United States Department of Labor
Employees' Compensation Appeals Board

D.R., Appellant	)	
and	)	**Docket No. 09-1700**
	)	**Issued: March 1, 2010**
DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 15, 2008 appellant, through counsel, filed a timely appeal of the Office of Workers' Compensation Programs' decision dated March 18, 2009 denying his claim for a hearing loss. 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 for an occupational hearing loss was timely filed pursuant to 5 U.S.C. § 8122(a).

On appeal appellant, through his attorney, argues that appellant did not receive any correspondence regarding the scheduling of a second opinion and that there was no basis for the Office's refusal to reschedule the second opinion evaluation.

FACTUAL HISTORY

On March 24, 2008 appellant, then a 55-year-old rigger, filed an occupational disease claim alleging that as a result of noise exposure during his federal employment he sustained a

loss of hearing in both of his ears. He indicated that he first became aware of the disease or illness and that it was caused or aggravated by his employment on January 1, 1991. In the supervisor's report on the claim form, the supervisor indicated that appellant resigned from his federal employment on November 12, 1991.

By letter dated October 23, 2008, the Office asked appellant to submit further information. In response to this letter, appellant submitted the results of prior audiograms conducted for the employing establishment on August 22, 1977 and April 2, 1979, as well as the results of an audiological test conducted on March 31, 2008. He also responded to the Office's questions with regard to his prior employment, military service and other exposure to noise. Appellant noted that he was last exposed to hazardous noise in 1991 and that he first noticed the hearing loss at that time. He also noted that he continued to work as a rigger after he left federal employment with various private employers from 1994 through October 2007.

By letter dated December 31, 2008, the Office, through Medical Consultants Network, referred appellant to Dr. Lorenz Lassen, a Board-certified otolaryngologist, for a second opinion. The letter directed appellant to appear at Dr. Lassen's office at 9:30 am on January 21, 2009. The letter was sent to appellant at his address of record. This letter was also sent to appellant's attorney. Appellant failed to report for the examination.

On March 12, 2009 the Office issued a Notice of Proposed Suspension of Compensation for appellant's failure to report to the examination. Appellant was given 14 days to provide a valid reason for not attending the examination.

In a March 17, 2009 note to the file, a representative of the Office noted that appellant indicated in a telephone call that he never received a letter regarding the second opinion appointment.

By decision dated March 18, 2009, the Office denied appellant's claim, finding that the evidence was not sufficient to establish that he sustained an injury as defined by the Act. It noted that, although the evidence of file supported that the claimed event occurred as alleged, there was no medical evidence that provided a diagnosis which could be connected to the event. The Office further noted that appellant never contacted the Office to offer a valid reason for missing the doctor's appointment.

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. The Board may raise the issue on appeal even if the Office did not base its decision on the time limitation provisions of the Federal Employees' Compensation Act.[1]

In cases of injury on or after September 7, 1974, section 8122(a) of the Act provides that an original claim for compensation for disability or death must be filed within three years after

[1] *David R. Morey*, 55 ECAB 642 (2004).

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 as 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 was given within 30 days."[2]

The three-year time period begins to run from the time the employee is aware or by the exercise of reasonable diligence should have been aware, that his or her condition is causally related to the employment. For actual knowledge of a supervisor to be 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.[3]

Even if an original claim for compensation for disability or death is not filed within three years after the injury or death, compensation for disability or death may be allowed if written notice of injury or death as specified in section 8119 was given within 30 days. Section 8119 provides that 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. Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[4]

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 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 the employee does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent. 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 the federal employment awareness, the time limitation begins to run on the date of the last exposure to the implicated factors. The

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[2] 5 U.S.C. § 8122(a).

[3] *Morey*, *supra* note 1.

[4] *Id.*

requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[5]

ANALYSIS

Appellant indicated on his Form CA-2 that he first realized his condition was caused by his federal employment in 1991. His exposure to the contributing employment factors at his federal employment ceased on November 12, 1991, his last date of employment with the employing establishment. Therefore, the time limitation to file a claim began to run on November 12, 1991, as appellant stated that he was aware of his hearing loss and its connection to his employment by this date. However, appellant did not file a claim until March 24, 2008, which was well beyond the three-year time limitation period, and thus it was untimely.[6]

As noted, appellant's claim would still be considered timely if his immediate supervisor had actual knowledge of his injury within 30 days from his last exposure.[7] However, there is no evidence that appellant's supervisor had any knowledge of his alleged hearing loss at this time. There were no audiograms submitted during his period of employment that were interpreted as showing a hearing loss. Appellant's claim would also be timely if he provided written notice of the injury within 30 days pursuant to section 8119 of the Act.[8] However, the record does not reflect that appellant provided written notice of injury prior to filing the present claim. Therefore, appellant has not established that the employing establishment had knowledge of a hearing loss within 30 days of his last exposure in 1991.

CONCLUSION

The Board finds that appellant's claim is barred by the applicable time limitation provisions of the Act.

[5] *W.L.*, 59 ECAB __ (Docket No. 07-1913, issued February 22, 2008).

[6] The Board notes that the record on appeal contains no evidence of any prior hearing loss claim filed with the Office.

[7] 5 U.S.C. § 8122(a)(1).

[8] *Id.* at § 8122(a)(2), 8119.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 18, 2009 is modified to find that appellant's claim was not timely filed and is affirmed, as modified.

Issued: March 1, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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