United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 07-2324**
	)	**Issued: March 25, 2008**
DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Norfolk, VA, Employer	)	

Appearances:
David G. Jennings, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 12, 2007 appellant filed an appeal of an August 21, 2007 decision of the Office of Workers' Compensation Programs denying his occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly determined that appellant's claim for occupational hearing loss is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act.

FACTUAL HISTORY

On August 7, 2006 appellant, then a 75-year-old former welder, filed an occupational disease claim (Form CA-2) claiming that he sustained a bilateral hearing loss due to hazardous noise exposure at work from February 7, 1977 to March 27, 1997. He attributed his condition to

working with pneumatic tools, air hammers, grinders and in close proximity to ventilation fans.[1] Appellant noted that he wore earplugs. He stated that he first became aware of his hearing loss and of its possible relationship to his federal employment on March 27, 1997. In an accompanying form, appellant again stated that he was first aware of his hearing loss and its relationship to his federal duties in 1997. He retired from the employing establishment on May 2, 1997. Appellant noted that he had participated for years in rifle hunting but wore appropriate hearing protection.

Appellant submitted annual employing establishment audiograms from February 1977 to October 1978 and from May 1985 to May 1, 1997. The audiograms were obtained as part of a hearing conservation program for hazardous noise exposure. Appellant asserted that these audiograms established that the employing establishment had actual knowledge of his hearing loss before he retired. Each of the audiograms from May 1985 onward demonstrates a ratable hearing loss in the left ear.[2] On May 1, 1997 the day before appellant retired, testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 10, 10, 45 and 60 decibels on the left and 10, 10, 30 and 45 decibels on the right.

Appellant obtained an audiogram at a private audiology clinic on July 25, 2006. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 20, 20, 50 and 60 decibels on the left and 15, 20, 35 and 55 decibels on the right.

In a September 11, 2006 report, S.E. Lewis, an audiologist working for the employing establishment, opined that, as appellant had no significant change in audiograms from 1980 to 1997, any hearing loss was not work related. Dr. G.V. Blackwood, an osteopathic physician working for the employing establishment, reviewed and concurred with Mr. Lewis' report. He stated that appellant had a work-related hearing loss at 4,000 cps on the left but that any other changes were due to rifle hunting.

In a June 26, 2007 letter, the Office advised appellant that his claim appeared untimely because he did not file within three years of March 27, 1997, the date he first became aware of the possible relationship between his hearing loss and occupational noise exposure. The Office afforded appellant 30 days to explain why he delayed in filing his claim.

By decision dated August 21, 2007, the Office denied appellant's claim on the grounds that it was not timely filed under the three-year time limitation at section 8122 of the Act. The

[1] A January 18, 1989 job description notes that welders were exposed to constant noise and intermittent excessive noise. In an October 18, 2006 letter, the Office requested that the employing establishment provide a history of appellant's occupational noise exposure. The record does not indicate if the employing establishment responded to this request.

[2] Under the Act, hearing loss impairments are determined by the average of the hearing levels at 500, 1,000, 2,000 and 3,000 cycles per second (cps). *See* American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) 250. If the average is less than 25, the hearing impairment is not ratable. A February 2, 1977 fitness-for-duty audiogram was within normal limits. A May 10, 1985 audiogram showed the following decibel losses in the left ear at the frequencies of 500, 1,000, 2,000 and 3,000 cps: 10, 10, 25 and 60 decibels. On October 2, 1987 the decibel losses at those frequencies were 5, 5, 40 and 55 decibels respectively. On October 5, 1994 the decibel losses were 10, 5, 45 and 55 decibels. The annual audiograms indicated a progressive, nonratable hearing loss in the right ear beginning in 1985.

Office found that appellant did not file his claim until August 7, 2006, more than three years after March 27, 1997, the date he first became aware of the connection between the claimed hearing loss and his federal employment. The Office further found that the evidence did not establish that the employing establishment had actual notice of the hearing loss within 30 days of the date of injury.

LEGAL PRECEDENT

Under section 8122 of the Act,[3] as amended in 1974, a claimant has three years to file a claim for compensation.[4] In a case of occupational disease, the Board has held that 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 his condition and his employment. When an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitation period even though he does not know the nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[5] Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of his last exposure to the implicated factors.[6] 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.[7]

Even if the claim is not filed within the three-year period, it may be regarded as timely under section 8122(a)(1) if appellant's immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days such that the immediate superior was put reasonably on notice of an on-the-job injury or death.[8] In interpreting section 8122(a)(1) of the Act, the Office procedure manual states that, if the employing establishment gives regular physical examinations, which might have detected signs of illness, such as 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.[9] The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program for hazardous noise exposure is sufficient to constructively establish actual knowledge of a hearing

[3] 5 U.S.C. § 8122.

[4] *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); *see* 20 C.F.R. § 10.101(b).

[5] *Larry E. Young*, 52 ECAB 264 (2001); *Duet Brinson*, *supra* note 4.

[6] *See Larry E. Young*, *supra* note 5.

[7] 5 U.S.C. § 8122(b); *Bennie L. McDonald*, 49 ECAB 509, 514 (1998).

[8] *William C. Oakley*, 56 ECAB 519 (2005); *Duet Brinson*, *supra* note 4; *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6(c) (March 1993); *L.C.*, 57 ECAB ___ (Docket No. 06-1190, issued September 18, 2006); *Ralph L. Dill*, 57 ECAB ___ (Docket No. 05-1620, issued December 6, 2005).

loss, such as to put the immediate supervisor on notice of an on-the-job-injury.[10] A hearing loss identified on such a test would constitute actual knowledge on the part of the agency of a possible work injury.[11]

ANALYSIS

In this case, appellant stated on his claim form that he was aware of a relationship between the claimed condition and his federal employment as of March 27, 1997. Under section 8122(b), the time limitation begins to run when appellant became aware of causal relationship, or, if he continued to be exposed to noise after awareness, the date he is no longer exposed to noise. Appellant retired from federal employment on May 2, 1997. Therefore, the three-year-time limitation began to run on May 2, 1997. As appellant did not file his occupational disease claim until August 7, 2006, the Board finds that it was not filed within the three-year-time period under section 8122(b).

As set forth above, appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor, another employing establishment official or employing establishment physician or dispensary had actual knowledge of the injury within 30 days of his last exposure to noise, *i.e.*, within 30 days of May 2, 1997.[12] The Board finds that the May 1, 1997 employing establishment audiogram is sufficient to establish actual knowledge of the claimed hearing loss within 30 days of May 2, 1997. In the May 1, 1997 audiogram, testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed the decibel losses of 10, 10, 45 and 60 decibels on the left and 10, 10, 30 and 45 decibels on the right. The ratable hearing loss on the left[13] constitutes actual knowledge by the employing establishment of a possible work-related hearing loss within 30 days of May 2, 1997.[14] Therefore, appellant's hearing loss claim is considered timely.

The case must, therefore, be remanded for the Office to address the merits of the claim. After any further development as deemed necessary, the Office should issue an appropriate decision.

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[10] *James W. Beavers*, 57 ECAB ___ (Docket No. 05-1603, issued December 7, 2005); *Ralph L. Dill*, *supra* note 9.

[11] *See* 5 U.S.C. § 8122(a)(1); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801(3) (March 1993); *Ralph L. Dill*, *supra* note 9; *Larry E. Young*, *supra* note 5; *Roger D. Dicus*, 56 ECAB 290 (2005).

[12] *See* 5 U.S.C. § 8122(a)(1); Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.801(3); *Ralph L. Dill*, *supra* note 9; *Larry E. Young*, *supra* note 5.

[13] *See* A.M.A., *Guides* 250, *supra* note 2.

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.8016(c) (March 1993); *Ralph L. Dill*, *supra* note 9; *Larry E. Young*, *supra* note 5; *Roger D. Dicus*, *supra* note 11.

CONCLUSION

The Board finds that appellant's claim for hearing loss was timely filed. The employing establishment had actual knowledge of a possible work-related hearing loss within 30 days of May 2, 1997 the date appellant was last exposed to hazardous noise at work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 21, 2007 is reversed and the case remanded for further development consistent with this opinion.

Issued: March 25, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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