# United States Department of Labor
# Employees' Compensation Appeals Board

| | | |
|---|---|---|
| **S.H., Appellant** | ) | |
| **and** | ) | **Docket No. 07-977** |
| | ) | **Issued: August 13, 2007** |
| **DEPARTMENT OF THE NAVY, U.S. MARINE CORPS, Camp Lejeune, NC, Employer** | ) | |

*Appearances:*
*Malton W. Brown, Jr.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On February 27, 2007 appellant filed a timely appeal from a November 28, 2006 merit decision of the Office of Workers' Compensation Programs denying his claim for hearing loss as untimely and a January 24, 2007 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUES***

The issues are: (1) whether appellant filed his claim within the applicable time limitation provisions of the Federal Employees' Compensation Act;[1] and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193.

## ***FACTUAL HISTORY***

On June 1, 2005 appellant, then a 75-year-old retired laborer, filed an occupational disease claim alleging that he sustained hearing loss in the performance of duty. He indicated that he first became aware of his condition and its relationship to his federal employment on June 25, 1952 and was last exposed to the employment conditions alleged to have caused his condition on May 7, 1968, when he retired. Appellant stated that he delayed in notifying the employing establishment of his condition because he was afraid of being "cut back or even let go."

Appellant submitted employment records from November 23, 1951 through May 7, 1968, including an application for employment and a notice of approval of disability retirement effective May 7, 1968. He submitted a job history indicating that he worked in various capacities and was exposed to noise produced by industrial machines for eight hours per day with no protection during his tenure at the employing establishment. Appellant stated that to the best of his recollection, he reported his hearing loss to his supervisor in 1953, so that he could "get it on record."

A May 1, 2006 audiologist's report from Sue Brown reflected mild hearing loss in the right ear and profound loss in the left ear. An unsigned report from Kinston Head and Neck Physicians and Surgeons indicated that appellant had a long-standing total hearing loss in the left ear. The report provided a diagnosis of "possible Meniere's disease with low frequency loss developing in the right ear."

By letter dated July 27, 2006, the Office informed appellant that the information submitted was insufficient to allow a determination as to whether his claim was timely filed. The Office requested details regarding his employment-related noise exposure and inquired as to why he waited 38 years to file a claim. In an August 7, 2006 statement, appellant indicated that he had not filed his claim earlier because he "did not know what to do about it" and acknowledged that he could not remember if he told his supervisor about his hearing loss.

By decision dated November 28, 2006, the Office denied appellant's claim as untimely.

On January 3, 2007 appellant requested reconsideration of the November 28, 2006 decision. He submitted copies of personnel and medical documents previously submitted and considered by the Office. By decision dated January 24, 2007, the Office denied appellant's request for reconsideration, finding the evidence submitted to be cumulative and, therefore, insufficient to warrant merit review.

## ***LEGAL PRECEDENT -- ISSUE 1***

In cases of injury prior to September 7, 1974, the Act provides that a claim for compensation must be filed within one year of the date that the claimant was aware or reasonably should have been aware that the condition may have been caused by the employment factors.[2] The one-year filing requirement may be waived if the claim is filed within five years and (1) it is

[2] *Eugene L. Turchin*, 48 ECAB 391, 395 (1997).

found that such failure was due to circumstances beyond the control of the person claiming benefits; or (2) that such person has shown sufficient cause or reasons in explanation thereof and material prejudice to the interest of the United States has not resulted from such failure.[3]

The test for whether sufficient cause or reason was shown to justify waiver of the one-year time limitation is whether a claimant prosecuted the claim with that degree of diligence which an ordinary prudent person would have exercised in protecting his right under the same or similar circumstances.[4] The five-year time limitation is a maximum mandatory period, which neither the Office nor the Board has the power to waive.[5]

In addition, for injuries occurring between December 7, 1940 and September 6, 1974, Office procedures provide that written notice of the injury should be given within 48 hours as specified in section 8119 of the Act,[6] but this requirement will be waived if the employee filed written notice within one year after the injury or if the immediate superior had actual knowledge of the injury within 48 hours after the occurrence of the injury.[7]

Where an employee has sustained a loss of hearing as a result of excessive noise at work over a period of time, the date of injury is determined to be the date of the last noise exposure which adversely affected his hearing.[8] In an occupational disease claim, the time limitation does not begin to run until the claimant is aware or reasonably should be aware, of the causal relationship between his employment and the compensable disability. If exposure to the implicated employment factors extends beyond the date of such awareness, the time limitation begins to run on the date of last exposure.[9]

## ***ANALYSIS -- ISSUE 1***

The Board finds that appellant did not establish that his claim was filed within the applicable time-limitation provisions of the Act. In a case involving a claim for an occupational illness, the time does not begin to run until claimant is aware or reasonably should have been aware, of the causal relationship between his employment and the compensable disability.[10] When an employee sustains hearing loss due to noise exposure at work over a period of time, the date of injury is determined to be the date of the last noise exposure which adversely affected his hearing.[11] In the present case, appellant indicated on his Form CA-2 that he realized his claimed

[3] *Edward Lewis Maslowski*, 42 ECAB 839 (1991).

[4] *Roseanne S. Allexenberg*, 47 ECAB 498, 500 (1996).

[5] *Albert K. Tsutsui*, 44 ECAB 1004, 1008 (1993).

[6] 5 U.S.C. § 8119(b).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(b)(1) (March 1993).

[8] *Solomon R. Stone*, 32 ECAB 150 (1980).

[9] *See Peter S. Elliott*, 51 ECAB 627 (2000).

[10] *William L. Gillard*, 33 ECAB 265, 268 (1981).

[11] *See Solomon R. Stone*, *supra* note 8.

condition was caused or aggravated by employment factors on June 25, 1952. However, he continued working for the employing establishment and was exposed to work-related noise until May 7, 1968, when he retired. Therefore, the time limitation in this case began to run on May 7, 1968. Since appellant did not file his claim until June 1, 2005, his claim was not filed within the one-year period of limitation. Furthermore, appellant is not entitled to waiver of the one-year filing requirement because his claim was not filed within five years of the claimed injury; nor has he met the other requirements, as delineated above, for such waiver. The five-year time limitation is a maximum, mandatory period which neither the Office nor the Board has authority to waive.[12]

For injuries occurring between December 7, 1940 and September 6, 1974, Office procedure manual indicates that written notice of the injury should be given within 48 hours as specified in section 8119 of the Act. The procedures further indicate that this requirement may be waived if the employee files written notice within one year of the injury or if the immediate superior had actual knowledge of the injury within 48 hours of the injury.[13] There is, however, no evidence that appellant filed written notice within one year of the injury as specified in section 8119. Moreover, appellant failed to establish that his immediate supervisor had actual knowledge of the injury within 48 hours after the occurrence of the injury. In fact, he stated that he could not remember whether or not he notified his supervisor of his hearing loss. Consequently, appellant has not established that his claim was filed within the applicable time-limitation provisions of the Act.

## ***LEGAL PRECEDENT -- ISSUE 2***

Under section 8128(a) of the Act,[14] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[15] which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, which sets forth arguments and contains evidence that:

> (1) Shows that the Office erroneously applied or interpreted a specific point of law; or
>
> (2) Advances a relevant legal argument not previously considered by the Office; or
>
> (3) Constitutes relevant and pertinent new evidence not previously considered by the Office.

[12] *Eugene L. Turchin*, *supra* note 2; *Albert K. Tsutsui*, *supra* note 5.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.7 (September 1990).

[14] 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[16]

Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[17]

## ***ANALYSIS -- ISSUE 2***

Appellant's January 3, 2007 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of his request for reconsideration, appellant submitted copies of documents previously received and considered by the Office. As the documents are duplicative, they do not constitute new evidence not previously considered by the Office.[18] Moreover, the documents submitted are not relevant to the issue decided by the Office in its November 28, 2006 decision, namely, whether appellant's claim was timely filed. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review under the third requirement under section 10.606(b)(2).

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his request for reconsideration.

## ***CONCLUSION***

The Board finds that appellant did not establish that his claim was filed within the applicable time limitation provisions of the Act. The Board further finds that the Office properly denied appellant's January 3, 2007 request for reconsideration without conducting a merit review of the claim.

[16] *Id.*

[17] *See Helen E. Paglinawan*, 51 ECAB 591 (2000).

[18] *See Susan A. Filkins*, 57 ECAB ___ (Docket No. 06-868, issued June 16, 2006).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 24, 2007 and November 28, 2006 are affirmed.

Issued: August 13, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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