

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICKY J. BRYANT and TENNESSEE VALLEY AUTHORITY,
CSB MOD SVS, Cumberland City, TN

*Docket No. 02-1243; Submitted on the Record;
Issued November 13, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant's compensation claim was filed within the applicable time limitation provisions of the Federal Employees' Compensation Act; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On September 4, 2001 appellant, then a 51-year-old steam fitter welder, filed an occupational disease claim (Form CA-2) alleging that in July 1995 he first realized his hearing loss was related to federal employment. His last day of work at the employing establishment was December 2, 1991.

In a letter dated January 17, 2002, the employing establishment denied that appellant's supervisor had any knowledge of his hearing loss. In support of this argument, the employing establishment noted that no audiograms were taken during his approximate four years of employment and the only audiogram submitted was a preemployment audiogram.

On March 12, 2002 the Office denied appellant's claim on the grounds that it had not been timely filed. The Office noted that appellant's last exposure was on December 2, 1991 and that appellant had provided no evidence that his immediate supervisor had knowledge of any hearing loss within 30 days of the date of injury.

By letter dated May 14, 2002, appellant requested reconsideration and submitted a March 4, 2002 audiogram and March 4, 2002 report by Dr. Robert A. Willis, a Board-certified otolaryngologist, in support of his request.

By decision dated April 3, 2002, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant to the issue of whether he had timely filed his claim and therefore was not sufficient to warrant further merit review.

The Board finds that appellant failed to file his claim for a hearing loss within the applicable time limitations of the Act.

Section 8122(a) of the Act¹ states that an original claim for compensation for disability or death must be filed within three years after the injury or death. Section 8122(b)² 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 such awareness, the time limitation begins to run on the last date of this exposure.³ Even if a claim was not timely filed within the three-year period of limitation, it would still be regarded as timely under section 8122(a)(1) if the immediate superior had actual knowledge of the injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.

In this case, the time limitation for filing a claim began to run beginning December 1991 the date appellant was last exposed to employment conditions alleged to have caused his hearing loss. Since appellant did not file a claim until September 4, 2001, his claim was not timely filed within the three-year period of limitation.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of appellant's injury.⁴ An employee must show not only that his immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.⁵ There is no evidence in the record, however, which indicates that appellant's immediate supervisor had actual knowledge of his injury within 30 days of the date of the injury. Moreover, the employing establishment denied any knowledge of appellant's hearing loss during the time he worked for it. Appellant has failed to submit any evidence to establish that there was actual notice of a work-related injury. Consequently, the exception to the statute is not met and appellant's claim for compensation is untimely filed.

The Board also finds that the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

Section 8128(a) of the Act⁶ does not give a claimant the right upon request or impose a requirement upon the Office to review a final decision of the Office awarding or denying compensation. Section 8128(a) of the Act, which pertains to review, vests the Office with the

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. §§ 8122(a).

³ See *Garyleane A. Williams*, 44 ECAB 441 (1993); *Charlene B. Fenton*, 36 ECAB 151 (1984).

⁴ *Delmont L. Thompson*, 51 ECAB 155 (1999).

⁵ *Leo Ferraro*, 47 ECAB 350 (1996).

⁶ 20 C.F.R. § 10.606(a). See generally 5 U.S.C. § 8128.

discretionary authority to determine whether it will review a claim following issuance of a final Office decision. The Office through regulations, has placed limitations on the exercise of that discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁷ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁸ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁹ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹⁰

The relevant issue in this case was medical in nature. Appellant's claim was denied because he failed to timely file his claim within the required time frames and there was no evidence his immediate supervisor had knowledge of the injury within 30 days of its occurrence. In support of his request for reconsideration, appellant submitted a March 4, 2002 audiogram and a March 4, 2002 report by Dr. Willis. The medical evidence submitted is irrelevant to the issue of whether his immediate supervisor had actual knowledge of the injury within 30 days of its occurrence and, thus, insufficient to warrant merit review.

In this case, appellant's May 14, 2002 request for reconsideration did not meet any of the above requirements for reopening a claim for merit review. The evidence submitted was not relevant to the present issue, nor did appellant submit a relevant legal argument or show that the Office erroneously applied or interpreted a specific point of law. Accordingly, the Board finds that the Office properly denied appellant's request for reconsideration without merit review.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 20 C.F.R. § 10.606.

⁹ 20 C.F.R. § 10.607.

¹⁰ 20 C.F.R. § 10.608.

The April 3 and March 12, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 13, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member