U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH A. ANGELONE and TENNESSEE VALLEY AUTHORITY, PARADISE STEAM PLANT, Chattanooga, TN

Docket No. 03-427; Submitted on the Record;
Issued May 27, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has established that he sustained a high frequency sensorineural hearing loss in the performance of duty.

On April 29, 2002 appellant, then a 54-year-old boilermaker welder, filed a claim alleging that in 1990 he first became aware that he had developed a "bad hearing loss" during his employment from working near loud motors, pumps, tools and other equipment. Appellant stopped work at the employing establishment on May 24, 1990 and did not return. There was no evidence his supervisor at the time of his work cessation had any knowledge of this condition.

In an accompanying letter, appellant stated that he still worked as a boilermaker welder in the private sector, that he had been continually exposed to loud noises from boilers, pumps, vacuum trucks, fans, diesel engines, gas engines, arc gouges, grinders and that sometimes safety equipment was provided. Appellant stated that his hearing became worse in the mid 1980s and early 1990s,[1] and he explained his delay in filing a claim.

The employing establishment controverted appellant's claim, noting that, although he claimed employment-related hearing loss, appellant worked for the employing establishment for less than four years. The employing establishment claimed that appellant did not timely file his hearing loss claim and that there were no reasons to waive the regulatory time requirement. It noted that no supervisor had actual knowledge of appellant's hearing loss claim within 30 days of May 24, 1990 and that no significant hearing loss had been identified on any regularly administered screening audiogram, such that actual knowledge could be imputed to the employing establishment. Although appellant claimed an awareness of his hearing loss in 1990, he did not file his claim for 12 years, such that written notice was not given within 3 years as required under the Federal Workers' Compensation Act.

[1] The only audiograms of record were from 1975 and 1976.

Appellant submitted pension records and an employment history indicating that he had work for the employing establishment for approximately 47 months intermittently from February 19, 1974 until May 24, 1990.

By decision dated October 25, 2002, the Office of Workers' Compensation Programs rejected appellant's claims finding that he failed to establish fact of injury. The Office explained that the evidence of record was insufficient to establish an exposure and, therefore, appellant had not established that he had sustained an injury.

The Board finds that this claim was not timely filed.

An employee seeking benefits under the Act[2] has the burden of establishing the essential elements of his claim, including the fact that he is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition, for which compensation is claimed are causally related to the employment injury.[3]

In the instant case, appellant has established that he is an employee of the United States; however, the question of whether his claim was timely filed was never appropriately addressed.

In the instant case, the Office skipped the prerequisites and analyzed the case to determine whether appellant had established fact of injury. However, the Board notes that the issue of time limitation is applicable to this case and that issue must be evaluated before any further analysis of the medical evidence of record is conducted.

Section 8122(a) of the Act[4] states that an original claim for compensation must be filed within three years after the injury, for which compensation is claimed.[5] A claim may be allowed notwithstanding the time limitation if the employee's immediate supervisor had actual

[2] 5 U.S.C. §§ 8101-8193.

[3] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989). To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition, for which compensation is claimed; (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition, for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *See William E. Enright*, 31 ECAB 426, 430 (1980).

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8122(a).

knowledge of the injury within 30 days of its occurrence, or if written notice of the injury was given within 30 days pursuant to 5 U.S.C. § 8119.[6]

In the case of a latent disability, as in this case, the time for filing the claim does not begin to run until the employee has a compensable disability and is aware, or reasonably should have been aware, that his disability is causally related to his employment.[7] In such a case, the time for giving notice of injury begins to run when the employee knows, or reasonably should have known, that he has a condition causally related to his employment, whether or not there is a compensable disability.[8] Appellant admits that he became aware of his hearing loss in 1990. He also terminated his employing establishment exposure in 1990.

The remaining exceptions to the three-year limitation are that time does not begin to run against a minor until he reaches the age of 21, or has a legal representative appointed; that time does not run against an incompetent individual while he is incompetent and has no appointed legal representative; and that time does not run against an individual whose failure to comply is excused by the Secretary on the ground that timely notice could not be given because of exceptional circumstances.[9]

In this case, appellant became aware of his hearing loss, by his own admission, in 1990. However, he did not file a claim for hearing loss for 12 years. Further, appellant ceased to be exposed to employing establishment factors on May 24, 1990. The Board has held that, if an employee continues to be exposed to injurious employing establishment working conditions after such awareness, the time limitation begins to run on the last date of this exposure.[10] In this case, that date was May 24, 1990, yet he did not file a claim until April 29, 2002.[11]

[6] 5 U.S.C. §§ 8122(a)(1), 8122(a)(2).

[7] 5 U.S.C. § 8122(b).

[8] *Id.*

[9] 5 U.S.C. § 8122(d).

[10] *See Willis E. Bailey*, 49 ECAB 511 (1998).

[11] Continued employment by another employer does not count as employing establishment exposure.

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 25, 2002 is hereby affirmed, as modified.

Dated, Washington, DC
May 27, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member