United States Department of Labor
Employees' Compensation Appeals Board

LARRY L. McGEE, Appellant	)	
and	)	**Docket No. 05-738**
	)	**Issued: August 8, 2005**
TENNESSEE VALLEY AUTHORITY, BROWNS FERRY NUCLEAR PLANT, Decatur, AL, Employer	)	

Appearances:
Larry L. McGee, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On February 7, 2005 appellant filed an appeal of decisions of the Office of Workers' Compensation Programs dated June 23, 2004 and January 18, 2005 finding that his occupational disease claim for hearing loss was untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the time limitation issue in the case.

ISSUE

The issue is whether appellant filed a timely claim under the three-year time limitation of section 8122 of the Federal Employees' Compensation Act.

FACTUAL HISTORY

This is appellant's second appeal before the Board in this case. By decision and order issued March 4, 2004,[1] the Board set aside decisions of the Office dated June 5 and July 23, 2002

[1] Docket No. 03-1661.

and May 28, 2003 which found that appellant's May 23, 2002 claim for a bilateral hearing loss was not timely filed under the three-year time limitation of section 8122 of the Act.[2] The employing establishment asserted that appellant stopped work on March 27, 1991 whereas appellant stated that he worked a minimum of 1,000 hours a year through 2002 and was still exposed to hazardous noise as of July 2002. Appellant was employed in the laborer craft. The Board remanded the case to the Office to determine the periods of appellant's federal employment and noise exposure. The law and the facts of the case as set forth in the Board's March 4, 2004 decision and order are hereby incorporated by reference.

On remand of the case, the Office conducted additional development to determine appellant's dates of federal employment. In an April 30, 2004 letter, the Office requested that appellant submit a detailed employment history including dates and hours worked and any exposure to hazardous noise. The Office also requested any medical reports regarding his treatment for ear or hearing problems. In a second April 30, 2004 letter, the Office requested that the employing establishment provide a history of appellant's federal employment.

In a May 7, 2004 letter, appellant noted periods of contract employment as a groundskeeper at the employing establishment with start dates from May 18, 1994 through April 1, 2002.[3] Appellant asserted that he worked in "noisy areas around motors, jackhammers … riding mowers and weed eaters." He stated that he had no nonoccupational exposure to hazardous noise. Appellant explained that he was no longer working as he had a quintuple bypass in August 2003 and had insulin-dependent diabetes.

In a June 15, 2004 letter, the employing establishment stated that there was no record of appellant's federal employment after March 27, 1991. In an attached chronology, the employing establishment noted that appellant was hired on September 29, 1989 and that his temporary appointment ended on June 8, 1990. He was hired for a second temporary appointment from July 8, 1990 to March 30, 1991. Appellant then worked as a contractor at the employing establishment for the following periods: February 23, 1993 to May 5, 1994; July 19, 1994 to April 26, 1996; November 4, 1996 to March 14, 1997; April 4 to October 24, 1997; April 8, 1998 to February 25, 1999; March 29 to May 7, 1999; December 15, 1999 to February 29, 2000; April 3 to May 19, 2000 and February 20 to April 14, 2001.

By decision dated June 23, 2004, the Office found that appellant's May 23, 2002 claim for hearing loss was not timely filed within the three-year time limitation of section 8122 of the Act. The Office further found that appellant's contract work at the employing establishment, after his temporary federal appointment ended on March 27, 1991, did not constitute federal employment. The Office further found no evidence that the employing establishment was aware of appellant's hearing loss within 30 days of March 27, 1991, noting that he was not aware of his hearing loss until January 30, 1999. The Office noted that, under a latent disability theory, appellant had three years from January 30, 1999, "the date [he] first became aware of a

[2] 5 U.S.C. § 8122.

[3] Appellant noted that the names of the contracting companies were Voith, Stone and Webster, ADA, Johnson Contractor and G-UB-MK.

relationship between [his] employment and the claimed condition." However, appellant did not file his claim until May 23, 2002, after the three-year period had run.

In a letter postmarked July 6, 2004, appellant requested a review of the written record by a representative of the Branch of Hearings and Review. He did not submit new evidence.

By decision dated and finalized January 18, 2005, the Office hearing representative affirmed the Office's June 23, 2004 decision, finding that appellant's hearing loss claim was not timely filed within three years of January 30, 1999, the date he was first aware of his condition and related it to factors of his federal employment.[4]

LEGAL PRECEDENT

The Act provides that the United States "shall pay compensation as specified by this subchapter for disability or death of an employee resulting from personal injury sustained while in the performance of duty."[5] A claimant seeking compensation under the Act must establish the essential elements of his claim, including that the claimant was an "employee" within the meaning of the Act.[6]

Section 8122(a) of the Act states than an "original claim for compensation for disability or death must be filed within three years after the injury or death."[7] Section 8122(b) provides that in latent disability cases, 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.

ANALYSIS

To ascertain if appellant's hearing loss claim was timely filed, the dates of his federal employment must be determined first. In a June 15, 2004 letter and attached chronology, the employing establishment stated that appellant was not a federal employee after March 27, 1991. The record demonstrates that, from February 23, 1993 to April 14, 2001, he worked for a series of private sector companies providing grounds keeping services to the employing establishment. There is no evidence of record that appellant was a federal employee after March 27, 1991.[8] Therefore, appellant's May 23, 2002 claim was not timely under the three-year time limitation of

[4] The Board notes that, in the January 18, 2005 decision, the Office hearing representative found that appellant's last date of federal employment was March 27, 1992. The record indicates, however, that the correct date is March 27, 1991. The Board finds that, under the circumstances of the case, this constitutes harmless, nondispositive error.

[5] 5 U.S.C. § 8102(a).

[6] *Tim G. Baysinger*, 54 ECAB ___ (Docket No. 03-825, issued August 14, 2003).

[7] 5 U.S.C. § 8122(a).

[8] *Donald L. Dayment*, 54 ECAB ___ (Docket No. 01-1846, issued January 21, 2003).

section 8122 of the Act, as it was filed more than three years after March 27, 1991, the last date of his federal employment.[9]

The Board further finds that appellant's claim was not timely filed under a latent disability theory. Section 8122(b)[10] provides that, in latent disability cases, 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. The Board has held that, if an employee continues to be exposed to injurious working conditions after an awareness of his or her claimed condition, the time limitation begins to run on the last date of this exposure.[11] In this case, appellant became aware of his hearing loss and its possible relationship to his federal employment on January 30, 1999, after his federal employment ended on March 27, 1991. Thus, appellant would have had three years from January 30, 1999, the date he first became aware of a relationship between his employment and the claimed condition, to file his claim. However, appellant did not file his claim until May 23, 2002, after the three-year period had run. Therefore, his claim is not timely under the latent disability theory.

Appellant's claim would still be regarded as timely under 5 U.S.C. § 8122 if his immediate supervisor had actual knowledge of the injury within 30 days. This provision removes the bar of the three-year time limitation if met.[12] The provision further provides that knowledge of the injury must be such as to put the immediate supervisor reasonably on notice of appellant's injury.[13] In this case, this provision would mean that the claim would be regarded as timely if the immediate superior knew of the injury within 30 days of appellant's last exposure to the implicated employment factors on March 27, 1991. The Board finds, however, that there is no evidence of record from which to conclude that appellant's supervisor had actual knowledge of the claimed conditions within 30 days after appellant's last exposure to the implicated factors on March 27, 1991. Appellant's May 23, 2002 claim form does not provide a date of supervisory notice as it was not signed by any employing establishment official. Thus, there is no evidence that appellant's supervisor had actual knowledge of the claimed hearing loss within 30 days of his last exposure to work factors on March 27, 1991.

CONCLUSION

The Board finds that appellant did not file a timely claim for hearing loss under the applicable time limitations under section 8122 of the Act.

[9] 5 U.S.C. § 8122.

[10] 5 U.S.C. § 8122(b).

[11] *See Garyleane A. Williams*, 44 ECAB 441 (1993); *Charlene B. Fenton*, 36 ECAB 151 (1984).

[12] *Hugh Massengill*, 43 ECAB 475 (1992).

[13] *Larry E. Young*, 52 ECAB 264 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 18, 2005 and June 23, 2004 are affirmed.

Issued: August 8, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board