United States Department of Labor
Employees' Compensation Appeals Board

R.A., Appellant	)	
	)	**Docket No. 12-1339**
and	)	**Issued: December 6, 2012**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, GOLDEN GATE NATIONAL RECREATION, San Francisco, CA, Employer	)	

Appearances:
James Wright, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 6, 2012 appellant, through her representative, filed a timely appeal of the January 4, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 filed a timely claim for compensation for hearing loss pursuant to the applicable time limitations under FECA.

On appeal, appellant's representative contends that the evidence of record establishes that appellant filed a timely claim for employment-related hearing loss. Appellant was not aware that her hearing loss constituted a compensable injury for which she could file a claim.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 9, 2010 appellant, then a 52-year-old maintenance worker, filed an occupational disease claim alleging that on August 2, 2010 she first became aware of her hearing loss and realized that it was caused by her employment. She contended that after her exposure to loud noise at work as a maintenance worker and other exposure to construction noises as a supply technician, she began to experience hearing loss which progressively worsened. Appellant stated that she was last exposed to conditions alleged to have caused her condition on April 5, 1995. In a July 7, 2010 narrative statement, she contended that she was exposed to loud noise at work eight hours a day, five days a week beginning in 1985 when she started work as a maintenance laborer. Appellant further contended that the employing establishment was aware of her hearing loss.

In a December 9, 2010 letter, Winnie Fong, a human resources specialist, stated that appellant worked as a laborer at the employing establishment from January 6, 1985 through June 6, 1987. She worked as a maintenance worker from June 7, 1987 to February 17, 1996. Appellant was off work due to a workers' compensation injury under OWCP File No. xxxxxx106 from April 4, 1995 to February 17, 1996. She returned to work on February 18, 1996 in a supply technician position that accommodated her physical restrictions. Appellant stopped work on April 29, 2003 due to the prior workers' compensation injury. Ms. Fong stated that appellant separated from federal service on February 8, 2008. She contended that appellant's last exposure to noise was in her maintenance worker position which was before April 4, 1995, over 15 years ago. Ms. Fong related that there was no record of hearing loss in appellant's employee medical file. She stated that an accompanying Form SF-78 dated March 28, 1985 established a threshold that appellant's hearing was normal. The medical file did not contain any subsequent medical documentation regarding her hearing. Ms. Fong stated that, if appellant's supervisors were aware of a hearing loss, they did not annotate it in her employee medical file. The employing establishment had no evidence to confirm that appellant had any hearing loss due to her employment, that she was exposed to high levels of noise eight hours a day, five days a week, or that she lost time from work as a result of her claimed condition.

By letter dated December 16, 2012, OWCP notified appellant of the deficiencies of her claim and requested additional factual information. Also, on December 16, 2012 it requested that the employing establishment answer questions regarding appellant's claim.

In a December 29, 2012 letter, appellant provided her employment history at the employing establishment from January 1981 to February 2008. She was last exposed to hazardous noise at work in April 2003. On August 2, 2010 appellant first realized that her hearing loss was related to her work exposure to loud noises. She selected August 2, 2010 as her date of injury because a physician's audiological evaluation performed on that date found that she had hearing loss due to loud noises at work.

In a March 2, 2011 letter, Ms. Fong stated that a maintenance worker was exposed to minimum noise. Under unusual circumstances, *i.e.*, 10 percent to 15 percent of the time, maintenance workers assisted building, utility, roads and trails crews. Ms. Fong stated that under no circumstances did maintenance workers operate any type of tools and/or equipment for eight continuous hours. Their primary function was to clean restrooms, perform minor repairs to these restrooms when needed, pick up litter throughout the park and assist other maintenance trades as needed. Ms. Fong noted a description of the maintenance worker position provided by Billy

Vogele, a maintenance worker supervisor, who currently managed appellant's former work area. Mr. Vogele stated that such workers used a gas-powered hand-held blower 15 to 30 minutes every 4 or 5 days. When there was a full gardening staff, maintenance workers performed no string trimming, mowing or edging. They only occasionally assisted with tree branch removal and used a gas-powered blower instead of a broom 15 minutes or less per week. In a March 31, 2011 letter, Ms. Fong contended that appellant's hearing loss claim was not timely filed. She stated that earplugs and muffs were issued to employees. The employing establishment did not have a noise abatement program during appellant's employment. Complaints of hearing loss due to exposure to loud noises would have been treated on a case-by-case basis. There were no records documenting hearing loss or complaints of exposure to loud noises in appellant's files.

In a June 1, 2011 decision, OWCP denied appellant's claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. It found that she did not file her claim until December 9, 2010, more than three years after April 3, 1995, the date she was last exposed to hazardous federal noise. OWCP further found that there was no evidence that a supervisor had actual knowledge of appellant's claim within 30 days of the date of injury.

By letter dated June 7, 2011, appellant, through her representative, requested an oral hearing before an OWCP hearing representative.

During the October 26, 2011 hearing, appellant testified that she was not aware that her hearing loss could be compensable until after she underwent an audiological evaluation in 2010. She first realized that her hearing loss was caused by her employment while working as a supply technician in an airplane hangar. Appellant stated that she was exposed to loud noise in this position from 1996 until maybe 2002. She noted that after 2002 her office moved from the airplane hangar to an office setting. Appellant did not report her hearing loss to the employing establishment because she did not think it was significant enough at that time.

In a January 4, 2012 decision, an OWCP hearing representative affirmed the June 1, 2011 decision. The hearing representative found that appellant did not file her claim within three years from when she was last exposed to noise as a supply technician from 1996 until 2002.

LEGAL PRECEDENT

Under FECA,[2] as amended in 1974, a claimant has three years to file a claim for compensation.[3] In a case of occupational disease, the Board has held that 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 her condition and her employment.[4] Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of her last exposure to the implicated factors.[5] Section 8122(b) provides that, in latent disability cases the time limitation does not begin to run until the claimant is aware or by

[2] 5 U.S.C. § 8122(a).

[3] *See Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); *see also* 20 C.F.R. § 10.101(b).

[4] *See William C. Oakley*, 56 ECAB 519 (2005).

[5] *See Larry E. Young*, 52 ECAB 264 (2001); *William D. Goldsberry*, 32 ECAB 536, 540 (1981).

the exercise of reasonable diligence, should have been aware, of the causal relationship between her employment and the compensable disability.[6] Even if the claim is not filed within the three-year period, it may be regarded as timely under section 8122(a)(1) if appellant's immediate supervisor had actual knowledge of her alleged employment-related injury within 30 days such that the immediate superior was put reasonably on notice of an on-the-job injury or death.[7] The Board has held that a program of annual audiometric examinations conducted by an employing establishment may constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury.[8]

ANALYSIS

The Board finds that the evidence of record establishes that appellant did not timely file a claim for compensation under FECA. Appellant reported on the claim form that she was aware of a relationship between the claimed condition and her employment as of August 2, 2010. Under section 8122(b), the time limitation begins to run when she became aware of causal relationship, or, if she continued to be exposed to noise after awareness, the date she is no longer exposed to noise. The record reflects that appellant stated that she first realized that her hearing loss was caused by her employment while working as a supply technician in an airplane hangar from 1996 to 2002. She further stated that after 2002 her office moved from the airplane hangar to an office setting. Appellant, therefore, was aware of a causal relationship between her hearing loss and her work during her federal employment and was last exposed to the work condition that caused her condition before she retired on February 8, 2008. Therefore, the three-year time limitation began to run in 2002, her date of last exposure to the implicated employment factor. Since appellant did not file her claim until December 9, 2010, the Board finds that her claim was filed outside the three-year time limitation period under section 8122(a).

Appellant's 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 Ms. Fong advised that the employing establishment had no knowledge of any hearing loss or complaints of exposure to loud noise. The record does not contain evidence of annual audiograms by the employing establishment. The Board finds, therefore, that appellant has not established that the employing establishment had knowledge of a hearing loss within 30 days of her last exposure in 2002.

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[6] 5 U.S.C. § 8122(b); *see also Bennie L. McDonald*, 49 ECAB 509, 514 (1998).

[7] *See Duet Brinson*, *supra* note 3; *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

[8] *See Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3c and 6c (October 2010) which states: "If the employing [establishment] gave regular physical examinations which might have detected signs of illness (for example, regular x-rays or hearing tests), the agency should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results. [If the claimant was still exposed to employment hazard on or after September 7, 1974 and the agency's testing program disclosed the presence of an illness or impairment, this would constitute actual knowledge on the part of the agency, and timeliness would be satisfied even if the employee was not informed...]."

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

The contention of appellant's representative, on appeal, that appellant was not aware that she could file a hearing loss claim is an insufficient cause or reason for failure to file a timely claim. 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.[10] Appellant was not under 21 years old and provided no evidence to show that she was incompetent or was prevented from giving notice by exceptional circumstances. Thus, she did not timely file a claim for compensation.[11]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not file a timely claim for compensation for an employment-related hearing loss and, therefore, her claim is barred by the applicable time limitation provisions of FECA.

ORDER

IT IS HEREBY ORDERED THAT the January 4, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[10] *B.J. (B.J.)*, 59 ECAB 660 (2008).

[11] *Id.*