

FACTUAL HISTORY

On October 20, 2004 appellant, then a 61-year-old former laborer, filed an occupational disease claim alleging that he sustained hearing loss in the performance of duty. He indicated on his claim form that he first became aware of his condition and its relationship to his federal employment on October 4, 1971. An official with the employing establishment indicated that appellant was last exposed to the employment conditions alleged to have caused his condition on January 27, 1971.

The record contains audiograms from the employing establishment dated 1968 to 1970. The audiograms reveal no ratable hearing loss in the left or right ear. In an audiological assessment dated June 29, 2000, an audiologist diagnosed tinnitus and sensorineural hearing loss and recommended hearing aids.

By letter dated January 25, 2005, an official with the employing establishment controverted appellant's claim on the grounds that it was not timely filed. The official noted that appellant was last exposed to noise at the employing establishment on January 27, 1971 and that his audiograms "document no hearing loss or shift in hearing to signify evidence of injury."

By letter dated February 8, 2005, the Office requested additional information from appellant. In a response received February 28, 2005, he indicated that he did not remember his supervisor informing him of a change in his hearing and noted that he was in the military from 1961 to 1967.

The Office referred appellant to Dr. George Godwin, a Board-certified otolaryngologist, for an evaluation to determine whether he had an employment-related loss of hearing. Based on Dr. Godwin's report, by decision dated May 4, 2005, the Office denied appellant's claim on the grounds that the medical evidence did not establish that his hearing loss was causally related to factors of his federal employment.

On May 10, 2005 appellant requested an oral hearing. At the hearing, held on September 23, 2005, appellant noted that at the time he stopped working for the employing establishment he had difficulty with his hearing but believed that any hearing loss might be due to his military service. He related that his hearing worsened from 1971 onwards and that he sought treatment for his hearing loss with the Veterans Administration (VA) around 1981. Appellant related that he continued to seek treatment for his hearing loss at the VA hospital but "they kept telling me that it was [not] caused by anything that I was exposed to in the military." He indicated that he did not file a claim for his hearing loss earlier because he was unaware of the program. Appellant stated:

"I was [not] sure because of the fact that I had been in the military, and I heard loud noises in the military, you know, I was in combat for three years. I [am] thinking, well, I [have] been out of the military since [19]67, so it should have started thereafter. This started after the [employing establishment]. But all day, all during my shift, all I could hear was loud noises, and pounding and stuff, all the noise, the sound that was on. I came to the conclusion that [is] where it was from."

By decision dated November 18, 2005, the hearing representative affirmed the Office's May 4, 2005 decision, modified to reflect that appellant did not timely file a claim for benefits under the Act.²

LEGAL PRECEDENT

In cases of injury prior to September 7, 1974, the Act³ provides that a claim for compensation must 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.⁴ 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 reasons in explanation thereof and material prejudice to the interest of the United States has not resulted from such failure.⁵

The test for whether sufficient cause or reason 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 ordinary prudent person would have exercised in protecting his right under the same or similar circumstances.⁶ The five-year time limitation is a maximum mandatory period, which neither the Office nor the Board has the power to waive.⁷

In addition, for injuries occurring between December 7, 1940 and September 6, 1974, Office procedure provide that written notice of the injury should be given within 48 hours as specified in section 8119 of the Act,⁸ but this requirement will be waived if the employee filed written notice within one year after the injury or if the immediate superior had actual knowledge of the injury within 48 hours after the occurrence of the injury.⁹

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 which adversely affected his hearing.¹⁰ In an occupational disease claim, the time limitation does not begin to run until the claimant is aware, or reasonably should be aware, of the causal relationship between his employment and the compensable disability. If exposure to the

² The hearing representative utilized sections of the Act relevant to claims for injuries after September 7, 1974.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Eugene L. Turchin*, 48 ECAB 391, 395 (1997).

⁵ *Edward Lewis Maslowski*, 42 ECAB 839 (1991).

⁶ *Roseanne S. Allexenberg*, 47 ECAB 498, 500 (1996).

⁷ *Albert K. Tsutsui*, 44 ECAB 1004, 1008 (1993).

⁸ 5 U.S.C. § 8119(b).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(b)(1) (March 1993).

¹⁰ *Solomon R. Stone*, 32 ECAB 150 (1980).

implicated employment factors extends beyond the date of such awareness, the time limitation begins to run on the date of last exposure.¹¹

ANALYSIS

Appellant was last exposed to the factors to which he attributed his hearing loss on January 27, 1971. When an employee sustains hearing loss due to noise exposure at work over a period of time, the date of injury is determined to be the date of the last noise exposure which adversely affected his hearing.¹² Appellant's date of injury, consequently, is January 27, 1971, the date that he stopped working for the employing establishment. The time limitation for filing his claim, however, does not begin to run until he was aware, or reasonably should have been aware, of the causal relationship between his employment and the compensable disability. Appellant indicated on his October 20, 2004 claim form that he first became aware of his hearing loss and its relationship to his federal employment on October 4, 1971. At the hearing, he related that he began having problems with his hearing after he stopped work with the employing establishment in January 1971. He indicated that he initially believed that his hearing problems might be related to his prior military service and sought treatment at the Veterans Administration in 1981. Appellant stated that the VA physicians told him that his hearing loss was not related to military service. He also indicated that he was aware that his hearing loss began after his work for the employing establishment rather than after his military service. The Board thus finds that the time limitation period began to run in 1981 as he reasonably should have been aware of a possible relationship between his hearing loss and his federal employment after he was informed by the VA physicians that his hearing loss was not due to his military service. Appellant did not file a claim until 2004, and thus his claim is clearly outside the one-year limitation period. Additionally, appellant is not entitled to waiver of the one-year filing requirement because his claim was not filed within five years of the claimed hearing loss.

Appellant's date of injury of January 27, 1971 falls into the category of injuries occurring between December 7, 1940 and September 6, 1974, in which the Office procedure manual indicates that written notice of the injury should be given within 48 hours as specified in section 8119 of the Act.¹³ There is, however, no evidence that appellant filed written notice within one year after the injury as specified in section 8119. Moreover, the record is devoid of any evidence that appellant's immediate supervisor had actual knowledge of any hearing loss within 48 hours after its occurrence. The audiograms from the employing establishment dated 1968 to 1970 revealed no significant hearing loss and thus were insufficient to put the employing establishment on notice of the alleged injury. Consequently, appellant has not established that his claim was filed within the applicable time limitation provisions of the Act. The Board has held that ignorance that a disability is compensable is insufficient cause for waiving the one-year limitation.¹⁴

¹¹ See *Peter S. Elliott*, 51 ECAB 627 (2000).

¹² See *Solomon R. Stone*, *supra* note 10.

¹³ 5 U.S.C. § 8119(b).

¹⁴ *Cecile Cormier*, 48 ECAB 436 (1997).

CONCLUSION

The Board finds that appellant did not establish that his claim was filed within the applicable time limitation provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 18, 2005 is affirmed and the decision dated May 4, 2005 is affirmed, as modified by the hearing representative to reflect that appellant's claim was untimely filed.

Issued: April 17, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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