

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID A. MONTGOMERY and TENNESSEE VALLEY AUTHORITY,
CUMBERLAND FOSSIL PLANT, Cumberland City, TN

*Docket No. 99-446; Submitted on the Record;
Issued May 19, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issue is whether appellant's claim for a hearing loss is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act.

On March 4, 1998 appellant, then a 56-year-old boilermaker, filed a notice of occupational disease and claim for compensation, Form CA-2, alleging that his loss of hearing was due to exposure to hazardous noise during his federal employment. Regarding when he realized the condition was due to his federal employment, appellant stated that "this was a progressive illness that has taken place over several years and I cannot give an exact date." On the reverse of the claim form, B. Don Aldridge, appellant's former supervisor, indicated that appellant was last exposed to the employment conditions alleged to have caused the hearing loss on November 17, 1991. Mr. Aldridge indicated that appellant notified him on March 16, 1998 of the alleged condition.

In response to the Office of Workers' Compensation Programs' request for additional information, appellant provided a March 4, 1998 statement in which he explained that he has worked as a construction boilermaker since 1980 and continues to do so. Appellant stated that he has been exposed to noise in or around the pulverizer, jackhammers, arc gouges, drills, grinders on a daily basis for 8 to 12 hours per day. Appellant could not give an exact date of the hearing loss as he stated that it was gradual. Appellant also submitted a computerized printout of his employment history.

By letter dated June 19, 1998, the employing establishment controverted appellant's claim for a hearing loss. The employing establishment asserted that appellant last worked for the employing establishment on November 17, 1991. Although appellant reports work from December 1991 through January 1998, the employing establishment asserted that none of it was with the employing establishment, but rather it was with private contractors. The employing establishment also asserted that the audiograms taken from 1975 to 1991 showed zero percent hearing loss.

Enclosed with the employing establishment's controversion were copies of audiograms from March 24, 1975 through February 4, 1991, an audiometric record, which showed zero percent hearing loss, a noise data survey, and a June 10, 1998 statement from Mr. Aldridge, safety supervisor. Mr. Aldridge stated that the employing establishment's organization that employed appellant was eliminated in December 1991 and that the work history reveals that appellant was "intermittently employed as a temporary hourly employee for short periods of time." Mr. Aldridge stated that any noise exposure since 1991 was the result of employment with other employers.

In response to the Office's request for more information, appellant provided a report of a May 7, 1998 audiogram performed by the Browns Ferry Medical Office. The audiogram revealed a possible hearing loss in the left ear for sounds associated with speech and conversation. Appellant also stated that his work history revealed that all of his boilermaker jobs constituted federal employment since he was working on employing establishment property.¹

By decision dated November 2, 1998, the Office denied appellant's claim for a hearing loss on the grounds that his claim was not timely filed in accordance with 5 U.S.C. § 8122. The Office found no evidence that the employing establishment knew of any hearing loss while appellant was employed there since all of the audiograms performed until 1991 were normal. Additionally, the Office found that since appellant had not been employed with the employing establishment since 1991, he should have reasonably been aware of any hearing loss prior to leaving the employing establishment.

The Board finds that appellant's claim for a hearing loss is barred by the applicable time limitation provisions of the Act.

Section 8122(a) of the Act² provides: "An original claim for compensation for disability or death must be filed within three years after the injury or death." 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 his employment and the compensable disability. The Board has held that, if an employee continues to be exposed to injurious working condition after such awareness, the time limitation begins to run on the last date of this exposure.³

In the present case, appellant did not provide a specific date indicating when he became aware of a causal relationship between his alleged hearing loss and his work during his federal employment but stated only that he became aware of his medical condition "over a period of time." While appellant maintains that his work as a boilermaker after November 17, 1991 constituted federal employment, the record indicates that appellant's last federal employment with

¹ The record erroneously contains a statement from a different appellant.

² 5 U.S.C. § 8122.

³ *Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 471 (1987).

the employing establishment was November 17, 1991.⁴ Thus, appellant's last exposure to noise in his employment was November 17, 1991 and therefore the three-year limitation period began to run on that date. Since appellant did not file his claim until March 4, 1998, it was not filed within the three-year limitation period found in 5 U.S.C. § 8122.

A claim may be allowed notwithstanding the time limitation if the employee's immediate supervisor had actual 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. § 8119.⁵ The knowledge must be such as to put the immediate supervisor reasonably on notice of an on-the-job injury.⁶ In the instant case, there is no indication that appellant provided written notice of injury prior to March 4, 1998.

The Board has also held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program was sufficient to constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury.⁷ The Office's procedures provide:

"If an agency, in connection with a recognized environmental hazard, has an employee testing program and a test shows the employee to have positive findings this should be accepted as constituting actual knowledge. For example, an agency where employees may be exposed to hazardous noise levels may give annual hearing tests for exposed employees. A hearing loss identified on such a test would constitute actual knowledge on the part of the agency of a possible work injury."⁸

In this case, the record contains audiograms performed by the employing establishment, but there is no indication that the audiograms were part of an annual testing program for employees exposed to hazardous noise. Moreover, the audiometric record indicates that the audiograms conducted from March 24, 1975 through February 4, 1991 revealed zero percent hearing loss. Accordingly, the Board finds that the employing establishment did not have constructive knowledge of a possible employment-related hearing loss in this case.

⁴ *Dennis G. Nivens*, 46 ECAB 926 (1995) (the question of whether a person is an employee of the United States or is an independent contractor is ultimately a question of fact to be decided on an individual basis in the particular case); *see also Darlene Menke*, 43 ECAB 173, 178 (1991).

⁵ 5 U.S.C. §§ 8122(a)(1), 8122(a)(2).

⁶ *Kathryn A. Bernal*, *supra* note 3.

⁷ *See Joseph J. Sullivan*, 37 ECAB 526, 527 (1986) (constructive knowledge of possible employment-related hearing loss provided by annual employing establishment audiograms); *see also* Federal (FECA) Procedural Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(c) (April 1995).

⁸ *Id.*

The decision of the Office of Workers' Compensation Programs dated November 2, 1998 is affirmed.

Dated, Washington, D.C.
May 19, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member