

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BOBBY G. BELL and TENNESSEE VALLEY AUTHORITY,
SHAWNEE STEAM PLANT, West Paducah, KY

*Docket No. 02-1495; Submitted on the Record;
Issued April 17, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's compensation claim on the grounds that he did not establish that his claim was filed within the applicable time limitation provision of the Federal Employees' Compensation Act.

On February 8, 2001 appellant, then a 66-year-old retired chemical engineering associate, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he was "hard of hearing." Appellant noted that he "worked in noisy places for hours at a time." Appellant indicated that he was last exposed to the conditions which could have caused his disease or illness on September 30, 1988. He indicated that he first became aware of the disease or illness "early in employment." When asked to list the date he first realized the disease or illness was caused or aggravated by his employment, he responded, "gradual in nature."

By decision dated June 8, 2001, the Office denied appellant's claim as it found that the evidence was not sufficient to show that he had filed his claim within the allowable time constraints.

The Board finds that the Office properly denied appellant's compensation claim on the grounds that he did not establish that his claim was filed within the applicable time limitation provision of the Act.

A claimant seeking compensation benefits under the Act¹ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,² including that he is an "employee" within the meaning of the Act³ and that he has

¹ 5 U.S.C. §§ 8101-8193.

² *Nathaniel Milton*, 37 ECAB 712 (1986).

³ *Kenneth W. Brant*, 39 EAB 208 (1987); *James E. Lynch*, 32 ECAB 216 (1980).

filed a claim within the applicable time limitation.⁴ The claimant must also establish that he sustained an injury in the performance of duty and that his disability, if any, was causally related to the employment injury.⁵

Section 8122(a)⁶ of the Act provides that an original claim for compensation for disability or death, must be filed within three years after the injury or death, unless the immediate superior had actual knowledge of the injury or death within 30 days, which knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury or death, as provided by 5 U.S.C. § 8122(a)(1), or written notice of injury or death was given within 30 days. Section 8122(b) provides that in latent disability cases, the time limitations 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 any employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of exposure. 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.⁷

In the present case, appellant indicated that he became aware of his disease or illness “early in employment.” His response to the question regarding the date when he first realized that the hearing problems were associated with his employment was “gradual in nature.” Appellant noted that he worked around “a lot of noisy places for hours at a time.” Appellant was last exposed to these noisy employment conditions on September 30, 1988. Therefore, the Board finds that appellant should have reasonably been aware of the connection between working around “noisy places” and his hearing loss, which he noted early in his employment, by the date of his last employment, September 30, 1988.⁸ Since appellant did not file a claim until February 8, 2001, over 12 years after the date of last exposure, it was not timely filed within the three-year period of limitation. Appellant’s claim, however, would still be regarded as timely under section 8122(a)(1) of the Act if his immediate superior had actual knowledge of the injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on

⁴ *Paul S. Devlin*, 30 ECAB 715 (1988); *Emmett L. Pickens*, 33 ECAB 1807 (1982).

⁵ *Elaine Pendleton*, 40 ECAB 1143 (1989); see *Daniel R. Hickman*, 34 ECAB 1220 (1983).

⁶ 5 U.S.C. § 8122(a)

⁷ *Linda J. Reeves*, 48 ECAB 373 (1997).

⁸ See *Emanue T. Posluszny*, 47 ECAB 651 (1996) (appellant should have been reasonably aware of the relationship between his employment and his hearing loss when the physician noted that appellant’s vestibular disturbance was initiated and aggravated by loud noises and he was exposed to occupational noise); *Albert K. Tsutsui*, 44 ECAB 1004 (1993) (the totality of the factual circumstances, including appellant’s statements regarding his awareness that he had employment-related hearing problems, establish that appellant should have been aware as of his last date of exposure to employment-related noise of the relationship between his employment and his hearing loss).

notice of an on-the-job injury or death.⁹ In the present case, there is no evidence that appellant's immediate superior had knowledge of a work-related injury within the applicable time period.

The decision of the Office of Workers' Compensation Programs dated June 8, 2001 is hereby affirmed.

Dated, Washington, DC
April 17, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁹ 5 U.S.C. § 8122(a)(1); *see Linda J. Reeves, supra note 7; Jose Salaz, 41 ECAB 743 (1990).*