his supervisor prior to leaving federal employment on June 1, 1984. The employing establishment stated that appellant was most likely exposed to high noise levels during his employment. Since appellant's claim was not filed until January 28, 2004, it was not filed within the one-year period of limitations applicable to this case.⁷

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.⁸

CONCLUSION

Based on the foregoing reasons, the Board finds that appellant has not established that his occupational disease claim for hearing loss was not filed within the applicable time-limitation provisions of the Act.

⁵ See *Anthony J. Pusateri*, 36 ECAB 283, 286 (1984); *Union Small*, 25 ECAB 275 (1974).

⁶ *Cecile Cormier (Edmond L. Cormier)*, 48 ECAB 436 (1997); *Francis B. Burgess*, 32 ECAB 702, 707 (1981).

⁷ See *Francis B. Burgess*, *supra* note 6; *Wallace A. Vaught*, 30 ECAB 291 (1978).

⁸ *Gary W. Hudiburgh, Jr.*, 37 ECAB 423, 425 (1986).

ORDER

IT IS HEREBY ORDERED THAT the October 27 and May 26, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 8, 2005
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member