United States Department of Labor
Employees' Compensation Appeals Board

FRANKLIN D. HOLT, Appellant	)	
and	)	**Docket No. 04-1150**
	)	**Issued: August 26, 2004**
TENNESSEE VALLEY AUTHORITY, Chattanooga, TN, Employer	)	

Appearances:
Franklin D. Holt, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 22, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 26, 2004 which denied his hearing loss claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly denied appellant's claim for compensation under the Federal Employees' Compensation Act.

FACTUAL HISTORY

On January 22, 2003 appellant, then 62-year-old retired maintenance supervisor/ electrician foreman, filed an occupational disease claim for compensation (Form CA-2) alleging that his hearing loss was a result of his federal employment. Appellant advised that he worked around steam turbines, boiler pumping, air compressors and throughout steam plants, where there were very noisy working conditions. Appellant indicated that he first became aware of his

hearing problem in 1994, but did not realize it was caused or aggravated by his employment until January 1998. He advised that he was treated with a middle ear infection in 1994. Appellant was last exposed to noise in his federal employment on July 26, 1992.

The employing establishment submitted appellant's personnel records, including serial audiograms. The employing establishment further indicated that when appellant worked as an electrician, the work may have been around turbines, coal pulverizers, boiler feed pumps, steam leaks, etc. Noise level readings are 78 to 91 decibels and appellant would have worked in areas with those readings 4 to 6 hours per day, 5 days a week. The employing establishment further stated that when appellant worked as a maintenance supervisor, the majority of work (six to eight hours a day) was done in an office building without exposure to noise. Occasionally, (0 to 2 hours a day) but not regularly, he would work in plant areas where noise level readings were 77 to 88 decibels.

By letter dated February 2, 2004, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. George Godwin, an otolaryngologist, for evaluation.

On February 14, 2004 Dr. Godwin examined appellant and obtained audiometric testing. He also completed an otologic evaluation form provided by the Office. He reported that there was no significant variation from the statement of accepted facts and that the workplace exposure was not sufficient as to intensity and duration to have caused the loss in question. Dr. Godwin advised that the physical examination was normal and diagnosed bilateral neurosensory hearing loss which he opined was not due to noise exposure encountered in appellant's federal employment. Dr. Godwin advised that appellant had normal hearing in 1978, when he was first employed at the employing establishment, had normal hearing in 1989 and retired in 1991.[1] He stated that appellant's significant hearing loss happened after his employment at the employing establishment. Bilateral amplification was recommended.

By decision dated February 26, 2004, the Office denied appellant's claim for compensation. The Office found that Dr. Godwin's report represented the weight of the medical evidence and established that appellant's hearing loss was not due to noise exposure in his federal employment.

LEGAL PRECEDENT

The issue of whether a claim is timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.[2] The Board may raise the issue on appeal even if the Office did not base its decision on the time limitation provision of the Act.[3]

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[1] The Board notes that the record contains several hearing tests conducted by the employing establishment after 1978, including an October 12, 1989 test showing normal hearing levels.

[2] *Charles Walker*, 55 ECAB ____ (Docket No. 03-1732, issued January 8, 2004); *see Charles W. Bishop*, 6 ECAB 571 (1954).

[3] *Id.*

In cases of injury on or after September 7, 1974, section 8122(a) 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. Compensation for disability or death, including medical care in disability cases may not be allowed if a claim is not filed within that time unless:

> "(1) [T]he immediate superior had actual knowledge of the injury or death 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; or
>
> "(2) [W]ritten notice of injury or death as specified in section 8119 was given within 30 days."[4]

The three-year time period begins to run from the time the employee is aware or by the exercise of reasonable diligence should have been aware, that his or her condition is causally related to the employment. For actual knowledge of a supervisor to be regarded as timely filing, an employee must show not only that the immediate superior knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.[5]

Even if an original claim for compensation for disability or death is not filed within three years after the injury or death, compensation for disability or death may be allowed if written notice of injury or death as specified in section 8119 was given within 30 days. Section 8119 provides that a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury or in the case of death, the employment factors believed to be the cause; and be signed by and contain the address of the individual giving the notice.[6] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[7]

In a case of occupational disease, the time for filing a claim begins to run when the employee first becomes aware, or reasonably should have been aware, of a possible relationship between his condition and his employment. When an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitation period even though he does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[8] Where the employee continues in the same employment after he or she reasonably should have been aware that he or she has a condition

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[4] 5 U.S.C. § 8122(a).

[5] *Duet Brinson*, 52 ECAB 168 (2000).

[6] *Larry E. Young*, 52 ECAB 264 (2001).

[7] *Laura L. Harrison*, 52 ECAB 515 (2001).

[8] *Larry E. Young, supra* note 6.

which has been adversely affected by factors of the federal employment awareness, the time limitation begins to run on the date of the last exposure to the implicated factors.[9] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[10]

ANALYSIS

The evidence of record establishes that appellant did not timely file a claim for compensation under the Act. Appellant filed an occupational disease claim on January 22, 2003 alleging that employment factors caused his hearing condition. The record indicates that he was last exposed to noise in his federal employment on July 26, 1992. However, appellant advised that he first became aware of the relationship between his hearing loss and his employment in January 1998. Appellant's awareness of the relationship between his condition and his employment in January 1998 is competent to start the limitation period. Appellant's January 22, 2003 claim was not timely filed within three years of January 1998. Consequently, there is no evidence to support that the time limitation began to run any later than January 1998.

The statute further provides that a claim may be regarded as timely if an immediate supervisor had actual knowledge of the injury within 30 days such that the immediate supervisor was put on reasonable notice of an on-the-job injury.[11] In this case, although the employing establishment appeared to have an employee testing program, there is no evidence that the employing establishment was put on actual or constructive notice that appellant had a hearing problem. Dr. Godwin had reviewed appellant's serial audiograms from the employing establishment and advised that such tests were indicative of normal hearing in 1978, when he first started at the employing establishment and in 1989. Dr. Godwin noted that appellant had retired in 1991 and opined that his significant hearing loss happened after his federal employment. Appellant's claim form clearly indicates that he first became aware of a hearing problem in 1994. Therefore, no probative evidence to establish that the employing establishment had actual or constructive knowledge, sufficient to put them reasonably on notice, that appellant's hearing condition was work related within 30 days of July 26, 1992, the day appellant retired.[12]

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[9] *Id.*

[10] *Debra Young Bruce*, 52 ECAB 315 (2001).

[11] *Duet Brinson, supra* note 5; *Delmont L. Thompson*, 51 ECAB 155 (1999).

[12] *Larry E. Young, supra* note 6.

CONCLUSION

The Board finds that appellant's claim is barred by the applicable time limitation provision of the Act.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 26, 2004 be modified to reflect that appellant's claim was barred by the time limitation provision of the Act.

Issued: August 26, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member