

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

M.R., Appellant	)	
	)	
and	)	Docket No. 07-1055
	)	Issued: September 5, 2007
TENNESSE VALLEY AUTHORITY,	)	
MUSCLE, SHOALS NUCLEAR PLANT,	)	
Muscle Shoals, AL, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 5, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated December 1, 2006 which denied her hearing loss claim.<sup>1</sup> Pursuant to 20 C.F.R. §§ 501(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant's claim for an occupational hearing loss was timely filed.

**FACTUAL HISTORY**

On February 28, 2006 appellant, then a 76-year-old retired clerk typist and accounting officer, filed an occupational disease claim alleging that on February 28, 2006 she first realized

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<sup>1</sup> Appellant also attempted to appeal a February 9, 2007 letter from the Office; however, this letter was not a final decision and cannot be appealed. 20 C.F.R. § 501.2(c).

that she had a hearing loss which was due to exposure to noise in the performance of duty. The record indicates that she retired on August 26, 1988.

Appellant submitted numerous audiograms taken during her employment dated January 25, 1963 to April 18, 1988. A February 28, 2006 audiogram was also submitted. The April 18, 1988 audiogram at frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibel losses of 10, 20, 20 and 20 for the right ear and 5, 15, 10 and 15 for the left ear.

In a July 25, 2006 letter, the Office requested additional information from appellant. Appellant responded in an August 10, 2006 letter providing a detailed history of work conditions which she alleged contributed to her hearing loss. She also stated that her first encounter with hearing loss was in 1950 and that she started experiencing ringing in her ears between 1979 and 1988.

In an October 20, 2006 letter, the Office informed appellant that a second opinion evaluation had been scheduled. It provided the second opinion physician with a statement of accepted facts which revealed that appellant received annual audiograms from her employer, that she worked in a building next to the railroad tracks and in an office next to a chemical plant. A second opinion otologic evaluation with audiometric testing was performed on November 16, 2006 by a Dr. Sage Copeland. Testing for at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibel losses of 55, 60, 65 and 70, for the left ear decibels respectively and 50, 60, 70 and 70, for the right ear. In a November 29, 2006 report, the district medical adviser reviewed the audiogram and opined that the November 16, 2000 audiogram did not establish work-related hearing loss.

By decision dated December 1, 2006, the Office denied appellant's claim on the grounds that it was not timely filed. It indicated that appellant retired effective August 26, 1988 and that her last exposure to presumably hazardous noise occurred in 1988. The Office advised appellant that an original claim for compensation must be filed within 3 years of the date of injury or date of awareness of a relationship between the condition and employment, unless the immediate supervisor had actual knowledge of the injury within 30 days. The Office found that the evidence of record failed to support that appellant's claim was filed in a timely manner or that her supervisor had actual knowledge of the injury within 30 days.<sup>2</sup>

### **LEGAL PRECEDENT**

In cases of injury on or after September 7, 1974, section 8122(a) of the Federal Employees' Compensation Act states that "an original claim for compensation for disability or death must be filed within three years after the injury or death."<sup>3</sup> Section 8122(b) of the Act 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

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<sup>2</sup> Appellant requested reconsideration before the Office on December 22, 2006. The Office issued a final decision regarding this request for reconsideration while appellant's appeal was pending before the Board. Therefore, the Office's March 8, 2007 decision regarding this request for reconsideration is null and void.

<sup>3</sup> 5 U.S.C. § 8122(b).

causal relationship between the employment and the compensable disability.<sup>4</sup> The Board has held that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of exposure.<sup>5</sup>

### ANALYSIS

Although appellant was last exposed to hazardous noise and thus, sustained injury no later than August 26, 1988, she indicated on her claim form that she first became aware that her hearing loss was caused by her employment on February 28, 2006. Her awareness of her hearing loss and the causal relationship to her former employment at this time was based upon the audiometric and otologic evaluation conducted on that day. Latent discovery of hearing loss would extend the time limitations period if appellant did not or should not have known that she had sustained a hearing loss in the performance of duty at an earlier time.

In the present case, however, annual audiograms were provided by the employing establishment during appellant's employment which indicated a loss in hearing over the years, although not a ratable amount. Appellant noted in her response letter that she was aware of a hearing loss as early as 1950. The evidence indicates that she should have known of her hearing loss and causal relationship to her employment before she stopped work. Therefore, the time limitations began to run on August 26, 1988, appellant's last day of work and exposure to the implicated employment factors. Since appellant did not file a claim until February 28, 2006 her claim was filed outside the three-year limitation period.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act, if her immediate supervisor had actual knowledge of the injury within 30 days of her last exposure to noise on August 26, 1988.<sup>6</sup> The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.<sup>7</sup> Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days pursuant to 5 U.S.C. § 8119.<sup>8</sup> In the instant case, there is no indication that appellant provided written notice of injury prior to February 28, 2006, the date she filed her claim or that her immediate supervisor had actual knowledge of a work-related hearing loss.

### CONCLUSION

The Board finds that appellant has not established that she submitted a timely occupational disease claim.

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<sup>4</sup> *Garyleane A. Williams*, 44 ECAB 441 (1993).

<sup>5</sup> *Larry E. Young*, 52 ECAB 264 (2001). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

<sup>6</sup> *Id.*

<sup>7</sup> *Kathryn A. Bernal*, 38 ECAB 470 (1987).

<sup>8</sup> 5 U.S.C. §§ 8122(a)(1), 8122(a)(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 1, 2006 is affirmed.

Issued: September 5, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board