United States Department of Labor
Employees' Compensation Appeals Board

ELEANOR T. HASEBE, Appellant	)	
and	)	**Docket No. 06-453**
	)	**Issued: May 10, 2006**
DEPARTMENT OF DEFENSE, INFORMATION SYSTEMS AGENCY, Pearl Harbor, HI, Employer	)	

Appearances:
Eleanor T. Hasebe, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 23, 2005 appellant filed a timely appeal of September 2 and December 1, 2005 merit decisions of the Office of Workers' Compensation Programs, denying her claim for a hearing loss on the grounds that it was not timely filed under 5 U.S.C. § 8122. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the timeliness issue.

ISSUE

The issue is whether the Office properly denied appellant's occupational disease claim for a hearing loss on the grounds that it was not timely filed under 5 U.S.C. § 8122.

FACTUAL HISTORY

This case has previously been on appeal before the Board. In a decision dated December 17, 2004, the Board found that the case was not in posture for a decision as to whether appellant had filed a timely occupational disease claim for a hearing loss under 5 U.S.C. § 8122. The Board remanded the case for further development regarding the issue of whether the

employing establishment had actual notice of an occupational hearing loss.[1] The facts and history contained in the prior decision are incorporated by reference. The facts and history relevant to the present issue are set forth.

On January 30, 2003 appellant, then a 75-year-old computer operator, filed an occupational disease claim alleging that on January 1, 1969 she first became aware of a hearing loss to both ears and she first realized that her condition was caused by factors of her federal employment. Appellant stated that she was exposed to noise at the employing establishment. Appellant did not file a claim within 30 days after realizing on January 1, 1969 that her hearing loss was work related because it only recently came to her attention that she could file a claim for her condition. Appellant retired from the employing establishment effective November 3, 1995 and ceased to be exposed to the implicated employment factors by that date.

Following the Board's December 17, 2004 decision, in a May 26, 2005 letter, the Office requested that the employing establishment submit audiograms that appellant mentioned were performed in 1969, 1970, 1971 and 1984.

On June 9, 2004 the employing establishment informed the Office that it would not be able to submit the requested information because no audiograms could be located and no knowledgeable supervisor possessed the requested information. The employing establishment reported that the records were destroyed and it was only required to keep records for seven years. The employing establishment contended that appellant's claim was not timely filed as it was filed long after she retired. In a June 20, 2005 memorandum, the employing establishment reiterated that it was unable to provide the requested audiograms.

Appellant's attorney submitted a March 18, 1985 document, which indicated that the employing establishment distributed earplugs to appellant.

By decision dated September 2, 2005, the Office denied appellant's claim on the grounds that it was not timely filed. The Office found no evidence establishing that the employing establishment had actual knowledge of her hearing loss condition within 30 days of the date of injury. It found that audiograms performed on May 29, 1990 and December 14, 2002 were not conducted by the employing establishment and were performed seven years after appellant's retirement from federal service. The Office also found that her claim was not filed within three years from the date of her last federal employment exposure to hazardous noise.

In a September 19, 2005 letter, appellant requested reconsideration of the Office's September 5, 2005 decision. She contended that the employing establishment tested the hearing of its personnel in 1969 and they were told that they had some form of hearing loss. Appellant further stated that, after a short period of time, they received "BRAC" notices and their health records must have been lost. She indicated that her entire federal employment consisted of being exposed to hazardous noise from equipment and that her hearing was affected by such exposure. When she retired, she was never told to undergo a hearing test or any other type of examination to ensure she was healthy prior to retirement. Appellant was not aware of the three-year limitation for filing claims. Her former supervisor, Donald L. Bartley, and two coworkers,

[1] Docket No. 04-910 (issued December 17, 2004).

Ken Miyasaki and Frank Hori, received hearing aids due to the government's negligence in failing to protect them from noise exposure.

Appellant submitted an unsigned September 14, 2005 audiogram performed by Aloha Hearing Aid Service, Incorporation, which found that she sustained a bilateral hearing loss. She also submitted Mr. Bartley's September 14, 2005 letter, which indicated that he was her supervisor and that he had known appellant for 30 years. He stated that, while working at the employing establishment, all the data center personnel were given a hearing test because a number of them had experienced trouble hearing due to noise from various machines and support equipment. In 1969, it was determined that they all sustained hearing losses at high pitches and that not long after that, they were given "BRAC" notices and for some unknown reason their health records were lost. He indicated that appellant worked for him in computer operations for a number of years and due to noise from main-frame computers, he had to obtain a special attachment for the telephone so that operators could hear and assist their customers. He filed an occupational disease claim for a hearing loss after learning that he could do so, which was accepted by the Office. Mr. Bartley related that he knew several people who had filed claims for hearing loss and received hearing aids.

By letter dated October 18, 2005, the Office requested that the employing establishment review Mr. Bartley's letter and confirm whether he was appellant's supervisor in 1969 and had knowledge of her industrial hearing loss.

In a June 12, 2003 letter, appellant advised the Office that she was not given the results of audiograms performed in 1969, 1970, 1971 and 1984, but was told that her hearing was growing worse every year. In 1990, her supervisor installed a noise enhancer to amplify the voice of the caller on the telephone and during that same year she had her hearing tested on her own because she did not realize that hearing loss was covered by workers' compensation until she saw an accompanying advertisement regarding such coverage.

In an undated letter, Mr. Bartley stated that appellant's hearing problem was work related. He stated that he was her supervisor from 1987 to 1993, that he was her coworker from 1968 to 1973 and that they both worked under the same conditions involving noisy machines. All personnel at the facility were tested by the employing establishment and found to have sustained hearing loss due to noise exposure. Mr. Bartley related that the government did not provide any protective equipment. He installed an amplifier on the telephone due to noise from machines and to assist employees with their telephone customers.

On November 30, 2005 the employing establishment noted that Mr. Bartley assumed that appellant sustained a hearing loss because he worked with her in 1969 and he had sustained a hearing loss. He did not become her supervisor until 1985 and he never received any data or verbal information regarding her hearing loss. The employing establishment related that Mr. Bartley also assumed that appellant sustained a hearing loss because she used a telephone amplifier and it was always set at a high volume.

By decision dated December 1, 2005, the Office denied modification of the September 2, 2005 decision. The Office found that the September 14, 2005 audiogram and Mr. Bartley's letter

were insufficient to establish that appellant's immediate supervisor had actual knowledge of the work-related hearing loss within 30 days of November 3, 1995.

LEGAL PRECEDENT

In cases of injury on or after September 7, 1974, section 8122(a) of the Federal Employees' Compensation Act states that "an original claim for compensation for disability or death must be filed within three years after the injury or death."[2] Section 8122(b) of the Act provide 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.[3] 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.[4]

The claim would still be regarded as timely under section 8122(a)(1) of the Act if the claimant's 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.[5] This provision removes the bar of the three-year time limitation if met.[6] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.[7] Additionally, section 8122(a)(2) of the Act[8] provides that the claim would be deemed timely if written notice of injury or death was provided within 30 days after the injury pursuant to 5 U.S.C. § 8119.[9]

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 constructively establish actual knowledge of a hearing loss such as to put the immediate

[2] 5 U.S.C. § 8122(a).

[3] 5 U.S.C. § 8122(b).

[4] *Garylean A. Williams*, 44 ECAB 441 (1993).

[5] 5 U.S.C. § 8122(a)(1); *Larry E. Young*, 52 ECAB 264 (2001); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

[6] *Hugh Massengill*, 43 ECAB 475 (1992).

[7] *Kathryn A. Bernal*, 38 ECAB 470 (1987).

[8] 5 U.S.C. § 8122(a)(2).

[9] 5 U.S.C. § 8119(a), (c); *see Gwen Cohen-Wise*, 54 ECAB 732 (2003).

supervisor on notice of an on-the-job injury.[10] The Office procedure manual, interpreting section 8122(a) of the Act, states:

> "If the employing agency gave regular physical examinations, which might have detected signs of illness (for example, x-rays or hearing tests), the agency should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results. [If the claimant was still exposed to employment hazard on or after September 7, 1974 and the agency's testing program disclosed the presence of an illness or impairment, this would constitute actual knowledge on the part of the agency, and timeliness would be satisfied even if the employee was not informed.]"[11]

Section 8122(d)(3) of the Act 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.[12]

ANALYSIS

Appellant filed a claim for compensation on January 30, 2003 alleging that on January 1, 1969 she became aware that she sustained a hearing loss due to her exposure to noise in her federal employment. The record establishes that appellant's last exposure to work factors was on November 3, 1995, when she retired. Since appellant did not file a claim for an occupational disease until January 30, 2003, it was clearly outside the three-year time limitation period, which began to run on November 3, 1995, the date when she retired from the employing establishment and ceased to be exposed to the implicated employment factor.

Appellant's claim would still be regarded as timely under section 8122 of the Act if her immediate supervisor, another employing establishment official or an employing establishment physician or dispensary had actual knowledge of the injury within 30 days of her last exposure to noise on November 3, 1995.[13] The Board finds, however, that the evidence of record does not establish that appellant's supervisor had actual knowledge of the claimed condition within 30 days after her last exposure to the implicated employment factor on November 3, 1995.

While appellant contends that Mr. Bartley, her supervisor, knew about her alleged work-related hearing loss, the evidence does not support her contention that he had actual knowledge of her claimed employment injury within 30 days after November 3, 1995. Mr. Bartley's statements indicate that appellant was exposed to noise while working at the employing establishment and, possibly, sustained a hearing loss based on audiometric testing. However, there is no evidence of record from which to conclude he had actual knowledge of her

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

[11] Federal (FECA) Procedure Manual, *supra* note 5 at 2.801.6(c) (March 1993).

[12] 5 U.S.C. § 8122(d)(3).

[13] 5 U.S.C. § 8122(a)(1); *Larry E. Young*, *supra* note 5; Federal (FECA) Procedure Manual, *supra* note 5.

claimed employment injury within 30 days after the date of her last exposure to the implicated employment factor. He did not state that she told him that she sustained a hearing loss due to work-related noise exposure within 30 days of November 3, 1995. Further, no audiograms administered by the employing establishment were submitted to establish that appellant sustained an employment-related hearing loss. The employing establishment contended that Mr. Bartley only assumed that appellant sustained a work-related hearing loss because he had worked with her and had sustained an employment-related hearing loss. The employing establishment contradicted the time period that he was appellant's supervisor and stated that he never received any data or verbal information regarding her hearing loss. Further, contrary to Mr. Bartley's statement that the employing establishment failed to provide hearing protection, a March 18, 1985 document indicates that the employing establishment distributed earplugs to appellant. The Board finds that Mr. Bartley did not have actual knowledge of appellant's hearing loss within 30 days of her last exposure to noise on November 3, 1995. The record does not establish that appellant provided written notice of her hearing loss condition to her supervisor within 30 days of November 3, 1995 pursuant to section 8119 of the Act.[14]

Appellant contends that the employing establishment tested her hearing in 1969, 1970, 1971 and 1984 and that she was told that her hearing was growing worse. These audiograms were requested by the Office, however, the employing establishment responded that they had been destroyed. The Board finds that appellant has not established that the employing establishment intentionally destroyed the requested audiograms.

Appellant submitted an unsigned September 14, 2005 audiogram, which found that she sustained a bilateral hearing loss. This audiogram, however, was performed by a private audiology clinic, not an employing establishment physician as part of a hearing conservation program. Therefore, it does not provide any support for a finding that the employing establishment had actual knowledge of the injury. This audiogram is irrelevant to whether the employing establishment had constructive knowledge of appellant's claimed hearing loss within 30 days of November 3, 1995.

Appellant's excuse for not filing a timely claim was that she only recently discovered that she could file a claim for her condition. After her retirement, she was never instructed to undergo a hearing test or any examination and was not aware of the three-year limitation for filing a claim. The Board has, however, held that unawareness of possible entitlement,[15] lack of access to information[16] and ignorance of the law or of one's obligations under it[17] does not constitute exceptional circumstances that could excuse a failure to file a timely claim.[18] Appellant has not established that she could not file a timely claim due to exceptional circumstances as that term is used in section 8122(d)(3) of the Act. The Board finds that

[14] 5 U.S.C. § 8119(a), (c); *see Gwen Cohen-Wise*, *supra* note 9.

[15] *Roger W. Robinson*, 54 ECAB 846 (2003).

[16] *Kathryn L. Cornett (Elmer Cornett)*, 54 ECAB 812 (2003).

[17] *George M. Dickerson*, 34 ECAB 135 (1982).

[18] *Michael Thomas Plante*, 44 ECAB 510 (1993).

appellant's failure to timely file her claim within three years after her retirement on November 3, 1995 precludes her from seeking compensation.

CONCLUSION

The Board finds that the Office properly denied appellant's occupational disease claim for a hearing loss on the grounds that it was not timely filed under 5 U.S.C. § 8122.

ORDER

IT IS HEREBY ORDERED THAT the December 1 and September 2, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 10, 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