

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

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O.S., Appellant )

and )

DEPARTMENT OF THE NAVY, SUBMARINE )  
BASE, Bangor, WA, Employer )

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**Docket No. 07-824  
Issued: July 20, 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 February 5, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 31, 2006 regarding a hearing loss claim. 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's claim for an employment-related hearing loss was barred by the time limitation provisions of 5 U.S.C. § 8122; and (2) whether the Office properly denied appellant's request for a hearing.

**FACTUAL HISTORY**

On July 25, 2006 appellant filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss as a result of his federal employment. In response to a question on the claim form as to the date he first became aware of his condition, he reported January 1, 1978.

With respect to the date that appellant first realized that the condition was causally related to employment, he reported January 1, 1980.

In a form entitled “checklist for filing federal occupational hearing loss claim,” appellant indicated that he was last exposed to hazardous noise in 1988. He first noticed hearing loss in 1980 and as to the date that he first related hearing loss to employment, and the reason why, he stated “none.” An employment history form indicated that appellant worked as a stockman and motor vehicle operator, retiring from federal employment in 1988.

The record contains audiograms dated December 28, 2005 and July 25, 2006.<sup>1</sup> By letters dated September 14, 2006, the Office requested additional information from appellant and the employing establishment. The employing establishment responded that appellant was retired and no medical or other information was available. Appellant responded by letter dated October 1, 2006. With respect to the date that he first noticed his hearing loss, he stated, “in 2005.” Appellant stated that he did not report hearing loss to his employer, since he was not aware of it at that time. In response to inquiry as to the date that he first related hearing loss to employment and how he realized this, appellant stated, “Did not notice hearing loss to work expos[ure] since there was loud noises and every one spoke very loud to hear over the noises at work. After I retired I notice[d] I had a hard time hearing people and they had to repeat in a normal conversation.”

By decision dated October 31, 2006, the Office determined that the claim was not filed in a timely manner pursuant to 5 U.S.C. § 8122. The Office noted that appellant indicated on the claim form that he was aware of an employment-related hearing loss as of January 1, 1980.

Appellant requested a hearing before an Office hearing representative by letter postmarked December 11, 2006. By decision dated January 9, 2007, the Office determined that the request for hearing was untimely. The Office further determined the issue could equally well be addressed through the reconsideration process.

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

Section 8122(a) of the Act states, “An original claim for compensation or death must be filed within three years after the injury or death.”<sup>2</sup> This section also indicates that a claim not filed within three years will not be allowed unless the immediate supervisor had actual knowledge of the injury or death within 30 days or written notice of injury was given within 30 days.<sup>3</sup> Section 8122(b) provides 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 his employment and the compensable disability.<sup>4</sup>

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<sup>1</sup> The record also contains audiograms dated January 6 and May 31, 2001, but the name on the reports is not appellant’s.

<sup>2</sup> 5 U.S.C. § 8122(a).

<sup>3</sup> *Id.*

<sup>4</sup> 5 U.S.C. § 8122(b).

## **ANALYSIS -- ISSUE 1**

The record established that appellant was last exposed to noise in his federal employment in 1988. As noted, the time limitation period does not begin to run until appellant is aware, or reasonably should be aware, of the injury and its relationship to employment. The Office made a determination that this date was January 1, 1980 based on information provided on the claim form. While the information on the claim form is probative evidence, it is not dispositive in the presence of additional relevant evidence.<sup>5</sup> Appellant indicated, for example, in the October 1, 2006 statement that he was not aware of a hearing loss at the time he was employed. He also reported that he did not notice a hearing loss until 2005, which may correspond to the 2005 audiogram of record. Medical evidence regarding hearing loss is relevant to the issue of when a claimant reasonably should be aware of a condition and its relationship to employment.<sup>6</sup>

The Office did not properly address all of the relevant evidence and make proper findings on the timeliness issue. It is not clear, for example, whether appellant had audiograms prior to 2005. The Office did not address appellant's statements that appeared to conflict with his initial reference to 1980 as the date he was aware of an employment-related hearing loss, nor did it discuss the medical evidence.

On remand, the Office should secure any additional relevant evidence on the issue of when appellant knew or should have known of an employment-related hearing loss. This would include clarification from appellant regarding his prior statements, as well as any relevant medical evidence. After such further development as the Office deems necessary, it should issue an appropriate decision with proper findings. In view of the Board's determination on this issue, it will not address the denial of a hearing request issue.

## **CONCLUSION**

The evidence of record is not sufficient to determine whether the claim was timely filed and the case is remanded for further development.

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<sup>5</sup> See *L.C.*, 57 ECAB \_\_\_ (Docket No. 06-1190, issued September 18, 2006) (Appellant had reported 1985 on the claim form as the date he was aware of an employment-related hearing loss, but subsequently explained this was the date of an ear infection. The Board found the time limitation period did not begin to run until a July 2004 audiogram showed hearing loss).

<sup>6</sup> *Id.*

**ORDER**

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

Issued: July 20, 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