

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

G.G., Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Portland, OR, Employer**

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**Docket No. 11-548
Issued: October 14, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 3, 2011 appellant filed a timely appeal from an October 4, 2010 decision of the Office of Workers' Compensation Programs (OWCP) finding his claim was not timely filed and from a December 15, 2010 decision denying his request for reconsideration. Pursuant to the Federal Employee's Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant filed his claim within the applicable time limitation provisions of FECA; and (2) whether OWCP properly denied his request for reconsideration under 5 U.S.C. § 8128(a).

On appeal, appellant contends that he was told in 2009 that his hearing loss was likely due to his employment-related noise exposure in the 1960s.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 4, 2010 appellant, a 70-year-old former engineering technician, filed an occupational disease claim alleging hearing loss as a result of noise exposure in his federal employment. He worked around an indoor rock crusher, rod mill, an abrasion machine, an indoor concrete mixer and other rock testing equipment. Appellant listed the date of awareness of illness and that the illness was caused by his employment as October 1965. He noted that when he returned to the university in October 1965 he did not hear as well as he had before and that he had tinnitus. A hearing test was administered in 1981 that detected a high-frequency loss in both ears. Appellant stated that his hearing loss became progressively worse. The employing establishment noted that he was last exposed to noise in September 1965 and that there was no medical surveillance until the mid 1970's.

In a statement dated February 4, 2010, appellant noted that from the summer of 1961 until September 1965 he worked at the employing establishment and that his duties included testing rock from construction sites that had to be reduced from boulder to sand size using a variety of machines. The rock products were then separated into size classes using rotating metal screens and were used to design concrete mixes that were mixed in an indoor concrete mixer. Appellant stated that each of these steps involved excessive noise. He never experienced hearing problems before working in the material lab, but when he returned to university, he noticed tinnitus sat near the front of class to understand the lecture. Appellant had his hearing tested in 1981 by Dr. Edwin C. Everts, a Board-certified otolaryngologist. At that time, the test showed significant high-frequency hearing loss in both ears. Appellant submitted a December 28, 2009 audiology report by a Dr. Susan A. Reeder.

In response to questions from OWCP, appellant indicated that his last major daily exposure to hazardous noise at work was in August 1965. He first noticed his hearing loss in September 1965 and stated that he first related his hearing loss to work exposure in the mid-1970s.

In a May 20, 2010 letter, a human resources specialist for the employing establishment noted that appellant had not worked at the employing establishment since 1965.

By decision dated June 28, 2010, OWCP denied appellant's claim finding that it was not timely filed.

By letter dated July 2, 2010, appellant disagreed with the decision, contending that although tests in the 1980s detected high-frequency hearing loss it was not severe enough to require hearing aids or have a major impact on his quality of life. He described his exposure to noise while he worked at the employing establishment. Appellant attached an article from the internet with regard to noise-induced hearing loss.

On July 6, 2010 appellant requested reconsideration. By letter dated August 18, 2010, OWCP asked the employing establishment for documents or records with regard to his hearing condition.

By decision dated October 4, 2010, OWCP denied modification of the June 28, 2010 decision.

On October 21, 2010 appellant again requested reconsideration. He stated that in the 1970s he did not know that noise exposure in the 1960s could have a progressive affect on his hearing. Dr. Everts did not discuss the long-term effects of noise exposure and since appellant's hearing loss was not severe enough to require hearing aids, he never considered filing a claim. Appellant's first awareness that his current hearing loss was related to exposure to loud noise in his work environment during the 1960s was a result of testing for a dizziness problem in 2009. Dr. Reeder asked for a complete history of exposure to loud noise and he informed her of his work with the Corps of Engineers. She stated that working around loud noise early in his life could very well be the primary cause of the hearing loss appellant was experiencing today.

In a decision dated December 15, 2010, OWCP declined to reopen appellant's case for further merit review.

LEGAL PRECEDENT -- ISSUE 1

In cases of injury prior to September 7, 1974, FECA provides that a claim for compensation must be filed within one year of the date that the claimant was aware or reasonably should have been aware that the condition may have been caused by the employment factors.² The one-year filing requirement may be waived if the claim is filed within five years and (1) it is found that such failure was due to circumstances beyond the control of the person claiming benefits; or (2) that such person has shown sufficient cause or reasons in explanation thereof and material prejudice to the interest of the United States has not resulted from such failure.³

The test for whether sufficient cause or reason was shown to justify waiver of the one-year time limitation is whether a claimant prosecuted the claim with that degree of diligence which an ordinary prudent person would have exercised in protecting his right under the same or similar circumstances.⁴ The five-year time limitation is a mandatory period which neither OWCP nor the Board has the power to waive.⁵

For injuries occurring between December 7, 1940 and September 6, 1974, OWCP procedures provide that written notice of the injury should be given within 48 hours as specified in section 8119 of FECA,⁶ but this requirement will be waived if the employee filed written notice within one year after the injury or if the immediate superior had actual knowledge of the injury within 48 hours after the occurrence of the injury.⁷

² 5 U.S.C. §§ 8101-8193.

³ *Eugene L. Turchin*, 48 ECAB 391, 395 (1997).

⁴ *Edward Lewis Maslowski*, 42 ECAB 839 (1991)

⁵ *Roseanne S. Allexenberg*, 47 ECAB 498, 500 (1996).

⁶ *Albert K. Tsutsui*, 44 ECAB 1004, 1008 (1993).

⁷ 5 U.S.C. § 8119(b).

Where an employee has sustained a loss of hearing as a result of excessive noise at work over a period of time, the date of injury is determined to be the date of the last noise exposure which adversely affected his hearing.⁸ In an occupational disease claim, the time limitation does not begin to run until the claimant is aware or reasonably should be aware of the causal relationship of between his employment and the compensable disability. If exposure to the implicated employment factors extends the beyond the date of such awareness, the time limitation begins to run on the date of the last exposure.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant did not file his claim within the applicable time-limitation provisions of FECA. In an occupational illness claim, the time for filing a claim does not begin to run until claimant is aware or reasonably should have been aware of the causal relationship between his employment and the compensable disability.¹⁰ When an employee sustains hearing loss due to noise exposure at work over a period of time, the date of injury is determined to be the date of the last noise exposure which adversely affected his hearing.¹¹ Appellant stopped working at the employing establishment in September 1965. He stated that he was aware of his hearing loss and its relationship to his employment in October 1965 when he noted that he did not hear as well as he had previously and experienced tinnitus. In 1981, appellant stated that he had diagnostic tests administered that indicated a high-frequency loss in both ears. However, he did not file his claim until February 4, 2010. February 4, 2010 was not within the one-year period of limitation commencing in September 1965. Furthermore, appellant is not entitled to waiver of the one-year filing requirement because his claim was not filed within five years of the claimed injury, nor has he met the other requirements for such waiver. The five-year time limitation is a maximum, mandatory period which neither OWCP nor the Board has authority to waive.¹²

For injuries occurring between December 7, 1940 and September 6, 1974, OWCP's procedure manual indicates that the written notice of the injury should be given within 48 hours as specified in section 8119 of FECA. That this requirement may be waived if the employee filed written notice within one year of the injury or if the immediate superior had actual knowledge of the injury within 48 hours of the injury.¹³ There is no evidence that appellant filed written notice within one year of the injury as specified in section 8119 of FECA. Further, appellant failed to establish that his immediate supervisor had actual knowledge of the injury within 48 hours after the occurrence of the injury. He contends that his claim was timely filed because he became aware that his hearing loss was problematic in 2009. Even though appellant

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(b)(1) (March 1993).

⁹ See *Peter S. Elliott*, 51 ECAB 627 (2000).

¹⁰ *William L. Gillard*, 33 ECAB 265, 268 (1981).

¹¹ See *Solomon R. Stone*, 32 ECAB 150 (1980)

¹² *Eugene L. Turchin*, *supra* note 3.

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.7 (September 1990).

may not have been fully aware of the seriousness of his condition,¹⁴ the Board finds that there are no exceptional circumstances that excuse his failure to file a timely claim in this case. Consequently, he has not established that his claim was filed within the applicable time limitation provisions of FECA.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁵ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁶ To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁷ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁸

ANALYSIS -- ISSUE 2

In the instant case appellant did not show that OWCP erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by OWCP, nor did he submit any new pertinent new and relevant evidence. Appellant made arguments already considered and rejected by OWCP concerning the deleterious affect employment-related noise exposure had on his hearing. Accordingly, OWCP properly denied appellant's request for a merit review.

CONCLUSION

The Board finds that appellant did not file his claim within the applicable time limitation provisions of FECA. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim.

¹⁴ *J.R.*, Docket No. 07-2278 (issued May 19, 2008); *see generally Emma L. Brooks*, 37 ECAB 407 (1986); *Rodney E. Hoover*, 32 ECAB 1469 (1981); *Fred L. Ingram*, 30 ECAB 959 (1979)

¹⁵ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

¹⁶ 20 C.F.R. § 10.606(b)(2).

¹⁷ *Id.* at § 10.607(a).

¹⁸ 20 C.F.R. § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 15 and October 4, 2010 are affirmed.

Issued: October 14, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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