

FACTUAL HISTORY

On September 23, 2009 appellant, then a 57-year-old former marine patternmaker, filed an occupational disease claim alleging that working around loud machine noise at work caused employment-related hearing loss and tinnitus. He stated that he first became aware of the condition and its relationship to his federal employment on September 1, 2009, and that he had not been exposed to loud noise since leaving federal employment, noting that he resigned effective November 1, 1987. Appellant submitted a September 1, 2009 audiogram report and stated that his physician, Dr. Preston A. Rice, a Board-certified otolaryngologist, explained that his condition could be caused by exposure to loud noise.

In December 1, 2009 letters, the Office asked that appellant provide information regarding his employment and claimed hearing loss, and asked that the employing establishment provide information regarding noise exposure. On December 17, 2009 the employing establishment responded that appellant had not been in a hearing conservation program and provided his employment history, noting that he began employment in 1973 and in 1981 became a management analyst. Audiograms dated July 15, 1981 and July 31, 1984 were submitted. Appellant advised that he did not participate in a hearing conservation program.

By decision dated January 5, 2010, the Office denied the claim on the grounds that it was not timely filed. On January 8, 2010 appellant requested a review of the written record. In a September 1, 2009 report, Dr. Rice noted a two-week history of tinnitus in both ears and that he was exposed to noise in his federal employment and in the military. He advised that an audiogram demonstrated a normal sloping to mild/moderate high frequency sensorineural hearing loss. The employing establishment provided a noise assessment worksheet.

In an April 19, 2010 decision, an Office hearing representative affirmed the January 5, 2010 decision. On May 19, 2010 appellant requested reconsideration, stating that he did not know that he had tinnitus or a hearing loss until just before he saw Dr. Rice on September 1, 2009, and that shortly thereafter he filed his claim. He stated he was never told he had a hearing problem prior to leaving federal employment, and did not know there was a relationship between his hearing problems and his federal employment until he saw Dr. Rice.

In a nonmerit decision dated June 11, 2010, the Office denied appellant's reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.² 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

² *Charles Walker*, 55 ECAB 238 (2004); see *Charles W. Bishop*, 6 ECAB 571 (1954).

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.”³

Section 8119 of the Act 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.⁴ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.⁵

Section 8122(b) provides that the time for filing in latent disability cases 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 the employment and the compensable disability, and the Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.⁶ 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.⁷

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 or she 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.⁸ 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 federal employment, the time

³ 5 U.S.C. § 8122(a).

⁴ *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

⁵ *Laura L. Harrison*, 52 ECAB 515 (2001).

⁶ 5 U.S.C. § 8119(b); *Delmont L. Thompson*, 51 ECAB 155 (1999).

⁷ *Id.* at § 8122(b); *Duet Brinson*, 52 ECAB 168 (2000).

⁸ *Larry E. Young*, *supra* note 4.

limitation begins to run on the date of the last exposure to the implicated factors.⁹ The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.¹⁰

In interpreting section 8122(a)(1) of the Act, Office procedures provide 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.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant's claim was timely filed. As noted above, if an employee continues to be exposed to injurious working conditions, the time limitation begins to run on the date of the last exposure.¹² Therefore, the time for filing appellant's claim did not begin to run until November 1, 1987, the date he resigned. Accordingly, the three-year statute of limitations would have expired no later than November 1, 1990 and appellant's September 23, 2009 claim for compensation would be barred by this exception to the statute of limitations.¹³ There is also no evidence of record that establishes that appellant's supervisor had actual knowledge of any injury within 30 days or that written notice of the injury was given within 30 days. Furthermore, this is not a case where the employing establishment had constructive knowledge of an employment-related hearing loss as both appellant and the employing establishment acknowledged that there was not a hearing conservation program in place.

In cases of latent disability, however, 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 the employment and the compensable disability.¹⁴ When appellant filed this claim for compensation on September 23, 2009, he indicated that he was first aware of his condition and its relationship to his employment on September 1, 2009 because Dr. Rice explained to him at that time that his condition could be caused by noise exposure. While the record contains employing establishment audiograms dated July 15, 1981 and July 31, 1984, neither shows that at that time appellant was informed of the results or if any hearing loss condition was considered employment related, and although he reported that his hearing worsened over time and thought that it was due to aging, he also stated that his tinnitus condition became severe two weeks prior to seeing Dr. Rice on September 1, 2009, when he was told by the physician of the possible relationship of his hearing loss and tinnitus to employment noise exposure.

⁹ *Id.*

¹⁰ *Debra Young Bruce*, 52 ECAB 315 (2001).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6(c) (March 1993); see *James A. Sheppard*, 55 ECAB 515 (2004).

¹² *Larry E. Young*, *supra* note 4.

¹³ *Supra* note 2.

¹⁴ 5 U.S.C. § 8122(b).

There is therefore no evidence to support that appellant should have had actual knowledge of a possible causal relationship between his work activities and the hearing loss and tinnitus prior to September 1, 2009.¹⁵ The Board therefore finds that there is no competent evidence of record to start the running of the time limitations period prior to appellant's assertion that he became aware on September 1, 2009, the date of Dr. Rice's examination, that his hearing loss and tinnitus were employment related. As appellant has filed a timely claim for compensation, the case will be remanded to the Office for further development to determine if he sustained the claimed hearing loss and tinnitus causally related to factors of his federal employment. Following such development as the Office deems necessary, it shall issue a *de novo* decision on the merits of this case.

In light of the Board's findings regarding Issue 1, Issue 2 is rendered moot.

CONCLUSION

The Board finds that appellant's claim was timely filed.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 11 and April 19, 2010 are set aside, and the case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: April 1, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

¹⁵ *Debra Young Bruce, supra* note 10.