U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTIN SMITH and TENNESSEE VALLEY AUTHORITY, SEQUOYAH NUCLEAR PLANT, Soddy Daisy, TN

Docket No. 03-591; Submitted on the Record;
Issued June 2, 2003

DECISION and ORDER

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

The issue is whether appellant's claim for an occupational hearing loss was timely filed pursuant to 5 U.S.C. § 8122(a).

On August 26, 2002 appellant, then a 53-year-old pipefitter, filed an occupational disease claim, alleging that in 1985 he first realized that his hearing loss was caused by factors of his federal employment. He noted that he worked at least eight hours a day around high noise levels and that by the end of 13 years with the employing establishment, noticed a significant decrease in his hearing. Appellant did not file his claim within 30 days after realizing in 1985 that his hearing loss was work related because he did not know that he could file a claim for such an injury. On the reverse of appellant's claim form, Nancy L. Branham, an employing establishment manager, stated that appellant was last exposed to the conditions alleged to have caused his hearing loss on September 15, 1987.

In support of his claim, appellant submitted a history of his employment with federal and nonfederal employers covering the period 1974 through the time of filing his hearing loss claim. He stated that at each job listed he was exposed to no less than eight hours of noise as a pipefitter. Appellant was given earplugs as needed for each job. He noted that he did not have any hobbies or other jobs that exposed him to excessive noise. Appellant stated that prior to working at the employing establishment as a pipefitter he did not have any problems with his hearing. He noticed a decrease in his hearing approximately 10 to 12 years prior and believed that his everyday exposure to excessive noise on the job was the reason why he wore a hearing aid. Appellant stated that he was still employed as a pipefitter and exposed to daily noise.

Appellant submitted audiograms conducted by the employing establishment. A September 12, 1974 audiogram indicated testing at 500, 1,000, 2,000, 3,000, 4,000 and 6,000 hertz and revealed in the right ear losses of -10, 0, -10, -5, -10, 10 decibels; and in the left ear losses of -10, -10, -10, -10, 0 and -10 decibels respectively. An October 25, 1977 audiogram also indicated testing at the same hertz levels and revealed in the right ear losses of 5, 5, 5, 5, 5 and 10 decibels and losses of 25, 5, 5, 5, 10 and 0 decibels in the left ear respectively. A July 7,

1981 audiogram indicated thresholds for the right ear at the same hertz levels and losses of 5, 5, 5, 5, 10 and 10 decibels and in the left ear losses of 10, 5, 0, 0, 10 and 5 decibels respectively. A September 15, 1987 audiogram revealed losses in the right ear of 5, 5, 5, 5 and 15 decibels and losses of 5, 5, 0, 5, 5 and 15 decibels in the left ear at the same hertz levels.

Appellant submitted medical treatment notes, a December 23, 1999 audiogram report indicating that he had bilateral sensorineural hearing loss and medical questionnaires.

In a September 16, 2002 letter, Susie L. Holland, an employing establishment claims officer, controverted appellant's hearing loss claim contending that it was not timely filed under section 8122. Ms. Holland stated that appellant last worked for the employing establishment on March 3, 1986. She contended that, since the employing establishment audiograms did not reveal any hearing loss, the employing establishment did not have actual knowledge of appellant's injury. Ms. Holland noted that, since 1973, hearing protection had been provided to employees and use was mandatory.

By letters dated October 4, 2002, the Office of Workers' Compensation Programs advised appellant that the evidence submitted was insufficient to establish his claim. The Office further advised appellant about the type of factual and medical evidence he needed to submit to establish his claim. The Office requested that appellant provide the last day of his employment with the employing establishment and the date he became aware that he could file a claim.

In response to the Office's letters, appellant provided that he left the employing establishment on January 31, 1986 due to a lay off because there was a lack of jobs. He stated that he was exposed to noise no less than eight hours a day and that he wore earplugs. Appellant further stated that he did not have any hobbies, which caused him to be around excessive noise. He noted that he wore earplugs and protective goggles when he worked in the yard. Appellant first became aware that he could file a claim approximately five months ago from his coworkers who performed the same type of work, filed claims and received compensation for their hearing loss. He resubmitted the employing establishment audiograms and his employment history.

By decision dated December 12, 2002, the Office denied appellant's claim on the grounds that it was untimely filed. The Office found that appellant's last federal employment exposure occurred on March 3, 1986. The Office also found that the results of the employing establishment audiograms did not establish a work-related hearing loss, and thus, the employing establishment did not have actual knowledge of the injury within the appropriate time frame to establish a timely filed claim.

The Board finds that the Office properly denied appellant's claim for an occupational disease pursuant to 5 U.S.C. § 8122(a).

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."[1] Section 8122(b) of the Act provides that, in latent disability cases, the time limitation does not begin to run until the

[1] 5 U.S.C. § 8122(a).

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.[2] 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]

In this case, appellant indicated on his Form CA-2 that he first became aware that his hearing loss was caused by his employment in 1985. He stated that he was exposed to no less than eight hours of excessive noise while working as a pipefitter at the employing establishment.

Appellant stopped work at the employing establishment on March 3, 1986 and thus, ceased to be exposed to the implicated employment conditions by that date. Appellant noted his belief that there was a relationship between his hearing loss and his noise exposure at the employing establishment beginning as early as 1985 and continuing until he stopped work on March 3, 1986. Therefore, the time limitations began to run on March 3, 1986, appellant's last day of work and exposure to the implicated employment factors. Since appellant did not file a claim until August 26, 2002 his claim was clearly filed outside the three-year time limitation period.

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 the injury within 30 days of his last exposure to noise on March 3, 1986.[4] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.[5] 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.[6] In the instant case, there is no indication that appellant provided written notice of injury prior to August 26, 2002, the date he filed his Form CA-2.

The Board has 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 procedure manual, interpreting section 8122(a)(1) of the Act, states:

> "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

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[2] 5 U.S.C. § 8122(b).

[3] *Garylean A. Williams*, 44 ECAB 441 (1993).

[4] *Larry E. Young*, 52 ECAB ____ (Docket No. 00-476, issued February 23, 2001).

[5] *Kathryn A. Bernal*, 38 ECAB 470 (1987).

[6] 5 U.S.C. §§ 8122(a)(1), 8122(a)(2).

[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) (March 1993).

> 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 on September 12, 1974, October 25, 1977, July 7, 1981 and September 15, 1987, but there is no indication that they were part of an annual testing program for employees exposed to hazardous noise. Moreover, the audiograms revealed a nonratable hearing loss. Thus, the Board finds that the employing establishment did not have constructive knowledge of a possible employment-related hearing loss.

Further, the Board finds that the December 23, 1999 report indicating that appellant had binaural sensorineural hearing loss does not establish that the employing establishment had knowledge of appellant's condition as it failed to relate this condition to factors of appellant's employment.

The Board further finds that section 8122(d), which allows the Office to excuse failure to comply with the time limitation provisions for filing a claim for compensation, does not apply in the instant case. Section 8122(d)(1) and (d)(2) tolls the time limitations for a minor or an incompetent individual.[9] The record reflects that appellant was not a minor during his employment as a pipefitter and the record is devoid of any showing that appellant was ever an incompetent individual. Furthermore, appellant has not shown that he is entitled to have the time limitations toll due to "exceptional circumstances" as provided by section 8122(d)(3) of the Act.[10] For instance, an "exceptional circumstance" recognized by the Secretary of Labor is where an employee is a prisoner of war. Appellant has not shown that he was under that type of circumstance.[11]

It is for the above reasons that the Office's decision finding that appellant's claim was not filed will be affirmed.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time* Chapter 2.801.7(d) (September 1990).

[9] 5 U.S.C. § 8122(d)(1) and (d)(2).

[10] 5 U.S.C. § 8122(d)(3).

[11] *Paul S. Develin*, 39 ECAB 715, 726 (1988).

The December 12, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 2, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member