

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**K.M., Appellant** )

**and** )

**DEPARTMENT OF THE ARMY, ROCKY )  
MOUNTAIN ARSENAL, Commerce City, CO, )  
Employer** )  
\_\_\_\_\_ )

**Docket No. 10-750  
Issued: November 17, 2010**

*Appearances:*  
*Appellant, pro se*  
*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 January 27, 2010 appellant filed a timely appeal from a September 4, 2009 merit 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 this issue.

**ISSUE**

The issue is whether appellant's claim for a loss of hearing is barred by the applicable time limitation provisions under the Federal Employees' Compensation Act.

**FACTUAL HISTORY**

On May 5, 2009 appellant, then a 77-year-old former army maintenance scheduler, filed an occupational disease claim (Form CA-2) alleging that on January 1, 1986 he first realized that he had hearing loss caused or aggravated by factors of his federal employment. He first became aware of his hearing loss on or about January 1, 1980. In a statement accompanying his claim, appellant advised that his family complained about the hearing loss, which he ignored

and admitted that he was in denial of his condition. He explained that he did not file his claim within 30 days because of his ignorance as to the time limitation. Appellant retired on November 30, 1985. The claim form did not contain a supervisor's report because appellant's supervisor was deceased. The employing establishment controverted appellant's claim due to untimely filing on the claim form and in a response dated May 6, 2009.

On May 7, 2009 the Office requested additional medical and factual information from appellant. Appellant submitted the requested documentation on May 21, 2009 including multiple personal statements discussing the chronological history of his hearing loss, authorization to discuss his case with his daughter and granddaughter and several audiograms. He submitted a job description dated July 10, 1978 that described "personal contacts with supervisory shop foremen" and the like, as well as "obtaining shop and technical information" as two of his major duties.

Appellant submitted a progress report dated March 27, 2002 from Michelle LeBanc Gross, an audiologist, who advised that the onset of hearing loss and noise exposure occurred "years ago." In a report dated April 7, 2009, Cody Sanders, a certified hearing instrument specialist for Dr. Shad Grubb, a Board-certified internist, noted that the cause of appellant's hearing loss was impossible to define, but was "almost certainly to a degree work related."

In a narrative dated May 14, 2009, appellant stated that he "first had hearing tests and purchased 'inside of the ear' hearing aids about 1980" and that he "should have filed a hearing loss claim" at that time. He was unaware of the severity of his hearing loss until after his hearing tests were administered. On the hearing loss claim (Form CA-35B), appellant identified November 30, 1985 as the date he was last exposed to hazardous noise at work. He submitted a notification of personnel action dated November 26, 1985, reporting that he retired from federal employment effective November 30, 1985. A response from the employing establishment dated May 20, 2009 corroborated the date of last exposure as November 30, 1985 because it was the day appellant resigned and was given an exit medical examination.<sup>1</sup>

By decision dated September 4, 2009, the Office denied appellant's claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. It found that he had failed to file a claim within three years of the date of injury, January 1, 1980. The Office also found that appellant did not file within three years of November 30, 1985, the date of his retirement and date of last exposure to the implicated employment factors. It determined that this is the day he knew or should have known about his loss of hearing and its employment relationship. The Office further found that there was no evidence that his supervisor had actual knowledge of his claim within 30 days of the date of injury.

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<sup>1</sup> A copy of the exit medical examination was not received by the Office.

## LEGAL PRECEDENT

Section 8122(a) of the Act<sup>2</sup> provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.<sup>3</sup> Section 8122(b) of the Act provides that the time limitation for latent disability cases does not 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.<sup>4</sup> The Board has held that an employee need only be aware of a possible relationship between the injury and its relation to the employment to trigger the beginning of the statute of limitations.<sup>5</sup> If an employee continues to be exposed to injurious employment conditions after such awareness, the Board has held that the time limitation begins to run on the last date of exposure.<sup>6</sup>

The time limitations in section 8122(a) and (b) do not: (1) begin to run against a minor until he reaches 21 years of age or has had a legal representative appointed; (2) run against an incompetent individual while he is incompetent and has no duly appointed legal representative; or (3) 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.<sup>7</sup>

Compensation for disability or death may be allowed even if a claim is not timely filed within the three-year period of limitation if: (1) the immediate supervisor had actual knowledge of the alleged employment-related injury within 30 days;<sup>8</sup> or (2) written notice of the injury or death was provided within 30 days as specified in section 8119.<sup>9</sup> The knowledge must put the supervisor reasonably on notice of an on-the-job injury or death.<sup>10</sup>

## ANALYSIS

The Board finds that the evidence of record establishes that appellant did not timely file a claim for an employment-related loss of hearing under the Act. Appellant asserted that his hearing loss was caused by his federal employment on April 24, 2009. His last day of exposure was the day he retired on November 30, 1985, when he was also given an exit medical examination. The three-year time limitation began to run on November 30, 1985 and expired no

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8122(a); *W.L.*, 59 ECAB 362 (2008).

<sup>4</sup> 5 U.S.C. § 8122(b); *J.P.*, 59 ECAB 178 (2007).

<sup>5</sup> *Richard Narvaez*, 55 ECAB 661 (2004).

<sup>6</sup> *James W. Beavers*, 57 ECAB 254 (2005).

<sup>7</sup> *J.P.*, *supra* note 4.

<sup>8</sup> 5 U.S.C. § 8122(a)(1).

<sup>9</sup> *Id.* at § 8122(a)(2).

<sup>10</sup> *James W. Beavers*, *supra* note 6.

later than November 30, 1988. Appellant's April 24, 2009 claim was not timely filed within three years of November 30, 1985 and is, therefore, barred by the statute of limitations.

Furthermore, the evidence shows that appellant was aware or should have been aware of the relationship of his hearing loss to his federal employment prior to the date of last exposure on November 30, 1985. The evidence establishes that he first became aware of his hearing loss on or about January 1, 1980. Appellant reported that he underwent hearing tests and purchased hearing aids as early as 1980. He was unaware as to the "severity" of his hearing loss until after hearing tests were administered, but he did not establish that he was unaware of his hearing loss and its relationship to his employment. Consequently, there is no evidence to support that the time limitation began to run any later than November 30, 1985.

Although appellant's claim for compensation was not timely filed within the three-year statute of limitations, his claim would be regarded as timely if his immediate supervisor had actual knowledge or written notice that he sustained an employment-related injury within 30 days. He, however, provided no evidence to establish that his supervisor had actual knowledge of the injury within 30 days or that written notice of the injury was given to the supervisor within 30 days. There is no probative evidence to establish that appellant's supervisor had actual knowledge sufficient to put the employer reasonably on notice that his hearing loss was related to his federal employment within 30 days of November 30, 1985, the day he retired and the date of last exposure.

The Board has held that an employee's unawareness of possible entitlement, lack of access to information or ignorance of the law or one's rights and obligations under it do not constitute exceptional circumstances that excuse a failure to file a timely claim.<sup>11</sup> Appellant was not under 21 years old and provided no evidence to show that he was incompetent or was prevented from giving notice by exceptional circumstances. Thus, he did not timely file a claim for compensation.<sup>12</sup>

### CONCLUSION

The Board finds that appellant did not file a timely claim for compensation and his claim is barred by the applicable time limitation provisions of the Act.

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<sup>11</sup> *B.J.*, 59 ECAB 660 (2008).

<sup>12</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 4, 2009 is affirmed.

Issued: November 17, 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