

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**ROBERT L. MATTHEWS, Appellant**

**and**

**TENNESSEE VALLEY AUTHORITY, FOSSIL  
POWER, Chattanooga, TX, Employer**

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**Docket No. 05-1910  
Issued: December 13, 2005**

*Appearances:*  
*J. Shannon Garrison, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On September 14, 2005 appellant, through counsel, filed a timely appeal of decision of the Office of Workers' Compensation Programs' hearing representative dated January 25, 2005, which affirmed the denial of his hearing loss claim because it was untimely filed and also from a June 14, 2005 nonmerit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over merits in this case.

**ISSUES**

The issues are: (1) whether appellant filed a timely claim under the three-year time limitation of section 8122 of the Federal Employees Compensation Act; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On March 5, 2004 appellant, a 74-year-old boilermaker, filed an occupational disease claim alleging that he first became aware of his hearing loss was caused or aggravated by factors

of his federal employment in the late 1980's.<sup>1</sup> He noted that he was exposed to high pressure steam leaks, machinery noises and high frequency sounds and his hearing loss was gradual.

In support of his claim appellant submitted a history of federal employment and the private sector for the period 1948 to 1988 and audiograms for the period October 2, 1964 to November 19, 1979.

In a letter dated March 16, 2004, a workers' compensation claims representative, on behalf of the employing establishment, controverted the claim and contended that it had no knowledge of his hearing loss. It noted that appellant was employed in various occupations and locations at the employing establishment from October 23, 1967 through August 18, 1988 but that his audiograms did not document any hearing loss or shifts in hearing.

In a report dated March 31, 2004, an Office medical adviser noted that appellant had a preexisting mild to moderate hearing loss and that testing of October 2, 1964 did not show significant worsening or progression as of the November 19, 1979 study.

By decision dated April 6, 2004, the Office denied appellant's claim on the grounds that it was untimely filed in accordance with 5 U.S.C. § 8122. The Office found that his last federal exposure was on August 1, 1988 and his March 5, 2004 filing was not within the three-year time limitation period. The Office found that the record contained no evidence that appellant's supervisors had actual knowledge of his hearing loss.

On April 21, 2004 appellant requested an oral hearing before an Office hearing representative, which was held on October 19, 2004. Subsequent to the hearing appellant submitted a statement disagreeing with the denial of his claim, an October 25, 2004 audiogram and an October 24, 2004 hearing evaluation report.

By decision dated January 25, 2005, the Office hearing representative affirmed the denial of appellant's claim on the grounds that it had not been timely filed.

In a letter dated May 16, 2005, appellant's counsel requested reconsideration and submitted medical evidence dated October 25, 2004 and an affidavit by Harold E. Jeffery in support of his request. Mr. Jeffery stated that he worked with appellant in the 1970's and 1980's and that he was appellant's direct supervisor when appellant worked at the power division. Mr. Jeffery stated that he "noticed a decline in [appellant]'s hearing" during the 1980's, but that he "attributed this decline in hearing to the fact that [appellant] was getting older and particularly to the fact that [appellant] worked in an extremely noisy environment at [the employing establishment.]"

On June 14, 2005 the Office denied appellant's request for reconsideration of the merits of his claim on the grounds that appellant did not present evidence showing that the Office erroneously applied or interpreted "the provision of the Act," nor did he provide any relevant and new evidence to establish a timely filing.

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<sup>1</sup> Appellant retired from the employing establishment effective August 1, 1988.

### LEGAL PRECEDENT -- ISSUE 1

The Act provides that the United States shall pay compensation as specified by this subchapter for disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup> A claimant seeking compensation under the Act must establish the essential elements of his claim, including that the claimant was an employee within the meaning of the Act.<sup>3</sup>

Section 8122(a) of the Act states that an original claim for compensation for disability or death must be filed within three years after the injury or death.<sup>4</sup> Section 8122(b) 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.

### ANALYSIS -- ISSUE 1

In this case, appellant filed a claim for compensation on March 5, 2004 alleging that in the late 1980's he became aware that he had sustained hearing loss due to his exposure to noise in his federal employment. The record establishes that appellant's last exposure to work factors was August 1, 1988, when he retired from his federal employment. Since appellant did not file his claim for occupational disease until March 5, 2004, he is clearly outside the three-year time limitation period, which began to run from the late 1980's, the date when he realized his hearing loss was related to his federal employment.

Appellant's claim would still be regarded as timely under 5 U.S.C. § 8122 if his immediate supervisor had actual knowledge of the injury within 30 days. This provision removes the bar of the three-year time limitation if met.<sup>5</sup> The provision further provides that knowledge of the injury must be such as to put the immediate supervisor reasonably on notice of appellant's injury.<sup>6</sup> In this case, this provision would mean that the claim would be regarded as timely if the immediate superior knew of the injury within 30 days of appellant's last exposure to the implicated employment factors on August 1, 1988. The Board finds, however, that there is no evidence of record from which to conclude that appellant's supervisor had actual knowledge of the claimed conditions within 30 days after appellant's last exposure to the implicated factors on August 1, 1988. Appellant's March 5, 2004 claim form does not provide a date of supervisory notice as it was not signed by any employing establishment official such as a supervisor,<sup>7</sup> only the workers' compensation claims representative. There is no evidence that

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> *Tim G. Baysinger*, 54 ECAB \_\_\_\_ (Docket No. 03-825, issued August 14, 2003).

<sup>4</sup> 5 U.S.C. § 8122(a).

<sup>5</sup> *Hugh Massengill*, 43 ECAB 475 (1992).

<sup>6</sup> *Larry E. Young*, 52 ECAB 264 (2001).

<sup>7</sup> See e.g., *Larry L. McGee*, Docket No. 05-738 (issued August 8, 2005).

appellant's supervisor had actual knowledge of the claimed hearing loss within 30 days of his last exposure to work factors on August 1, 1988.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of the Act<sup>8</sup> vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>9</sup>

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.<sup>10</sup> Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>11</sup> When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

The Office's June 14, 2005 decision, denied appellant's reconsideration request, without conducting a merit review, on the grounds that the evidence submitted neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

However, with his May 16, 2005 reconsideration request, appellant submitted relevant and pertinent evidence not previously considered by the Office. After the January 25, 2005 hearing representative's decision, appellant submitted an affidavit by Mr. Jeffrey, who was appellant's supervisor during his employment at the power division. This evidence is relevant as Mr. Jeffrey addressed the issue of whether he had been put on notice of appellant's injury. This is relevant because the Office hearing representative found that there was no evidence that appellant's immediate supervisor or the employing establishment had been put on notice regarding his hearing loss. The case will be remanded for the Office to reopen appellant's claim

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<sup>8</sup> 5 U.S.C. § 8128(a) (“[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application”).

<sup>9</sup> *Jeffrey M. Sagrecy*, 55 ECAB \_\_\_ (Docket No. 04-1189, issued September 28, 2004); *Veletta C. Coleman*, 48 ECAB 367 (1997).

<sup>10</sup> 20 C.F.R. § 10.606(b)(2).

<sup>11</sup> 20 C.F.R. § 10.608(b).

<sup>12</sup> *Annette Louise*, 54 ECAB \_\_\_ (Docket No. 03-335, issued August 26, 2003).

for a merit review. Following this and such other development as is deemed necessary, the Office shall issue an appropriate merit decision on appellant's claim.

**CONCLUSION**

The Board finds that Office hearing representative properly found that appellant did not timely file a claim for a hearing loss under section 8122 of the Act. However, the Board finds that the Office improperly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 25, 2005 is affirmed and the June 14, 2005 decision is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: December 13, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board