United States Department of Labor
Employees' Compensation Appeals Board

L.G., Appellant	)	
and	)	**Docket No. 07-969**
	)	**Issued: September 6, 2007**
DEPARTMENT OF AGRICULTURE, OFFICE OF BUDGET & PROGRAM ANALYSIS, Washington, DC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 26, 2007 appellant filed a timely appeal from a February 12, 2007 merit decision of the Office of Workers' Compensation Programs denying her hearing loss claim as untimely. 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 appellant's claim was timely filed within the applicable time limitations of the Federal Employees' Compensation Act.

FACTUAL HISTORY

On July 28, 2006 appellant, then a 44-year-old program analyst, filed an occupational disease claim (Form CA-2) for a bilateral hearing loss sustained as a result of her federal employment. She stated that her office was located on a busy street and she could hear the traffic noise through the closed windows. Appellant also stated that she could hear the noise

from the heating and ventilation systems in the building. In response to a question as to when she became aware that the condition was caused or aggravated by her employment, she reported December 1, 2003. The reverse of the claim indicated that appellant first reported the condition to a supervisor on August 14, 2006 and that she was dismissed on September 22, 2000 by the employing establishment for unacceptable work performance. Her supervisor stated that he had no knowledge of a hearing loss by appellant at the time of her dismissal on September 22, 2000.

Appellant submitted a statement indicating that she did not file her claim within 30 days after the date she first became aware that her hearing loss was employment related because she had been misinformed about the program. She applied for and was granted Social Security disability benefits on December 20, 2003, which was retroactive to September 2002. Appellant noted that she had been employed by the employing establishment for the period May 17, 1992 to September 22, 2000. During this time, she complained about the noise level in her office which she characterized was excessive. The employing establishment moved her to another office in 2000 and appellant alleged that the noise was just as bad in that office.

Appellant submitted medical and factual evidence including a June 18, 1998 memorandum to her supervisor requesting that her office be evaluated for ways to reduce the noise level; a July 7, 1998 memorandum detailing suggestions to reduce the noise level; and a December 20, 2003 Social Security disability determination.

On August 16, 2006 the employing establishment responded to appellant's claim. John Subat, appellant's supervisor, stated that he had no knowledge of her claim for a hearing loss prior to her dismissal. He noted that, while there was some noise in the office appellant occupied, no complaints were made by other employees about the noise.

On February 13, 2002 Dr. Joseph J. Moravec, a treating Board-certified otolaryngologist, diagnosed tinnitus, depression and possible neurosensory hearing loss. He noted that appellant related that she "had a problem with exposure to noises" while working at the employing establishment.

In a report dated December 4, 2003, Dr. Jack D. Summerlin, a Board-certified otolaryngologist, diagnosed tinnitus due to bilateral sensorineural hearing loss with left ear moderate to severe high-frequency hearing loss and essentially normal right ear high-frequency hearing sensitivity. Appellant related "a history of recurrent ear infections due to earplug usage for loud noise exposure." She attributed her loud noise exposure to her work environment.

By letters dated November 9, 2006, the Office requested that the employing establishment furnish information regarding appellant's noise exposure and informed her of the evidence needed to support her claim.

On December 4, 2006 appellant responded to the Office's request for additional information. She stated that she was fired from her job with the employing establishment on September 22, 2000 and that she was not currently working as she was disabled. Appellant had her hearing tested when she moved back to Indiana after being fired and alleged exposure to hazardous noise from a nearby school. She stated that she first became aware of her hearing loss on December 1, 2003, which she attributed to her noise exposure at federal job.

By decision dated February 12, 2007, the Office denied the claim on the grounds that it was not timely filed. It found that her date of last exposure was September 22, 2000 and that her claim for compensation was filed on July 28, 2006. The Office found that appellant should have been aware of a relationship between her employment and the claimed hearing loss by September 22, 2003. It further found that her immediate supervisor did not have actual knowledge of the injury within 30 days. The medical evidence established that she was aware of the causal relationship between her claimed hearing loss and her employment as of February 13, 2002, the date of Dr. Moravec's report.

LEGAL PRECEDENT

In cases of injury on or after September 7, 1974, section 8122(a) of the Act[1] provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless:

> "(1) [T]he immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury or death; or
>
> "(2) [W]ritten notice of injury or death as specified in section 8119 of this title was given within 30 days."[2]

Section 8119 provides: a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury or in the case of death, the employment factors believed to be the cause; and be signed by and contain the address of the individual giving the notice.[3] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[4]

Section 8122(b) provides that the time for filing in latent disability cases 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 the employment and the compensable disability and the Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.[5] For actual knowledge of a supervisor to be

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[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8122(a). *See also L.C.*, 57 ECAB ___ (Docket No. 06-1190, issued September 18, 2006).

[3] *Gerald A. Preston*, 57 ECAB ___ (Docket No. 05-1198, issued December 15, 2005); *Larry E. Young*, 52 ECAB 264 (2001).

[4] *Laura L. Harrison*, 52 ECAB 515 (2001).

[5] *Gerald A. Preston*, 57 ECAB ___ (Docket No. 05-1198, issued December 15, 2005); *L.C.*, *supra* note 2; *Delmont L. Thompson*, 51 ECAB 155 (1999).

regarded as timely filing, an employee must show, not only that the immediate superior knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.[6]

In a case of occupational disease, the time for filing a claim begins to run when the employee first becomes aware or reasonably should have been aware, of a possible relationship between her condition and her employment. When an employee becomes aware or reasonably should have been aware that he or she has a condition which has been adversely affected by factors of her federal employment, such awareness is competent to start the limitation period even though the employee does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[7] Where the employee continues in the same employment after he or she reasonably should have been aware that he or she has a condition which has been adversely affected by factors of federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.[8] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[9]

The time limitations do not begin to 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.[10]

ANALYSIS

Appellant stated on her claim form that she first became aware of her hearing loss and its relationship to her federal employment on December 1, 2003. The employing establishment reported that appellant was last exposed to noise in her federal employment on September 22, 2000, when she last worked. The Office found the time limitations period began to run no later than September 22, 2000, which was appellant's last exposure to the implicated factors, traffic noise and noise from the heating and ventilation systems in the building.

The Board notes that appellant first became aware of the relationship of her hearing loss to her federal employment on February 13, 2002. In a February 13, 2002 report, Dr. Moravec provided a history of appellant's history of noise exposure when she was employed in Washington, D.C. and that she was concerned about hearing loss. He diagnosed tinnitus, depression and possible neurosensory hearing loss. Thus, the record reflects that, as of February 13, 2002, the date of Dr. Moravec's report, appellant first became aware or reasonably should have been aware of a possible relationship between a diagnosed hearing loss and factors of her federal employment.

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[6] *Duet Brinson*, 52 ECAB 168 (2000).

[7] *Larry E. Young*, *supra* note 3.

[8] *Id.*

[9] *Debra Young Bruce*, 52 ECAB 315 (2001).

[10] 5 U.S.C. § 8122(d)(3).

The Board has held that, when an employee becomes aware or reasonably should have been aware that she has a condition which has been adversely affected by factors of her employment, such awareness is competent to start the running of the time limitation period even though she does not know the precise nature of the impairment or whether the ultimate result of such adverse effect would be temporary or permanent.[11] As appellant should have became aware of the relationship of her work-related hearing loss to her federal employment on February 13, 2002, the time limitation began to run at that time and appellant had until February 13, 2005 to timely file a claim. As she did not file her claim until July 28, 2006, her claim was not timely filed within the three-year period.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if her immediate supervisor, another employing establishment official or the employing establishment physician or dispensary had actual knowledge of the injury within 30 days of her last exposure to noise, *i.e.*, within 30 days of September 22, 2000.[12] The knowledge must be such as to put the immediate supervisor reasonably on notice of an on-the-job injury or death.[13] Mr. Subat, appellant's supervisor, denied any knowledge of appellant's hearing disability. He noted that there were allegations of some noise in the office appellant occupied, but no complaints were made by other employees about the noise. The record contains a June 18, 1998 memorandum from appellant requesting an evaluation to reduce the noise level and a July 7, 1998 response detailing suggestions to reduce the noise level. This evidence is not sufficient to put appellant's supervisor on notice that she had a hearing loss injury or that any such injury was employment related. There is no evidence of record that appellant participated in an employing establishment hearing surveillance program or that it obtained any audiometric tests from this period. This is not a case where the employing establishment had constructive knowledge of an employment-related hearing loss, *e.g.*, by performing routine audiometric testing as part of a hearing conservation program.[14] In this case, there is no probative evidence to establish that appellant's superior had constructive knowledge sufficient to be put on notice that her hearing loss was work related within 30 days of September 22, 2000, the date of last exposure. Accordingly, appellant's claim was clearly outside the three-year time limitation period and was untimely.

CONCLUSION

The Board finds that appellant has not filed a timely claim for compensation under the Act.

[11] *See Larry E. Young*, *supra* note 3.

[12] *Id. See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

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

[14] *Compare James A. Sheppard*, 55 ECAB 515 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 12, 2007 is affirmed.

Issued: September 6, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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