United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
and	)	**Docket No. 07-723**
	)	**Issued: August 2, 2007**
DEPARTMENT OF THE NAVY, NAVAL FACILITIES ENGINEERING COMMAND, SOUTHWEST DIVISION, Seal Beach, CA, Employer	)	

Appearances:
David G. Jennings, 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 January 22, 2007 appellant, through his attorney, filed a timely appeal of a December 13, 2006 merit decision of the Office of Workers' Compensation Programs, terminating his compensation due to rescission of the acceptance of his claim. 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The issue is whether the Office properly rescinded acceptance of appellant's claim for hearing loss on the grounds that his claim was not timely filed pursuant to 5 U.S.C. § 8122(a).

FACTUAL HISTORY

On March 31, 2005 the Office received an occupational disease claim signed on September 18, 2004 by appellant. Appellant, then a 52-year-old engineering technician, alleged that in January 1999 he first realized that he had bilateral hearing loss and that it was caused or aggravated by his federal employment. He attributed his hearing loss to high noise levels while

working at the employing establishment. Appellant explained that his claim was not filed within 30 days after he realized the causal relationship between his alleged condition and employment because he was only recently advised that he could file a claim for hearing loss.

In an accompanying undated narrative statement, appellant related that he was exposed to noise while working as an engineering technician from 1994 to the present at the employing establishment's Southwest Division of the Naval Facilities Engineering Command and a machinist from 1975 to 1994 at the U.S. Marine Corps Air Station in El Toro, California. In the former position, he was exposed to noise from jack hammers, air compressors and heavy equipment four hours per day. In the latter position, appellant was exposed to jet engine noise four hours per day. He stated that he was exposed to noise four hours per day in each position and that the employing establishment issued earplugs to him in the engineering technician position in 1998 and in the machinist position in 1980. Appellant contended that he continued to be exposed to noise at work. He further contended that his hearing loss was caused by work-related noise exposure because it could not have been caused by anything else.

Appellant submitted an audiogram performed by a private audiology facility on July 22, 2004 which demonstrated that he had mild-to-severe bilateral hearing loss between 25 and 85 decibels. He also submitted employment records. An official description of his engineering technician position provided, among other things, that the work environment involved moderate risks and discomforts that require special safety precautions, "*e.g.*, working around moving parts, carts or machines." It stated that appellant "may be required to use protective clothing and gear, such as hard hats, masks, coats, boots, goggles, gloves, fall protection, *etc*."

On appellant's claim form, Vithlaish Nanda, appellant's supervisor, stated that he first became aware of appellant's alleged injury on March 18, 2005. Mr. Nanda related that, based on a conversation with appellant on March 21, 2005, he understood that the claim covered the period when he worked at the office in El Toro, California sometime in 1988 or 1989 under the supervision of Ted Schives. He indicated that he was not appellant's supervisor when he worked in El Toro from 1986 to 1994.

By letter dated July 27, 2005, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It addressed the factual evidence that he needed to submit to establish his claim including, a history of his employment and noise exposure in the stated jobs, an explanation as to why his claim was not timely filed and whether he was still exposed to noise at work. In another letter dated July 27, 2005, the Office requested that the employing establishment provide information regarding appellant's noise exposure at work.

By letter dated August 9, 2005, appellant's attorney stated that appellant was still exposed to noise at work and, thus, no time limitations had begun to run. He contended that appellant's employment records reflected his hearing loss which meant that the employing establishment had actual notice of his condition. Consequently, counsel argued that appellant did not file a claim for his hearing loss in 1999 because he was not required to do so. Appellant knew that it was a long process and that he did not have enough time to devote to handling the claim. Counsel stated that his hearing loss may have started while he worked at the El Toro Marine Corps Air Station but since he was still working at the Naval Facilities Engineering Command Southwest Division his hearing loss continued to worsen.

In a letter dated August 26, 2005, the employing establishment advised the Office that it was unsuccessful in obtaining some of the requested documents. It submitted Mr. Nanda's May 13, 2005 email message which reiterated his prior statement that he believed appellant's claim covered the period he worked at the El Toro Marine Corps Air Station around 1988 or 1989. Mr. Nanda stated that he did not know whether appellant was in a medical surveillance program.

On November 17, 2005 the Office accepted that appellant was exposed to occupational noise levels above 85 decibels from 1994 to the present.

By letter dated November 29, 2005, the Office referred appellant, along with a statement of accepted facts, the case record and a list of questions to be addressed to, Dr. Henry Bikhazi, a Board-certified otolaryngologist, for a second opinion medical examination to determine the nature and extent of appellant's hearing loss and its relationship to his federal employment. In a medical report dated December 8, 2005, Dr. Bikhazi provided a history of appellant's employment. He reported normal findings on physical examination. Dr. Bikhazi stated that appellant was exposed to noise levels above 85 decibels in his federal employment from 1994 to the present according to a statement of accepted facts. He diagnosed moderate bilateral noise-induced sensorineural hearing loss. Dr. Bikhazi opined that appellant would benefit from hearing aid amplification to help with daily communication. He indicated that appellant related that he had not been exposed to any noise levels in his current position. A December 8, 2005 audiogram performed by Dr. Howard T. Mango, an audiologist, accompanied Dr. Bikhazi's report. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 hertz (Hz) revealed decibel losses of 35, 50, 60 and 65, respectively and in the left ear decibel losses of 30, 50, 60 and 55, respectively.

In a letter dated December 15, 2005, the Office accepted appellant's claim for bilateral noise-induced hearing loss.

On January 12, 2006 an Office medical adviser reviewed the medical evidence including, Dr. Bikhazi's December 8, 2005 report. He stated that appellant reached maximum medical improvement on December 8, 2005. The medical adviser found that appellant sustained work-related binaural high frequency sensorineural hearing loss. He applied the Office's standardized procedures to the December 8, 2005 audiogram obtained by Dr. Bikhazi. The medical adviser found that appellant had 41.3 percent hearing loss of the right ear and 35.6 or 36 percent hearing loss of the left ear. He opined that appellant sustained 36 percent binaural hearing loss based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). The medical adviser recommended hearing aids.

By letter dated January 19, 2006, Robin S. Merriweather, a supervisory human resources specialist at the employing establishment, stated that, although appellant filed his claim for compensation in March 2005 alleging a date of injury of January 1, 1999, his date of last exposure was on January 26, 1986. Ms. Merriweather contended that, if his federal employment caused his hearing loss, it would have been while he was working in El Toro as a machinist. She indicated that appellant's current supervisor had verified that his exposure occurred prior to working at Naval Facilities Engineering Command Southwest Division as a construction representative and currently as an engineering technician. Ms. Merriweather related that, in the

latter position, appellant was not exposed to hazardous noise. She contended that it would appear that the filing of his claim in 2005 was not timely filed because the date of last exposure was in 1986, over 19 years ago. An accompanying notice of personnel action (Form SF-50) dated January 26, 1986 indicated that appellant was promoted from a machinist in El Toro to a construction representative in San Bruno, California.

On September 18, 2004 appellant filed a claim for a schedule award.

By letter dated March 2, 2006, the Office reopened appellant's claim pursuant to 5 U.S.C. § 8128 and issued a notice of proposed termination of his compensation. It found that his occupational disease claim was not timely filed based on Ms. Merriweather's January 19, 2006 letter which established that appellant's last exposure to hazardous noise was in 1986 when he left his position as a machinist in El Toro. The Office provided appellant with 30 days to respond to the proposed action.

Appellant submitted audiograms performed by the employing establishment on November 12, 1973, September 14, 1984, September 27, 1985, February 8, 1991 and September 21 and November 19, 1993. He also submitted fitness-for-duty reports dated November 12, 1973 and May 19, 1975 and his medical history.

On July 18, 2006 the Office reissued its March 2, 2006 notice of proposed termination of appellant's compensation to notify his attorney.

In a July 24, 2006 letter, appellant's attorney stated that the employing establishment issued earplugs to appellant in 1998. He noted appellant's work-related noise exposure. Counsel contended that Ms. Merriweather failed to provide a factual basis for her statement that appellant was not exposed to hazardous noise in his current position. He questioned why the employing establishment issued earplugs to him in 1998 if he was not exposed to noise at that time. Counsel stated that Dr. Bikhazi's report concluded that appellant was exposed to noise levels above 85 decibels from 1994 to the present and audiograms performed by the employing establishment demonstrated hearing loss. He argued that these test results and the employing establishment's issuance of earplugs established hearing conservation programs which eliminated the issue of whether appellant filed a timely claim. Counsel concluded that these programs established the employing establishment's knowledge of its hazardous noise conditions.

In a letter dated September 28, 2006, Ms. Merriweather described how workplace noise exposure was tested at the employing establishment. Industrial hygiene specialists conducted periodic evaluations and monitoring at its work sites. Part of their evaluation included the identification of any exposures in the workplace and what occupations were affected by such exposure. Following the workplace inspection/evaluation/monitoring, a formal industrial hygiene report is provided to the command. The report directs the supervisor to identify the employees in occupations that were exposed. Ms. Merriweather stated that these affected employees were directed to the employing establishment's occupational health unit for monitoring in the applicable surveillance program. She researched the employing establishment's medical records and could not find any audiograms it performed. Ms. Merriweather related that there were no medical records for appellant. The employing

establishment's safety office did not have appellant on the list of employees enrolled in a hearing conservation program. Ms. Merriweather indicated that his position description required the use of protective clothing such as hard hats, masks, coats, boots, goggles, gloves, fall protection but it did not mention hearing protection. However, she noted that, when an employee requests hearing protection or was expected to wear protective gear, the purpose of this protection would be to eliminate the exposure.

By decision dated December 13, 2006, the Office terminated appellant's compensation effective November 28, 2006 based on the grounds that his occupational disease claim was not timely filed. It found that he began working for the employing establishment on January 26, 1994 and first realized, five years later in January 1999, that his hearing loss was caused by his employment. The Office further found the evidence of record insufficient to establish that appellant continued to be exposed to hazardous noise after January 26, 1994. It determined that since he had knowledge of his employment-related hearing loss no later than January 1999 and he was last exposed to hazardous noise while working in El Toro in 1994, he failed to file a timely occupational disease claim.

LEGAL PRECEDENT

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[1]

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits.[2] This holds true where the Office later decides that it has erroneously accepted a claim for compensation. In establishing that, its prior acceptance was erroneous, the Office is required to provide a clear explanation of the rationale for rescission.[3]

Under the Federal Employees' Compensation Act,[4] as amended in 1974, a claimant has three years to file a claim for compensation.[5] 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.[6] In a case of occupational disease, the Board has held that the time for filing a

[1] *Andrew Wolfgang-Masters*, 56 ECAB ___ (Docket No. 05-1, issued March 22, 2005); *see also* 20 C.F.R. § 10.610.

[2] *Jorge E. Stotmayor*, 52 ECAB 105 (2000).

[3] *Andrew Wolfgang-Masters, supra* note 1.

[4] 5 U.S.C. §§ 8101-8193.

[5] *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dotson*, 47 ECAB 253 (1995); *see* 20 C.F.R. § 10.101(b).

[6] 5 U.S.C. § 8122(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.[7] 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 federal employment, such awareness is competent to start the limitation period even though he does know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[8] 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.[9] Also, a claim would be regarded as timely under section 8122(a)(1) if the 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.[10] This provision removes the bar of the three-year time limitation if met.[11] The knowledge must be such as to put the immediate supervisor reasonably on notice of appellant's injury.[12] Additionally, section 8122(a)(2) of the Act[13] 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.[14] 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.[15]

The Board has also held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program was sufficient to constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury.[16] The Office's procedures provide:

> "If an agency, in connection with a recognized environmental hazard, has an employee testing program and a test shows the employee to have positive findings this should be accepted as constituting actual knowledge. For example, an agency where employees may be exposed to hazardous noise levels may give annual

[7] *Duet Brinson, supra* note 5.

[8] *Larry E. Young*, 52 ECAB 264 (2002); *Duet Brinson, supra* note 5; *see also Leo Ferraro*, 47 ECAB 350 (1996).

[9] *See L.C.*, 57 ECAB ___ (Docket No. 06-1190, issued September 18, 2006); *Garyleane A. Williams*, 44 ECAB 441 (1993); *Charlene B. Fenton*, 36 ECAB 151 (1984).

[10] 5 U.S.C. § 8122(a)(1); *Larry E. Young, supra* note 8; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

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

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

[13] 5 U.S.C. § 8122(a)(2).

[14] *Id.* at § 8119(a), (c); *see Gwen Cohen-Wise*, 54 ECAB 732 (2003).

[15] *Id.* at § 8122(d)(3).

[16] *See James A. Sheppard*, 55 ECAB 515 (2004).

hearing tests for exposed employees. A hearing loss identified on such a test would constitute actual knowledge on the part of the agency of a possible work injury."[17]

ANALYSIS

Although the Office characterized the December 13, 2006 decision as a termination of appellant's compensation benefits, upon review of the Office's decision, the Board finds that rather than terminating appellant's compensation benefits, the Office effectively rescinded its prior acceptance of appellant's occupational disease claim for bilateral noise-induced hearing loss.

The Board finds that appellant's claim was not timely filed. The Office accepted appellant's claim for work-related bilateral noise-induced hearing loss. Upon examination of additional evidence provided by the employing establishment, the Office rescinded acceptance of appellant's claim, finding that it was not timely filed within the three-year time limitation under section 8122(a) of the Act. In a letter dated January 19, 2006, Ms. Merriweather contended that appellant's claim for compensation was not timely filed. She stated that, although he filed his claim in March 2005, alleging a date of injury of January 1, 1999, his date of last exposure to noise was on January 26, 1986 when he worked for the employing establishment as a machinist in El Toro, CA. Ms. Merriweather stated that appellant was not exposed to hazardous noise in his current position as an engineering technician at the employing establishment.

When appellant filed his claim for compensation on September 18, 2004, he indicated that in 1999 he first learned of his bilateral hearing loss and that it was caused or aggravated by exposure to noise in his federal employment. Under section 8122(b), the time limitation begins to run when appellant became aware of causal relationship or, if he continues in the same employment after awareness, the time limitation begins to run on the date of the last exposure to the implicated factors.[18] Appellant consistently contends that as an engineering technician at the employing establishment, a position he has held since 1994, he is currently exposed to noise from jack hammers, air compressors and heavy equipment four hours a day. The Board, however, finds that he did not provide sufficient evidence to establish this contention.

Dr. Bikhazi reported on December 8, 2005 that appellant was not exposed to noise in his current position. Although appellant's position description indicated that his work environment involved working around moving parts, carts or machines, it did not require him to wear hearing protection. The Board finds that appellant has not established that he is currently exposed to hazardous noise levels in his federal employment.

The record establishes that in 1999 appellant became aware that he had sustained hearing loss due to his exposure to noise in his federal employment. Since appellant did not file a claim for an occupational disease until March 31, 2005, it was clearly outside the three-year time

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

[18] *L.C., supra* note 9.

limitation period, which began to run in 1999, the date when he knew that his hearing loss was related to his federal employment.

Appellant's claim would still be regarded as timely under section 8122 of the Act if his immediate supervisor, another employing establishment official or an employing establishment physician or dispensary had actual knowledge of the injury within 30 days of his last exposure to noise on January 26, 1986.[19] Mr. Nanda, appellant's supervisor, stated that he first became aware of appellant's hearing loss condition on March 18, 2005. The Board finds that the evidence of record does not establish that appellant's supervisor had actual knowledge of the claimed condition within 30 days after his last exposure to the implicated employment factor on January 26, 1986.

Further, the record does not establish that the employing establishment had constructive knowledge of appellant's hearing loss based on its program of annual audiometric examinations. Ms. Merriweather stated that, she could not find any records of audiograms performed by the employing establishment or appellant's medical records. In addition, she stated that, he was not on the list of employees enrolled in the employing establishment's hearing conservation program. Although the record in fact contains audiograms performed by the employing establishment on intermittent dates from November 12, 1973 through November 19, 1993, there is no indication that they were part of an annual testing program for employees exposed to hazardous noise. Moreover, the audiograms revealed zero percent hearing loss. Therefore, the Board finds that the employing establishment did not have constructive knowledge of a possible employment-related hearing loss in this case.

Appellant submitted a July 22, 2004 audiogram which demonstrated mild-to-severe bilateral hearing loss between 25 and 85 decibels. This audiogram, however, was performed by a private audiology facility, 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 January 26, 1986.

Appellant's excuse for not filing a timely claim was that he was only recently advised that he could file a claim for his condition. The Board has, however, held that unawareness of possible entitlement,[20] lack of access to information[21] and ignorance of the law or of one's obligations under it[22] does not constitute exceptional circumstances that could excuse a failure to file a timely claim.[23] Appellant has not established that he 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

[19] 5 U.S.C. § 8122(a)(1); *Larry E. Young*, *supra* note 8; Federal (FECA) Procedure Manual, *supra* note 10.

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

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

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

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

that appellant's failure to timely file his claim within three years after his last exposure on January 26, 1986 precludes him from seeking compensation.

CONCLUSION

The Board finds that the Office properly rescinded acceptance of appellant's claim for hearing loss on the grounds that his claim was not timely filed pursuant to 5 U.S.C. § 8122(a).

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2006 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: August 2, 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