United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 06-2015**
	)	**Issued: December 14, 2006**
DEPARTMENT OF THE ARMY, ABERDEEN ARMY PROVING GROUND, Aberdeen, MD, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 29, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated May 31, 2006 which denied his hearing loss claim as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant filed a timely claim for compensation under the Federal Employees' Compensation Act.

FACTUAL HISTORY

On June 22, 2005 appellant, then a 52-year-old supervisory operations research analyst, filed a Form CA-2, occupational disease claim, alleging that exposure to noise during his federal employment caused severe bilateral hearing loss and tinnitus. He first received treatment for the condition in 1992 and his last exposure was in 1995. Appellant was not aware that he could file

a claim. By letters dated July 6, 2005, the Office requested that the employing establishment furnish information regarding appellant's noise exposure and informed him of the evidence needed to support his claim.

In an undated statement, appellant advised, "After realizing how significant hearing loss was in the early 90's, I started thinking about all the loud noises I was around at different times in my career. That's when I thought that my employment contributed to my hearing loss." He also submitted personnel documents showing that he began his federal employment in 1975, continuing to the present. In a report dated October 7, 1998, Dr. C.W. Gehris, Board-certified in otolaryngology, noted the history of employment-related noise exposure and diagnosed tinnitus and sensorineural hearing loss, possible noise-induced hearing loss. He recommended audiometric evaluation. Audiometric test results dated October 9, 1998 and March 21, 2003 demonstrated bilateral hearing loss. A July 18, 2005 test was done with hearing aids. In a July 20, 2005 letter, appellant advised that "After being examined by an ear, nose and throat doctor in September 1992, I realized that my hearing loss was related to my exposure at work. I had seen him because of an auto accident and he indicated that my hearing loss was not related to the accident, but due to exposure to loud noise." He stated that his last exposure was in December 1995.

The employing establishment submitted an undated statement which described appellant's noise exposure at work from 1975 until the date of last exposure of December 1, 1995.[1] By decision dated May 31, 2006, the Office denied the claim on the grounds that it had not been timely filed.

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.[2] In cases of injury on or after September 7, 1974, section 8122(a) of the Act[3] provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless:

> "(1) the immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death; or
>
> "(2) written notice of injury or death as specified in section 8119 was given within 30 days."[4]

[1] The noise exposure was from observing land mine testing from 1975 to 1985 and helicopter transportation between Aberdeen, Maryland and Northern Virginia from 1987 to 1995.

[2] *Charles Walker*, 55 ECAB 238 (2004); *see Charles W. Bishop*, 6 ECAB 571 (1954).

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8122(a).

Section 8119 provides that a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury, or in the case of death, the employment factors believed to be the cause; and be signed by and contain the address of the individual giving the notice.[5] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[6]

Section 8122(b) provides that the time for filing in latent disability cases 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, and the Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.[7] For actual knowledge of a supervisor to be regarded as timely filing, an employee must show not only that the immediate superior knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.[8]

In a case of occupational disease, 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 or she 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 the employee does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[9] Where the employee continues in the same employment after he or she reasonably should have been aware that he or she has a condition which has been adversely affected by factors of federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.[10] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[11]

In interpreting section 8122(a)(1) of the Act, the Office procedure manual states that if the employing agency gives regular physical examinations which might have detected signs of

[5] 5 U.S.C. § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

[6] *Laura L. Harrison*, 52 ECAB 515 (2001).

[7] *Delmont L. Thompson*, 51 ECAB 155 (1999).

[8] 5 U.S.C. § 8122(b); *Duet Brinson*, 52 ECAB 168 (2000).

[9] *Larry E. Young*, *supra* note 5.

[10] *Id.*

[11] *Debra Young Bruce*, 52 ECAB 315 (2001).

illness, such as hearing tests, it should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results.[12]

ANALYSIS

The Office found that appellant had not filed a timely claim for compensation under the Act. When he filed his claim on June 22, 2005, appellant indicated that he was first aware of his hearing loss in 1992. In personal statements, he advised that he was aware of its relationship to his employment at that time. Appellant therefore clearly maintained that in 1992 he was aware of a relationship between his hearing loss and factors of his federal employment,[13] and 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 employment, such awareness is competent to start the running of the time limitations period even though he does not know the precise nature of the impairment or whether the ultimate result of such adverse effect would be temporary or permanent.[14]

However, if an employee continues to be exposed to injurious working conditions, the time limitation begins to run on the date of the last exposure.[15] Therefore, the time for filing appellant's claim did not begin to run until December 1995, the date both he and the employing establishment was advised of his last employment-related noise exposure. Accordingly, the three-year statute of limitations would have expired no later than December 30, 1998, and appellant's June 22, 2005 claim for compensation is barred by this exception to the statute of limitations.[16]

The record also does not support that appellant's "immediate superior had actual knowledge of the injury or death within 30 days."[17] There is no evidence of record that establishes that appellant's supervisor had actual knowledge of any injury within 30 days or that written notice of the injury was given within 30 days. There is nothing in the record to indicate that appellant participated in an employing establishment hearing surveillance program, and both the 1998 and March 2003 audiometric tests were done by an audiologist at Dr. Gehris' clinic. Thus, this is not a case where the employing establishment had constructive knowledge of an employment-related hearing loss, *e.g.*, by performing routine audiometric testing.[18] A claimant has to show that his supervisors knew or reasonably should have known that this condition was

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6(c) (March 1993); *see James A. Sheppard*, 55 ECAB 515 (2004).

[13] *Larry E. Young*, *supra* note 5.

[14] *Richard Narvaez*, 55 ECAB 661 (2004).

[15] *Larry E. Young*, *supra* note 5.

[16] *Supra* note 4.

[17] 5 U.S.C. § 8122(a)(1); *see also Duet Brinson*, *supra* note 8.

[18] *Compare James A. Sheppard*, *supra* note 12.

caused by his employment.[19] In this case, there is no probative evidence to establish that appellant's superior had constructive knowledge sufficient to be reasonably put on notice that his hearing loss was work related within 30 days of December 30, 1995, the date of last exposure. Accordingly, appellant's claim, which is clearly outside the three-year time limitation period, is untimely.[20]

CONCLUSION

The Board finds that appellant's claim is barred by the applicable time limitation provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 31, 2006 be affirmed.[21]

Issued: December 14, 2006
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[19] *See David R. Morey*, 55 ECAB 642 (2004).

[20] *See Richard Narvaez, supra* note 14.

[21] The Board notes that the May 31, 2006 decision contains a factual error, stating that appellant retired in 1995 when he continues to work. The Board finds this error harmless as it does not affect the outcome in this case. *See generally Lan Thi Do*, 46 ECAB 366 (1994).