United States Department of Labor
Employees' Compensation Appeals Board

ROGER D. DICUS, Appellant	)	
and	)	**Docket No. 04-2122**
	)	**Issued: January 27, 2005**
TENNESSEE VALLEY AUTHORITY, BELLEFONTE NUCLEAR POWER PLANT, Hollywood, AL, Employer	)	

Appearances:
Roger D. Dicus, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On August 21, 2004 appellant filed a timely appeal of a June 7, 2004 decision of a hearing representative of the Office of Workers' Compensation Programs that found his claim for hearing loss was not timely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant's claim for a hearing loss was timely filed.

FACTUAL HISTORY

On February 19, 2003 appellant, then 48 years old, filed a claim for a high frequency hearing loss that he attributed to his exposure to loud noises in his employment as a construction laborer. Appellant indicated that he first became aware of his hearing loss and first realized it was caused or aggravated by his employment in 1978 or 1979. He stated that when the employing establishment gave him his yearly physical examination in 1978 or 1979 he was told

he had a loss of hearing for high frequency sounds. Appellant described his exposure to noise from trucks, backhoes, forklifts, grout and sump pumps, jackhammers, and high pressure torches, which he said occurred four to eight hours per day.

The employing establishment confirmed that appellant worked as a construction laborer and flagman from July 30, 1975 to March 18, 1988, and submitted audiograms done on July 30, 1975, August 6, 1976, August 15, 1977, August 22, 1978, November 15, 1979 and September 19, 1983. In a March 19, 2003 letter, the employing establishment stated that, since appellant's "audiograms document no hearing loss or shifts in hearing to signify evidence of injury, it is not possible for [the employing establishment] to have had any immediate actual knowledge of injury." This letter also stated that appellant's exposure to loud noise as a construction laborer was limited to about one hour a day and normally did not exceed 89 decibels, and that during his entire period of employment state-of-the-art earplugs were provided and their use was mandatory in the areas where appellant worked.

On April 21, 2003 the Office referred appellant, his audiograms and a statement of accepted facts to Dr. Sage Copeland, a Board-certified otolaryngologist, for an evaluation of his hearing loss and its relationship to his employment. In a May 8, 2003 report, accompanied by a May 7, 2003 audiogram, Dr. Copeland concluded that appellant had a severe bilateral high frequency neurosensory hearing loss that was not due to noise exposure in his employment. Dr. Copeland's rationale for this opinion was: "(1) degree of change in hearing (2) standard threshold shift not documented."

By decision dated June 27, 2003, the Office found that it was not established that appellant's hearing loss was related to factors of his employment. This decision found that appellant's claim was timely filed.

Appellant requested a hearing, which was held on May 3, 2004. Appellant testified that he was issued hearing plugs when he was first hired, and that, after his second or third annual physical examination at the employing establishment, he was told he had a high frequency hearing loss. In response to appellant's hearing testimony, the employing establishment again contended that appellant's claim was not timely filed.

By decision dated June 7, 2004, an Office hearing representative found that appellant did not file his claim within the requisite three-year limit. The hearing representative noted that the medical evidence also failed to establish a causal relationship between appellant's hearing loss and his employment.

LEGAL PRECEDENT

Section 8122(a) of the Federal Employees' Compensation Act states, "An original claim for compensation for disability or death must be filed within three years after the injury or death." 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.

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.[1]

The statute provides an exception to the three-year limit for filing, which states that a claim may be regarded timely if an 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.[2] The Board has held that a program of annual audiometric examinations conducted by an employing establishment may constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury.[3]

ANALYSIS

On his claim form filed on February 19, 2003 and at a hearing held on May 3, 2004, appellant acknowledged that he was aware of his hearing loss and its relationship to his employment in 1978 or 1979. He continued to work at the employing establishment and be exposed to noise until March 18, 1988. On this date the time for filing a claim began to run. Appellant's claim filed on February 19, 2003 was not filed within the three-year limit of the Act.

The Office's June 7, 2004 decision, however, did not address whether the audiograms performed at the employing establishment during appellant's employment showed actual knowledge of appellant's hearing loss. The employing establishment appears to have run a hearing conservation program by mandating the use of ear plugs and conducting annual audiograms to test its employees for hearing loss. The employing establishment maintained that it was not put on notice of appellant's hearing loss by these audiograms because they did not show a shift in appellant's hearing. The audiogram done on July 30, 1975, the date appellant began employment at the employing establishment, does indicate a significant high frequency hearing loss, and the subsequent audiograms done at the employing establishment look similar. These audiograms, though, should be reviewed by an Office medical adviser to determine if they show a decrease in appellant's hearing acuity. The Office should then issue a decision addressing whether these audiograms establish actual knowledge by the employing establishment such that appellant's failure to file a claim within the three-year time limit of the Act should be excused.

[1] *Garyleane A. Williams*, 44 ECAB 441 (1993).

[2] 5 U.S.C. § 8122(a)(1); *Eddie L. Morgan*, 45 ECAB 600 (1994).

[3] *Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6c (February 2000) states: "If the employing agency gave regular physical examinations which might have detected signs of illness (for example, regular x-rays or hearing tests), the agency should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results. If the claimant was still exposed to employment hazard on or after September 7, 1974 and the agency's testing program disclosed the presence of an illness or impairment, this would constitute actual knowledge on the part of the agency, and timeliness would be satisfied even if the employee was not informed."

CONCLUSION

The Board finds that the case is not in posture for decision on whether appellant's claim is timely under the Act. The case must be remanded to the Office for a determination on whether the employing establishment had actual knowledge of his hearing loss and its relation to his employment during his employment.

ORDER

IT IS HEREBY ORDERED THAT the June 7, 2004 decision of the Office of Workers' Compensation Programs is set aside and remanded for further action on whether the claim should be regarded as timely based on actual knowledge by the employing establishment.

Issued: January 27, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member