United States Department of Labor
Employees' Compensation Appeals Board

R.J., Appellant	)	
and	)	**Docket No. 07-456**
	)	**Issued: August 7, 2007**
U.S. POSTAL SERVICE, TERMINAL ANNEX BUILDING, Denver, CO, Employer	)	

Appearances:
Steven D. Scavuzzo, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 8, 2006 appellant timely appealed the May 31, 2006 merit decision of the Office of Workers' Compensation Programs which affirmed the denial of his occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant filed a timely claim pursuant to 5 U.S.C. § 8122.

FACTUAL HISTORY

On November 5, 2001 appellant, then a 47-year-old retired mail handler, filed an occupational disease claim for binaural hearing loss.[1] He was aware of his hearing loss as early as January 1, 1982, but it was not until January 1, 1984 that he first realized the condition was

[1] The employing establishment acknowledged receiving the claim form more than a year later on December 13, 2002.

employment related. Appellant stated that as a mail handler he was exposed to noise from various machines on the workroom floor. He was also exposed to noise from trucks and tractor trailers, moving forklifts and other equipment being moved about in the workplace. Appellant last worked as a mail handler on September 6, 1988.[2]

Appellant claimed that he was informed at work about his hearing loss while still employed as a mail handler. He advised the Office to contact Dr. Donald Olson, an employing establishment physician, to obtain medical records relevant to his hearing loss. Appellant also stated that every three to six months his supervisors told him to report to the employing establishment's medical office for testing. According to him, his employment records documented his hearing difficulties in the workplace.

The employing establishment challenged appellant's claim as untimely filed. The claim (Form CA-2) did not indicate if and when appellant reported his condition to his supervisor. The employing establishment's injury compensation manager, who acknowledged receipt of the claim, indicated that she was first notified of appellant's condition on October 17, 2002.

After additional development of the record, the Office denied the claim on June 18, 2004. It found that the medical evidence did not provide a diagnosis that could be connected to appellant's employment exposure.[3]

Appellant requested a review of the written record. By decision dated June 13, 2005, the Office hearing representative remanded the case for consideration of whether appellant's November 15, 2001 claim was timely. In a decision dated September 30, 2005, the Office denied the claim as untimely filed.[4]

Appellant, with the assistance of counsel, requested a review of the written record. In a letter dated May 3, 2006, counsel advised the Office that he had attempted to obtain copies of appellant's hearing tests from the employing establishment.[5] Appellant's medical records had reportedly been transferred from the employing establishment's Denver medical records facility. Counsel had been referred to the National Archives and Records Administration, National Personnel Records Center in St. Louis, MO and he was awaiting a response on whether

[2] Shortly thereafter he received a disability annuity from the Office of Personnel Management.

[3] Dr. David M. Harris, a Board-certified otolaryngologist and Office referral physician, examined appellant on August 19, 2003 and diagnosed bilateral hearing loss. The left ear was indicative of noise-induced hearing loss. However, Dr. Harris indicated that the right ear loss, which was profound, was possibly partially due to noise exposure, but probably from another cause. The district medical adviser expressed similar doubts about the employment-related nature of appellant's right ear hearing loss. He noted that there were no available audiograms from the time appellant last worked in 1988 or 1989 and recommended obtaining such information for comparison purposes. The employing establishment subsequently advised the Office that it did not have appellant's medical records and that the facility where he previously worked had closed.

[4] Prior to issuing the decision, the Office afforded both appellant and his counsel the opportunity to submit any additional evidence relevant to the issue of timeliness. But the Office did not receive any additional information.

[5] The record also indicates that on at least three separate occasions between March and June 2004, appellant wrote to the employing establishment requesting that he be provided copies of his employee medical records.

appellant's medical records were at that facility. Counsel also submitted a sworn statement from appellant dated April 19, 2006 indicating that he was last exposed to excessive noise in September 1988 and that he had participated in an annual testing program for employees exposed to high noise levels.

On May 8, 2006 the St. Louis National Personnel Records Center advised counsel that the medical records he had requested were not on file at that particular center.

By decision dated May 31, 2006, the Office hearing representative denied appellant's claim as untimely.

LEGAL PRECEDENT

Section 8122(a) of the Federal Employees' Compensation Act provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.[6] A claim filed outside this time frame must be disallowed unless the immediate superior had actual knowledge of the injury or death within 30 days.[7] An otherwise untimely claim will also be considered timely if the immediate supervisor received written notice within 30 days of the date of injury or death.[8]

In a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment.[9] An employee with actual or constructive knowledge of his employment-related condition, who continues to be exposed to injurious working conditions, must file his or her claim within three years of the date of last exposure to the implicated conditions.[10]

ANALYSIS

Appellant was last exposed to the alleged injurious working conditions on September 6, 1988. However, he did not file his occupational disease claim for another 13 years. Appellant has not claimed, nor is there any documentary evidence that he provided his supervisor written notice of his injury within the requisite 30-day time frame. Thus, the only remaining avenue for finding the claim timely is if appellant's supervisor had knowledge of his claimed hearing loss within the applicable timeframe.

[6] 5 U.S.C. § 8122(a) (2000).

[7] The knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury. 5 U.S.C. § 8112 (a)(1).

[8] 5 U.S.C. § 8122(a)(2) (the written notice provided must be in accordance with 5 U.S.C. § 8119).

[9] 5 U.S.C. § 8122(b).

[10] *E.g., James A. Sheppard*, 55 ECAB 515, 518 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993).

Appellant claimed that he learned of his employment-related hearing loss from an employing establishment physician. He also indicated that his supervisors told him every three to six months to report to the employing establishment medical facility for testing. Additionally, appellant identified Dr. Olson as the employing establishment physician at the Denver facility where he was last employed but, thus far, both appellant and his counsel have been unsuccessful in their respective attempts to obtain copies of his employee medical records which reportedly include routine periodic hearing tests administered by the employing establishment.

Although the employing establishment challenged appellant's claim as untimely, it has not submitted any evidence contradicting appellant's assertions that his hearing was regularly monitored by the employing establishment medical personnel and that an employing establishment's physician informed him of his hearing loss. The employing establishment has not denied these allegations but, thus far, has only stated that it does not have appellant's medical records.[11]

A positive employee test result from an employing establishment program of regular audiometric examinations is sufficient to establish knowledge of a hearing loss so as to put the immediate supervisor on notice of an on-the-job injury.[12] The Office Procedure Manual is particularly instructive with respect to developing evidence regarding employee health testing programs when determining whether a claim is timely. According to the procedure manual, if the employing establishment's regular physical examinations which might have detected signs of illness (for example, regular 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.[13] The procedure manual further provides that, if the claimant was still exposed to employment hazard on or after September 7, 1974 and the employment establishment'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.[14]

While the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government sources.[15] As indicated in the procedure manual, the Office should inquire of the employing establishment, whether such audiometric testing occurred and if the results were indicative of a hearing loss.[16] The employer is responsible for submitting to the Office all relevant and

[11] But even a mere assertion of disagreement with appellant's version of events will not suffice. Absent a written explanation to support the disagreement, the Office may accept the claimant's version of events as established. *See* 20 C.F.R. § 10.117.

[12] *See James A. Sheppard*, *supra* note 2.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6c (March 1993) (Emphasis added).

[14] *Id.*

[15] *Richard Kendall*, 43 ECAB 790, 799 (1992).

[16] *See supra* note 7.

probative factual and medical evidence in its possession or which it may acquire through investigation or other means.[17] Accordingly, the case is remanded for further development. After such further development as the Office deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: August 7, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[17] 20 C.F.R. § 10.118(a).