

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

K.W., Appellant

and

**DEPARTMENT OF ENERGY,
Pickstown, SD, Employer**

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**Docket No. 06-2182
Issued: January 3, 2007**

Appearances:
Appellant, pro se
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 September 27, 2006 appellant filed a timely appeal from the December 23, 2005 decision of the Office of Workers' Compensation Programs denying his claim on the grounds that he failed to establish fact of injury in the performance of duty. On August 31, 2006 the Office issued a nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant filed a timely claim for compensation under the Federal Employees' Compensation Act.

FACTUAL HISTORY

On March 10, 2005 appellant, then a 77-year-old retired hydroelectric senior operator, submitted a claim for occupational disease, Form CA-2.¹ He alleged that he was aware of a

¹ The Board notes that appellant also worked as a turbine operator and a journeyman operator at the employing establishment.

hearing loss and its relationship to his federal employment on August 13, 1975. The employing establishment filed the form with the Office on August 10, 2005. Appellant alleged that he had partial hearing loss from his work at the employing establishment between January 1955 and June 1968. He claimed that he had no protection from noise caused by riveting, grinding, hammering, welding and the operation of large equipment. Appellant was aware of the effect that this environment had on his hearing after approximately two years of work. He stated that a doctor examined him around 1957 and informed him that he had lost his ability to hear high level tones because of his exposure to excessive amounts of noise. Appellant claimed that he “mentioned [his] hearing loss while on the job,” but that nothing was done to prevent further hearing loss since “conditions were becoming less obtrusive.” He alleged that the employing establishment did not begin to provide annual hearing examinations until after he left in 1968. Appellant did not file his claim earlier because he was “unaware until recently that similar claims have received favorable determinations for compensation.” He stated that he was subjected to high noise levels at the employing establishment from January 1955 to June 1968 for a total of 13½ years. Appellant concluded that “these conditions caused the loss of hearing that I experience.”

On October 19, 2005 the Office requested additional information. It provided information to appellant about filing time limits under the Federal Employees’ Compensation Act and requested an explanation of why the claim had not been made within three years of his awareness of the relationship between his employment and his hearing loss. The Office requested additional factual and medical evidence. It did not receive a response to this request in the 30 days allotted.²

By decision dated December 23, 2005, the Office denied appellant’s claim on the grounds that he had not provided sufficient evidence to establish that he had sustained an injury. It noted that appellant had timely filed his claim for compensation. The Office found, however, that he had not provided evidence sufficient to prove the occurrence of the alleged noise exposure. It also found that there was no medical evidence diagnosing hearing loss or connecting it to the claimed employment factor.

On August 17, 2006 appellant filed a request for reconsideration of his claim and submitted a narrative statement together with medical and employment records that he had recently received from the National Personnel Records Center. A certificate of medical examination was completed at the time of appellant’s hire by the employing establishment on January 17, 1955. This certificate, which was signed by a physician at Fort Randall Hospital,³ indicated that appellant’s hearing was normal (20/20) and that he had no evidence of disease or injury in either ear. Driver qualification records from June 18, 1956 and January 28, 1957 indicated that his hearing was unchanged. A driver qualification record from March 9, 1960 indicated that appellant’s hearing had diminished to 15/20. Appellant alleged that sometime

² Appellant presented evidence that he submitted a letter in November 2005 informing the Office that he had requested his personnel files from the National Personnel Records Center and would provide further information as soon as he received his file. This letter was not in the record at the time of the Board’s review.

³ The name of the physician is illegible.

during this period he contacted a doctor in Mitchell, SD about his hearing loss. He did not remember the doctor's name and did not keep records of the visit.

Appellant also provided two reports from federal employment-related medical examinations that occurred in the mid 1980s. A March 22, 1985 letter from Dr. Roy L. DeHart, Board-certified in occupational medicine, stated that appellant had "significant neurosensory high frequency hearing loss" and that he should use ear protection when exposed to noise-hazardous environments. An October 8, 1986 letter from Dr. G. Wayne Kelly, Board-certified in occupational medicine, indicated that appellant should wear hearing protection when in high noise-level environments.

By decision dated August 31, 2006, the Office denied appellant's request for reconsideration of its prior decision on the grounds that appellant had provided no new and relevant evidence or legal contentions.

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.⁴ The Board may raise the issue on appeal even if the Office did not base its decision on the time limitation provisions of the Act.⁵

For injuries occurring prior to September 7, 1974, the time limitation provisions of the Act require that an injured employee file a claim for compensation within one year after the injury.⁶ The one-year requirement may be waived provided the claim is filed within five years and: (1) the failure to timely file was due to circumstances beyond the control of the employee; or (2) the employee has shown sufficient cause or reason in explanation of the late filing and there has been no material prejudice to the interest of the United States.⁷ An employee could be entitled to medical benefits despite the failure to timely file a claim if written notice of injury was filed in accord with 5 U.S.C. § 8119 or if the immediate supervisor had actual knowledge of the injury within 48 hours after the occurrence of the injury.⁸

In a case involving a claim for an occupational illness, the time does not begin to run until the claimant is aware, or reasonably should have been aware, of the causal relationship between his condition and federal employment.⁹ In situations where the exposure to an injurious employment factor continues after the employee gains such awareness, the time for filing a claim

⁴ See *Charles W. Bishop*, 6 ECAB 571 (1954).

⁵ *Id.*; *Charles Walker*, 55 ECAB 238 (2004).

⁶ 5 U.S.C. § 8122 (1968). Section 8122 was amended as of September 7, 1974 to provide the current three-year time limitation.

⁷ *Id.*; see also *Allen E. Grether*, 24 ECAB 76 (1972).

⁸ See, e.g., *Ida Ambler*, 25 ECAB 116 (1974).

⁹ *William L. Gillard*, 33 ECAB 265, 268 (1981).

begins to run on the date of the employee's last exposure to those factors.¹⁰ The time limitations do not run against an incompetent individual while he is incompetent and has no duly appointed legal representative.¹¹

ANALYSIS

Appellant alleged that, in his 13½ years at the employing establishment, from 1995 to 1968, he was regularly exposed to loud noise. He provided medical evidence showing a diminishment in his ability to hear high frequencies between January 1955 and October 1986. Appellant stated that he realized between approximately 1957 and 1960 that his hearing loss was related to his employment. He alleged that the doctor he sought out for diagnosis and treatment during that time confirmed that loss of the ability to hear certain high frequencies was generally related to exposure to excessive amounts of noise. The Board finds that appellant was aware of the relationship between his federal employment and his hearing loss by 1960. Because appellant continued to be exposed to noise at the employing establishment until June 1968, when he transferred to a different federal agency, the time limits on filing his claim did not begin to run until the last date of his exposure. The Board finds that he was last exposed to the employment factor of high levels of noise in June 1968.

The alleged occupational disease occurred before 1974, therefore, appellant had one year from the time of his last exposure to the noise to file a claim. In his claim form, appellant stated that he had a good reason for the delay in filing his claim. If good cause were shown and the interests of the Federal Government were not prejudiced, the filing limitation could be extended to five years. Appellant has claimed that the reason he delayed filing his claim was that he was unaware that such claims could receive favorable determinations for compensation. The Board has held that ignorance of the law and the benefits it provides is not a sufficient cause or reason to delay filing of a claim.¹² Accordingly, the Board finds that appellant has not provided sufficient grounds for extending the filing limit to five years.

On the facts of this case, appellant should have filed his claim for hearing loss no later than June 1969, one year after his last exposure to the noise. As he did not file a claim until 2005, it was not timely filed.

Incompetence of the employee will keep the filing limitations from running for the duration of the incompetence. As appellant has not alleged any period of mental incompetence, there is nothing to bar the running of the one year filing limit.

Appellant could still be eligible for medical benefits under the Act if he were able to demonstrate that a written notice of injury had been filed in accordance with the Act or that his immediate supervisor had actual knowledge of his condition within 48 hours of appellant's awareness that the condition was work related. He has provided any evidence that a written

¹⁰ *Jaried M. Bailey*, 26 ECAB 9 (1974).

¹¹ *Allen E. Grether*, *supra* note 6.

¹² *William D. Goldsberry*, 32 ECAB 536 (1981) (interpreting the pre1974 statute).

notice was ever filed with the employing establishment. Appellant alleged that he mentioned his hearing loss on the job, but provided no details as to who he informed, what information he conveyed or when this occurred. The Board finds that appellant has not provided sufficient evidence to demonstrate that the employing establishment or his immediate supervisor had actual knowledge that he had an on-the-job injury.

CONCLUSION

Appellant's claim is barred by the applicable time limitation provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 31, 2006 and December 23, 2005 be modified to reflect that appellant's claim is barred by the time limitation provisions of the Act and affirmed as modified.¹³

Issued: January 3, 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

¹³ The Board's decision in this case renders the reconsideration issue moot.