

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY ZEMAN and DEPARTMENT OF JUSTICE,
BUREAU OF FEDERAL PRISONS, McNeil Island, WA

*Docket No. 98-1650; Submitted on the Record;
Issued February 15, 2000*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's compensation claim on the grounds that his claim was not filed within the applicable time limitation provisions of the Federal Employees' Compensation Act; and (2) whether the Office properly denied appellant's request for reconsideration pursuant to section 8128 of the Act.

On February 10, 1996 appellant, then a 70-year-old retired supervisor of inmates, filed an occupational disease claim, alleging that he sustained a hearing loss that was causally related to factors of his federal employment. In a decision dated July 25, 1996, the Office denied appellant's claim on the grounds that it was not timely filed within three years of the date of his last exposure when appellant should have been reasonably aware of a relationship between the employment and the claimed condition. By decision dated July 28, 1997, an Office hearing representative affirmed the July 25, 1996 decision of the Office. In a decision dated March 16, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to reopen the record for merit review.

The Board has duly reviewed the case record on appeal and finds that the Office properly denied appellant's claim for an occupational disease as it was not filed within the applicable time limitation provisions of the Act.

In cases of injury on or after September 7, 1974, section 8122(a) of the Act¹ provides that a claim for disability or death must be filed within three years after the injury or death. 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 his employment and the compensable disability.² In a case involving a claim for occupational hearing loss, the time limitation provision of the Act begins to

¹ 5 U.S.C. § 8122(a).

² 5 U.S.C. § 8122(b); *see* § 10.105(c).

run when the employee becomes aware or reasonably should have been aware of a possible relationship between his hearing loss and factors of his federal employment.³ In situations where the exposure to noise in the employment continued after such knowledge, the time for filing begins to run on the date of the employee's last exposure to such noise.⁴

In the instant case, appellant indicated that he was first aware of his hearing loss condition and its causal relationship to factors of his federal employment on January 31, 1965. Appellant retired March 15, 1975 and this was his date of last exposure. Appellant did not stop work until retirement. Pursuant to section 8122(b) of the Act, appellant's claim which was filed on February 10, 1996 is not timely filed within three years of the date of last exposure, March 15, 1975. On appeal, appellant contended that he met the exception to the time limitation statute as he advised his immediate supervisor of this hearing loss and its causal relationship to his federal employment. Thus, appellant contends that his immediate supervisor had actual knowledge of the injury within 30 days such that the supervisor was reasonably put on notice of an on-the-job injury. However, a review of the evidence initially submitted by appellant with his claim indicates he did not present sufficient evidence to meet the exception to the time limitation provision. Appellant submitted a statement from the Acting farm manager and one of his supervisors, Jim Ellison, which indicated that there was little official leadership in the use of hearing protection devices at the employing establishment and few employees were aware of the connection between their work and hearing loss. While Mr. Ellison's statement supports appellant's contention he was exposed to loud noises in the workplace, it does not directly establish Mr. Ellison, or any other supervisor had actual knowledge of appellant's hearing problems and their relationship to an employment factor. He also submitted a statement from Robert Hearrell, the former farm manager and his overall supervisor, in which, Mr. Hearrell indicated that he heard about appellant's hearing loss from appellant's coworkers and the inmates. This evidence does not constitute actual notice of an on-the-job injury and is, therefore, insufficient for appellant's supervisor to be put on reasonable notice of an on-the-job injury under the Act. Thus, initially appellant did not meet his burden of proof in establishing an exception to the applicable time limitation provision set forth in section 8122 and the Office properly denied his claim on this basis.

However the Board also finds that the Office improperly denied appellant's request for reconsideration.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.⁵ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value

³ *Union Small*, 25 ECAB 275 (1974); *Chester T. DeMent*, 25 ECAB 230 (1974).

⁴ *Emanuel T. Posluszny*, 47 ECAB 651 (1996).

⁵ 20 C.F.R. § 10.138(b)(2).

and does not constitute a basis for reopening a case.⁶ Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁷

With his request for reconsideration, appellant submitted three additional statements from his immediate supervisors between 1965 and 1975. The statements indicated that appellant had notified them and they were aware of appellant's hearing loss and of a connection between appellant's hearing loss and factors of his federal employment. This evidence constitutes new and relevant evidence under section 10.138 of the implementing regulations in that it addresses whether appellant's immediate supervisors had actual knowledge of his claimed hearing loss and its relationship to his federal employment, which may establish an exception to the time limitation provisions of the Act. Therefore, the Board finds that the Office abused its discretion in not reopening this case for merit review as appellant has submitted relevant and pertinent evidence not previously considered by the Office.⁸

The decision of the Office of Workers' Compensation Programs dated July 28, 1997 is hereby affirmed. The decision of the Office dated March 16, 1998 is set aside and the case is remanded for review of the merits of appellant's claim and any other proceedings deemed necessary by the Office to be followed by an appropriate decision.

Dated, Washington, D.C.
February 15, 2000

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

⁷ *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

⁸ *Carol Cherry*, 47 ECAB 658 (1996).