United States Department of Labor
Employees' Compensation Appeals Board

W.M., Appellant	)	
and	)	**Docket No. 07-1223**
	)	**Issued: September 10, 2007**
DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS, Hannibal, OH, Employer	)	

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 April 10, 2007 appellant timely appealed the January 30, 2007 merit decision of the Office of Workers' Compensation Programs, which denied modification of a prior decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant filed a timely claim pursuant to 5 U.S.C. § 8122.

FACTUAL HISTORY

Appellant, a 73-year-old retired lock and dam operator, filed a claim on March 18, 2006 for employment-related hearing loss. He indicated that he first became aware of his employment-related hearing loss on January 2, 1986. Appellant also noted that he reported his condition to his supervisor in 1986. He was last exposed to alleged hazardous employment conditions on September 1, 1990.

On July 17, 2006 the Office wrote to both appellant and the employing establishment in an effort to obtain factual and medical evidence regarding appellant's claimed hearing loss and occupational noise exposure. The Office received appellant's response on July 25, 2006. Appellant described his four-year military service as a gunner mate in the early 1950s and his nonfederal employment as a laborer in 1956. He also described his various duties with the employing establishment from November 1956 until his retirement in September 1990. Appellant's federal civilian occupational exposure reportedly included noise from jackhammers, drills, various whistles and air compressors.[1] He stated that in 1972 he first noticed a loss of hearing. Appellant also indicated that in 1986 he was sent for a special hearing test and at that time was told he had hearing loss. He reiterated that he reported his condition to his supervisor in 1986. Additionally, appellant noted that he had undergone an audiometric examination on May 18, 2006. The Office received a copy of the recent audiogram, which was interpreted as revealing severe bilateral high-frequency, sensorineural hearing loss. The Office also received a copy of appellant's December 28, 1955 application for federal employment. The employing establishment did not specifically respond to the Office's July 17, 2006 request for information.

In a decision dated October 25, 2006, the Office denied appellant's claim as untimely filed.

On November 14, 2006 appellant filed a request for reconsideration. He stated that he was unaware of the specific filing requirements, but that his supervisor knew about his hearing problem. In 1972 appellant reportedly had difficulty hearing and he mentioned this to the Lock Master, Mr. Jones, who allegedly responded that "it was just one of those thing[s]."

The request for reconsideration was accompanied by an April 9, 1986 letter to appellant from Comprehensive Health Service, Inc. (CHS). The letter indicated that a CHS affiliate examined appellant on March 8, 1986 "as a participant in the U.S. Army Corps of Engineers Medical Surveillance Program." The letter further advised appellant of the findings from the March 8, 1986 examination. Appellant was noted to have had a mild low frequency hearing loss in both ears and a severe hearing loss in both ears in the higher frequency range. He was advised to discuss the findings with his personal physician.

On December 5, 2006 the Office again wrote to the employing establishment for additional information. It provided copies of appellant's three prior statements as well as the April 9, 1986 letter from CHS. Additionally, the Office summarized the legal requirements for submitting a timely claim and specifically inquired as to what prior notice the employing establishment may have received regarding appellant's claimed loss of hearing. The Office also inquired about the March 8, 1986 medical services CHS reportedly performed on behalf of the employing establishment and whether the employing establishment had prior knowledge of the test results. The Office also wrote to appellant and asked if he could submit a copy of the March 8, 1986 audiogram and any other audiograms not previously submitted.

In response, appellant resubmitted copies of the May 18, 2006 audiogram and the April 9, 1986 letter from CHS. He also stated that he had been sent for a hearing test in 1986 or 1987,

[1] The Office later received two similar statements from appellant describing his employment duties and the type of noise he was regularly exposed to while working. Appellant indicated that he did not have ear protection.

the results of which should be in his employment file. The employing establishment did not respond to the Office's December 5, 2006 request for information.

By decision dated January 30, 2007, the Office denied modification of the October 25, 2006 decision. The Office again found that appellant had not timely filed his claim.

LEGAL PRECEDENT

An original claim for compensation for disability or death must be filed within three years after the injury or death.[2] A claim filed outside this time frame must be disallowed unless the immediate superior had actual knowledge of the injury or death within 30 days.[3] Additionally, an otherwise untimely claim will be considered timely if the immediate superior received written notice within 30 days of the date of injury or death.[4]

In a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware or by the exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment.[5] An employee with actual or constructive knowledge of his employment-related condition, who continues to be exposed to injurious working conditions, must file his or her claim within three years of the date of last exposure to the implicated conditions.[6]

ANALYSIS

Appellant was last exposed to the alleged injurious working conditions on September 1, 1990. However, he did not file his occupational disease claim until almost 16 years after he stopped working for the employing establishment. Appellant should have filed his claim no later than three years after his September 1, 1990 retirement. But the claim may otherwise be considered timely if his immediate superior had actual notice of the injury. In this instance, appellant has not claimed, nor is there any documentary evidence that he provided his supervisor written notice of his injury within the requisite 30-day time frame. The only remaining avenue for finding the claim timely is if appellant's supervisor had actual knowledge of his hearing loss within the applicable time frame.

The March 18, 2006 claim form indicates that appellant reported his condition to his supervisor in 1986. He provided the same information in a subsequent statement received by the Office on July 25, 2006. In his November 14, 2006 request for reconsideration, appellant also indicated that he told the Lock Master Jones about his hearing condition in 1972. Additionally,

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[2] 5 U.S.C. § 8122(a) (2000).

[3] The knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury. 5 U.S.C. § 8122(a)(1).

[4] 5 U.S.C. § 8122(a)(2) (the written notice provided must be in accordance with 5 U.S.C. § 8119).

[5] 5 U.S.C. § 8122(b).

[6] *E.g., James A. Sheppard*, 55 ECAB 515, 518 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993).

appellant noted that the employing establishment had his hearing tested in 1986. He submitted an April 9, 1986 letter from CHS confirming that he had undergone a March 8, 1986 hearing examination as part of the employing establishment's medical surveillance program.

A positive employee test result from an employing establishment program of regular audiometric examinations is sufficient to establish knowledge of a hearing loss so as to put the immediate supervisor on notice of an on-the-job injury.[7] The Office procedure manual is particularly instructive with respect to developing evidence regarding employee health testing programs when determining whether a claim is timely. If the employing establishment gave regular physical examinations which might have detected signs of illness (for example, regular x-rays or hearing tests), it should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results.[8] The procedure manual further provides that, if the claimant was still exposed to employment hazard on or after September 7, 1974 and the agency's testing program disclosed the presence of an illness or impairment, this would constitute actual knowledge on the part of the employing establishment and timeliness would be satisfied even if the employee was not informed.[9]

The employing establishment has not disputed any of appellant's assertions nor has it specifically challenged appellant's claim as untimely. The employing establishment did not response to several requests for information. Other than signing and forwarding appellant's claim form, the employing establishment has provided no additional information relevant to the timeliness issue or any other issue. On two occasions the Office requested specific information from the employing establishment and received nothing in response. The employer is responsible for submitting to the Office all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means.[10]

While the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government sources.[11] In his December 20, 2006 response to the Office, appellant indicated that his 1986 hearing examination results were likely included in his employee personnel file. Appellant also claims to have informed his supervisor(s) of his hearing difficulties on at least two occasions prior to his September 1, 1990 retirement. He submitted evidence of his 1986 participation in an employer-sponsored medical surveillance program, the results of which indicated that appellant had a hearing loss. Although there is nothing in the record that contradicts any of the information provided by appellant, the Office found the evidence insufficient to establish that the employing establishment had prior notice of appellant's hearing condition.

[7] *See James A. Sheppard*, *supra* note 6.

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

[9] *Id.*

[10] 20 C.F.R. § 10.118(a) (2007).

[11] *Richard Kendall*, 43 ECAB 790, 799 (1992).

Appellant maintains notice to the employing establishment regarding his hearing loss. Under the circumstance, the employing establishment's silence should not be a basis for denying the instant claim. The Office should again inquire of the employing establishment whether it was aware of appellant's hearing condition prior to his September 1, 1990 retirement. It should also make further inquiries regarding appellant's 1986 participation in the medical surveillance program referenced in CHS's April 9, 1986 letter. If the employing establishment disagrees with appellant's version of events, it should provide a written explanation to support its disagreement. In the absence of any response, the Office may accept appellant's version of events as established.[12] Accordingly, the case is remanded for further development. After such further development as the Office deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: September 10, 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

[12] *See* 20 C.F.R. § 10.117.