

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RICKY FRENCH and TENNESSEE VALLEY AUTHORITY,  
Chattanooga, TN

*Docket No. 02-1302; Submitted on the Record;  
Issued June 17, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's compensation claim for loss of hearing on the grounds that his claim was not filed within the applicable time limitation provisions of the Federal Employees' Compensation Act; and (2) whether the Office properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On March 18, 2001 appellant, then a 40-year-old welder, filed a claim for occupational disease (Form CA-2), alleging that he sustained a hearing loss due to exposure to hazardous noise during his federal employment. He stated that he first became aware of his hearing loss and its relationship to his employment in 2001. Appellant left federal employment on March 27, 1991. On the reverse side of the claim form, his former supervisor indicated that appellant was last exposed to the employment conditions alleged to have caused the hearing loss on November 27, 1991. The supervisor indicated that appellant notified him on April 16, 2001 of the alleged condition.

Accompanying his claim, appellant submitted his federal employment application; audiograms dated July 13, 1978, February 27, 1980, July 28, 1986 and October 18, 1990; and a narrative statement. The audiograms revealed no abnormalities but noted that appellant was not provided with hearing protection until 1990. Appellant stated that he was exposed to noise 8 to 12 hours per day from concrete chipping guns, jackhammers, drills, grinders, bulldozers, scrapers, sledgehammers, metal shears, motors and pumps. He indicated that he had no hearing problems prior to his employment at the employing establishment.

By letter dated May 7, 2001, the employing establishment controverted appellant's claim, asserting that appellant last worked for the employing establishment on November 27, 1991. The employing establishment indicated that appellant worked from July 31, 1979 to November 27, 1991 as a boilermaker in the fossil plant where he worked around turbines, coal pulverizers, boiler feed pumps and steam leaks. The noise levels for these areas were 81 to 94 decibels and appellant would work in these areas for 4 to 6 hours a day, 5 days a week.

On May 16, 2001 an Office medical adviser reviewed the audiograms dated July 13, 1978 to October 18, 1990. He concluded that the audiograms revealed normal hearing, all tones, bilaterally.

By decision dated May 17, 2001, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that appellant's claim was timely filed in accordance with 5 U.S.C. § 8122. The Office found that appellant's last exposure was November 27, 1991 and his March 18, 2001 filing was, therefore, not within the three-year time limitation period.

In an undated letter, appellant filed a request for reconsideration and submitted an audiogram dated December 20, 2001. The audiogram noted appellant's complaints of abnormal hearing commencing four to five years ago and ringing in his ears. The audiogram was not signed by a physician nor did the audiogram provide any conclusions as to appellant's hearing loss.

In a decision dated February 1, 2002, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was irrelevant in nature and insufficient to warrant review of the prior decision.

In an undated letter, appellant filed a request for reconsideration and submitted duplicate audiograms dated July 13, 1978 and July 28, 1986.

In a decision dated March 20, 2002, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was duplicative in nature and insufficient to warrant review of the prior decision.

The Board finds that the Office incorrectly determined that appellant's claim for compensation benefits was untimely filed under the applicable time limitation provisions of the Act.

In cases of injury on or after September 7, 1974, section 8122(a) of the Act provides that a claim for "disability must be filed within three years after the injury."<sup>1</sup> However, section 8122(b) of the Act provides that the time for filing a claim for latent disability, as in the present case, "does not begin to run until the employee ... is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship ... [between his] compensable disability ... [and] his employment."<sup>2</sup>

On March 18, 2001 appellant claimed that he had sustained hearing loss caused by exposure to hazardous noise during his federal employment from July 1979 to November 1991. In the present case, the three-year statute of limitations did not begin to run until March 18, 2001

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<sup>1</sup> 5 U.S.C. § 8122(a).

<sup>2</sup> 5 U.S.C. § 8122(b). Section 8122(b) further provides that "the time for giving notice of injury begins to run when the employee is aware, or by the exercise of reasonable diligence should have been aware, that his condition is causally related to his employment." However, the time limitation of either section 8122(a) or section 8122(b) does not begin to run against a claimant if the claimant's failure to file is excused because of "exceptional circumstances." 5 U.S.C. § 8122(d)(3); *see Edward C. Hornor*, 43 ECAB 834 (1992).

when appellant filed his claim. Appellant indicated on the CA-2 that he had not yet been treated by a physician, however, he knew he had a hearing problem. He attributed his hearing loss to work-related noise exposure because he had no history of hearing loss prior to the position with the employing establishment. Appellant attributed his hearing loss specifically to his employment with the Tennessee Valley Authority where he was exposed to noise from the boilermakers.

The Board has held that the applicable statute of limitations commences to run when an employee becomes aware or reasonably should be aware that he has a condition causally related to his federal employment -- even though the employee does not know the precise nature of the impairment.<sup>3</sup> The claimant need not have definitive evidence of a condition and causal relationship on the date a claim is filed.<sup>4</sup> In the present case, appellant did not have any medical evidence providing a diagnosis of any hearing loss until December 20, 2001. Prior to the December 20, 2001 audiogram, the record was barren of any medical evidence suggesting a compensable hearing-related condition. For example, the audiograms from July 1978 to October 1990 revealed no abnormalities. Therefore, it would be patently unjust to require appellant to file a claim for a noise-induced hearing loss condition without positive medical evidence in support of his claim merely upon his concern for his history of noise exposure in his employment.<sup>5</sup>

Larson notes in his treatise that, even though a claimant knows he or she is suffering from an affliction, this is insufficient to start the statute if the affliction's compensable character is unknown to the claimant.<sup>6</sup> Larson states that the time limitation period does not begin to run until the claimant has reason to know its relationship to his employment.<sup>7</sup> In this case, appellant indicated that he noticed problems with his hearing four to five years prior to 2001; however, he did not make the connection that his hearing loss was related to his employment until 2001 and there is no evidence in the record suggesting that appellant was aware or reasonable should have been aware prior to this time. He further noted that he had no hearing loss prior to his employment with the employing establishment. There is no evidence in the record to support the Office's determination that appellant should have been reasonably aware of the relationship between the employment and appellant's hearing condition by November 27, 1991. The Office did not explain the evidentiary basis of how appellant would have been aware of the relationship at that time. Neither appellant's statements nor any other evidence of record suggests that he should have reasonably known of the relationship before December 20, 2001.

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<sup>3</sup> See, e.g., *Edward L. Maslowski*, 42 ECAB 839 (1991); *Joseph H. Sybertz*, 30 ECAB 861, 863 (1979); *Percy E. Rouse*, 26 ECAB 214, 217 (1974); see also 2B A. Larson, *The Law of Workers' Compensation* § 78.41(f) (2002).

<sup>4</sup> *William A. West*, 36 ECAB 525 (1985).

<sup>5</sup> See *Edward C. Hornor*, *supra* note 2.

<sup>6</sup> 5 A. Larson, *supra* note 3. Additionally, under 5 U.S.C. § 8122(b), "the time for filing a claim does not begin to run until the employee has a *compensable disability and* is aware, or ... [reasonably] should have been aware, of the causal relationship of the compensable disability to his employment." (Emphasis added.)

<sup>7</sup> A. Larson, *supra* note 3.

The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program will be 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.<sup>8</sup> 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.”<sup>9</sup>

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 July 1978 to October 1990 revealed no abnormalities. The record does not support appellant had any “positive findings” based on any employee testing program.

In the present case, appellant was not aware, or reasonably should have been aware, that he had any compensable condition related to his former federal employment until he noticed a dramatic hearing loss and underwent audiometric testing in 2001.<sup>10</sup> Therefore, appellant's claim was timely filed.<sup>11</sup>

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<sup>8</sup> 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).

<sup>9</sup> *Id.*

<sup>10</sup> The Board notes that it has previously stated that workers' compensation acts are remedial in nature and should be construed broadly and liberally so as to effectuate their remedial purposes. *Joel C. Webb*, 4 ECAB 79, 86 (1950); see *Jack Johnson*, 39 ECAB 1021, 1028 (1988).

<sup>11</sup> In view of the Board's disposition of the merit issue in the claim, the issue of whether the Office properly denied a merit review of appellant's claim is moot.

The decisions of the Office of Workers' Compensation Programs dated March 20 and February 1, 2002 and May 17, 2001 are set aside and the case remanded for further action on the merits of appellant's claim.

Dated, Washington, DC  
June 17, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member