

FACTUAL HISTORY

On November 16, 2004 appellant, then a 72-year-old custodian, filed an occupational disease claim, Form CA-2, alleging that he sustained a low frequency hearing loss due to his job at the employing establishment. He indicated that he first became aware of his hearing loss in 1991 and its possible causal relationship to his employment on November 16, 2004. Appellant submitted copies of audiometric test results dated 1981 to 2004. His last hearing test at the employing establishment was September 6, 1989 and did not document any hearing loss. Appellant retired from his job at the employing establishment on September 30, 1997. The employing establishment submitted a statement dated August 23, 2005 in which it was noted that since 1973 state of the art earplugs had been provided to employees for hearing protection and use was mandatory in noisy areas of the employing establishment.

By letter dated November 4, 2005, the Office provided appellant with a copy of an employing establishment letter in which it challenged his hearing loss claim on the grounds that his claim was not timely filed and he did not have a ratable hearing loss at the time he last worked. The Office allotted appellant 30 days in which to provide additional evidence in support of his claim. Appellant responded by alleging that he had friends who filed compensation claims which were accepted as timely.

By decision dated January 26, 2006, the Office denied appellant's claim on the grounds that it was not timely filed.

Appellant requested reconsideration and submitted the names of individuals at the employing establishment who had accepted claims for hearing loss. He indicated that when he retired from the employing establishment he was not aware of the time limitations for filing a compensation claim.

By decision dated February 21, 2006, the Office hearing representative denied appellant's request for reconsideration on the grounds that the evidence was not sufficient to warrant a review of his claim on the merits.

LEGAL PRECEDENT -- ISSUE 1

In cases of injury on and after September 7, 1974, 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.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 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 exposure.³

¹ 5 U.S.C. § 8122(a).

² 5 U.S.C. § 8122(b).

³ *Roger W. Robinson*, 54 ECAB 846 (2002).

ANALYSIS -- ISSUE 1

Appellant indicated that he became aware of his hearing loss in 1991. His last exposure to factors of employment was September 30, 1997, his date of retirement. Therefore, the time limitations period began to run no later than September 30, 1997 and ended September 30, 2000. Since appellant did not file a claim until November 16, 2004, his claim was filed outside the three-year time limitation period which ended September 30, 2000. Although appellant has alleged that he only became aware of the cause of his hearing loss in 2004, the Board finds that he reasonably should have been aware of his hearing loss in 1997, his last date of exposure to noise at the employing establishment since he indicated that he was aware of a hearing loss as early as 1991, he worked in an area where noise levels were high and he wore hearing protection at work since 1973. To be timely, his claim should have been filed within three years of his last exposure, but it was not filed until seven years later on November 16, 2004.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate superior or another employing establishment official had actual knowledge of the injury within 30 days of the date of injury. Therefore his superior would need actual knowledge of his claimed injury by October 30, 1997, *i.e.*, within 30 days of September 30, 1997.⁴ The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.⁵ There is no evidence that appellant's immediate superior or another employing establishment official had actual knowledge of his claimed injury within 30 days of the date of injury. His last hearing test at the employing establishment was September 6, 1989 and did not document any hearing loss which might indicate that appellant's superiors were aware of a hearing loss. Appellant's claim would still be deemed timely if written notice of injury or death was provided within 30 days pursuant to 5 U.S.C. § 8119.⁶ However, there is no indication that appellant provided written notice of injury prior to November 16, 2004, the date he filed his Form CA-2.

⁴ *Larry E. Young*, 52 ECAB 264 (2001). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (February 2000).

⁵ *Kathryn A. Bernal*, 38 ECAB 470 (1987).

⁶ 5 U.S.C. §§ 8122(a)(1), 8122(a)(2).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act⁷ vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

“The Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁸ When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.⁹

ANALYSIS -- ISSUE 2

In support of his request for reconsideration, appellant submitted the names of individuals at the employing establishment whose claims for hearing loss were accepted by the Office. However, the claims of other individuals have no bearing on the issue of whether appellant's claim was timely filed. Therefore this evidence does not constitute relevant and pertinent evidence not previously considered by the Office. Appellant indicated that when he retired from the employing establishment he was not aware of the time limitations for filing a compensation claim. However, the Board has held that unawareness of possible entitlement, lack of access to information and ignorance of the law or one's rights and obligations under it do not constitute exceptional circumstances that would excuse a failure to timely file a claim.¹⁰ Consequently, appellant's lack of knowledge of timeliness requirements is not sufficient to substantiate that his claim was timely filed on November 16, 2004. There are no “exceptional circumstances” in this case within the meaning of section 8122(d)(3)¹¹ which would permit the Office to excuse appellant's failure to comply with the time limitation. Therefore, appellant's argument that he was not aware of the time limitations for filing a claim in 1997 does not constitute a relevant legal argument not previously considered by the Office.

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(2).

⁹ 20 C.F.R. § 10.608(b).

¹⁰ *Roger W. Robinson, supra* note 3.

¹¹ 5 U.S.C. § 8122(d)(3).

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument or submit relevant and pertinent evidence not previously considered by the Office. Therefore, the Office properly denied his claim.

CONCLUSION

The Board finds that appellant failed to establish that his hearing loss claim was timely filed pursuant to section 8122 of the Act. The Board further finds that the Office properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 21 and January 26, 2006 are affirmed.

Issued: July 21, 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