United States Department of Labor
Employees' Compensation Appeals Board

K.L., Appellant	)	
and	)	**Docket No. 09-1865**
	)	**Issued: March 22, 2010**
DEPARTMENT OF THE NAVY, U.S. MARINE CORPS, COMPTROLLER DEPARTMENT, MARINE CORPS AIR STATION, Beaufort, SC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 14, 2009 appellant filed a timely appeal from an April 29, 2009 schedule award decision of the Office of Workers' Compensation Programs. 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).

FACTUAL HISTORY

On September 3, 2008 appellant, then a retired 55-year-old budget technician, filed a Form CA-2, occupational disease claim, alleging that she sustained an employment-related hearing loss in both ears. She stated that it had only recently come to her attention that she could file a claim. Appellant was first aware of the disease and its relationship to her federal

employment on October 1, 1990.[1] She attached a hearing loss questionnaire signed on August 26, 2008, a signed list of federal and nonfederal employment beginning in June 1973 in which she again stated she first noticed the hearing loss and its relationship to her employment in 1990, a description of work-related noise exposure and audiograms from the employing establishment dated from 1975 to 1986.[2] Appellant also submitted a November 18, 2006 audiogram performed by Joseph E. Gillespie, an audiologist.

An employing establishment deputy comptroller noted that she had been appellant's supervisor from December 2000 until her retirement in January 2002. During that time period, appellant was not exposed to any excessive noise. The supervisor was not aware of any medical examinations pertaining to appellant's claim. On October 9, 2008 the Office requested additional evidence. By letter dated October 23, 2008, appellant's attorney responded that she was exposed to jet engine noise while employed as a budget technician.

On February 10, 2009 the Office referred appellant to Dr. David E. Maurer, a Board-certified otolaryngologist, for a second opinion evaluation. In a February 24, 2009 report, Dr. Maurer provided findings on physical examination and audiogram test results. He diagnosed mild-to-moderate bilateral sensorineural hearing loss. Dr. Maurer found that it was caused by employment-related noise exposure and recommended a trial of hearing aids and noise protection. On March 5, 2009 the Office accepted that appellant sustained employment-related bilateral hearing loss. In an April 6, 2009 report, an Office medical adviser reviewed Dr. Maurer's report and the February 24, 2009 audiogram obtained on his behalf. He advised that the results were valid and found that appellant had a 15 percent hearing loss in each ear. The Office medical adviser also authorized hearing aids.

By decision dated April 29, 2009, appellant was granted a schedule award for a 15 percent hearing loss in each ear, for 30 weeks, to run from February 24 to September 21, 2009. Compensation was based on a weekly pay rate of $407.77.

LEGAL PRECEDENT

The timeliness of a claim 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

[1] Appellant's attorney forwarded the undated claim to the employing establishment on August 26, 2008. A deputy comptroller signed the form on September 3, 2008. Appellant's attorney authorization form was signed on August 5, 2008.

[2] The audiograms demonstrated decibel levels at 500, 1,000, 2,000 and 3,000 hertz as follows: July 7, 1982 left ear -- 20, 10, 10 and 10; right ear -- 15, 10, 15 and 10; September 21, 1982 left ear -- 15, 10, 15 and 25; right ear -- 15, 10, 15 and 15; September 17, 1983 left ear -- 20, 5, 15 and 20; right ear -- 15, 10, 15 and 15; October 14, 1983 left ear -- 20, 5, 15 and 20; right ear -- 15, 10, 15 and 15; July 23, 1984 left ear -- 10, 5, 5 and 20; right ear -- 10, 5, 10 and 10; September 4, 1985 left ear -- 10, 5, 10 and 20; right ear -- 15, 5, 10 and 5; and September 21, 1986 left ear -- 15, 10, 15 and 25; right ear -- 15, 10, 15 and 15. The record also contains an undated audiogram and incomplete results dated May 4, 1975 and April 14, 1978.

Office did not base its decision on the time limitation provisions of the Federal Employees' Compensation Act.[3]

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 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) the 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) written notice of injury or death as specified in section 8119 was given within 30 days.[4]

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.[5]

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.[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 his or her condition and his or 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 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

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

[4] 5 U.S.C. § 8122(a).

[5] *David R. Morey*, *supra* note 3.

[6] *Id*.

factors. The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[7]

ANALYSIS

Appellant filed her claim for hearing loss on September 3, 2008. She indicated on her claim form that she became aware of the condition and its relationship to her federal employment on October 1, 1990. Appellant's exposure to employment factors ceased in January 2002 when she retired. Therefore, the time to file a claim began to run in January 2002. Appellant did not file a claim until September 3, 2008, well beyond the three-year time limitation period provided in section 8122(a) of the Act.[8] Her claim would still be considered timely if her immediate supervisor had actual knowledge of her injury within 30 days of her last exposure or if she provided written notice.[9] The record does not reflect that appellant provided written notice of injury prior to filing the instant claim, and appellant's supervisor advised that she had no knowledge of a medical examination prior to appellant's retirement.

The record establishes that appellant was given audiograms as part of an employing establishment hearing conservation program. The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program is sufficient to constructively establish actual knowledge of a hearing 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 employing establishment of a possible injury.[11] In this case, however, the employing establishment audiograms did not show an employment-related hearing loss.[12] Appellant has not established that the employing establishment had constructive knowledge of her hearing loss. Her claim was not timely filed.[13]

CONCLUSION

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

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

[8] 5 U.S.C. § 8122(a).

[9] *Id*. at § 8122(a)(1); *see Ralph L. Dill*, 57 ECAB 248 (2005).

[10] *James A. Sheppard*, 55 ECAB 515 (2004); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3a(3)(3) (March 1993).

[11] *Supra* note 2; *see Ralph L. Dill, supra* note 9.

[12] *James W. Beavers*, 57 ECAB 254 (2005).

[13] As appellant's claim is untimely, the Board need not address appellant's arguments on appeal.

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2009 schedule award decision of the Office of Workers' Compensation Programs is reversed. Appellant's claim is barred by the time limitation provisions of the Act.

Issued: March 22, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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