United States Department of Labor
Employees' Compensation Appeals Board

WILLIAM C. OAKLEY, Appellant	)	
	)	**Docket No. 05-140**
and	)	**Issued: May 6, 2005**
TENNESSEE VALLEY AUTHORITY, Drakesboro, KY, Employer	)	

Appearances:
Ronald K. Bruce, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 14, 2004 appellant filed a timely appeal of a July 12, 2004 merit decision of the Office of Workers' Compensation Programs, in which an Office hearing representative affirmed the denial of his occupational disease claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly denied appellant's occupational disease claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. On appeal he contends that the employing establishment had actual knowledge of his hearing loss based on its audiometric records which reflected elevation of the thresholds 6,000 hertz for both ears and that he exercised reasonable diligence by notifying the employing establishment on August 26, 2003 when he first learned that his hearing loss was related to his employment.

FACTUAL HISTORY

On September 11, 2003 appellant, then a 65-year-old retired heavy equipment operator, filed an occupational disease claim for hearing loss, alleging that he first became aware of his disease or illness on October 17, 1994 and realized that his hearing loss was caused or aggravated by factors of his federal employment on August 26, 2003.[1]

In support of his claim, appellant submitted a history of his employment with federal and nonfederal employers covering the period 1954 through October 17, 1994, when he indicated that he was last exposed to hazardous noise and a narrative statement. He noted that he had operated diesel powered dozers and pans which produced a lot of noise for approximately 8 to 16 hours a day, 5 to 7 days a week and that there were other noises coming from the other equipment that was operating nearby when the coal was stockpiled. Appellant advised that he did not wear ear plugs and there were no cabs on the equipment during the first part of his work with the employing establishment. He stated that he had noticed his hearing loss at the time he last worked on October 17, 1994 but had first learned that his hearing loss was work related on August 26, 2003 when he saw the medical report from Dr. Uday Dave, a Board-certified otolaryngologist. Appellant also submitted audiograms conducted by the employing establishment dating from 1976 to 1994[2] and a July 22, 2003 medical report and audiogram from Dr. Dave, which diagnosed neurosensory hearing loss bilaterally with significant history of noise exposure.

By letter dated October 1, 2003, the employing establishment controverted appellant's claim and asserted that he worked for the employing establishment as a heavy equipment operator from June 1972 through October 1994 and that he could have been exposed to 79 to 92 decibels for 4 to 6 hours a day, 5 days a week. Hearing protection was noted to have been provided since 1973 with mandatory use in noisy areas and the hearing conservation program was noted to have been in place since 1983. Appellant's last employment audiogram on May 5, 1994 was noted to have no hearing loss.

In an October 20, 2003 report, an Office medical adviser indicated that there was no indication of noise-induced hearing loss at the time of appellant's retirement on October 17, 1994. The Office medical adviser stated that the initial employment audiogram of February 10, 1976 showed normal hearing bilaterally except for single mild elevation of thresholds at 6,000 hertz for both ears. The Office medical adviser further found that the serial studies through May 5, 1994 did not reveal significant progression.

By decision dated October 22, 2003, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that his claim was timely filed in accordance with 5 U.S.C. § 8122. The Office found that his last federal employment exposure occurred on October 17, 1994 and his September 16, 2003 filing was, therefore, not within the three-year time limitation period. The Office also found that appellant's immediate supervisor did not have knowledge of the injury appellant was claiming and there was no evidence to support that his

[1] Appellant last worked for the employing establishment on October 17, 1994.

[2] These tests did not show any hearing loss.

hearing loss was due to his federal employment since the audiograms did not document evidence of work-related, noise-induced hearing loss.

By letter dated November 4, 2003, appellant requested an oral hearing which was held on May 3, 2004. In a letter dated May 21, 2004, the employing establishment advised that the testimony provided by him and his attorney did not change the fact that his claim was not timely filed.

By decision dated July 12, 2004, an Office hearing representative affirmed the Office's prior decision of October 22, 2003. The Office hearing representative found that there was no indication that appellant's immediate supervisor had actual knowledge of the claimed condition, nor was written notice given within 30 days. The Office hearing representative also found that, as appellant reported being aware of this condition upon retirement, he should have been aware by the exercise of reasonable diligence that the alleged condition was causally related to factors of his employment.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,[3] as amended in 1974, a claimant has three years to file a claim for compensation.[4] In a case of occupational disease, the Board has held that 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 nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[5] Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of his last exposure to the implicated factors.[6] 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 his employment and the compensable disability.[7] Even if the claim is not filed within the three-year period, it may be regarded as timely under section 8122(a)(1) if appellant's immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days such that the immediate superior was put reasonably on notice of an on-the-job injury or death.[8]

[3] 5 U.S.C. § 8122.

[4] *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); *see* 20 C.F.R. § 10.101(b).

[5] *Larry E. Young*, 52 ECAB 264 (2001); *Duet Brinson*, *supra* note 4.

[6] *See Larry E. Young*, *supra* note 3; *William D. Goldsberry*, 32 ECAB 536, 540 (1981).

[7] 5 U.S.C. § 8122(b); *Bennie L. McDonald*, 49 ECAB 509, 514 (1998).

[8] *Duet Brinson*, *supra* note 4; *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

ANALYSIS

The Office denied appellant's occupational disease claim on the grounds that it was not timely filed. The Office found that he should have been aware of a relationship between his employment and the alleged condition by October 17, 1994, the date of his last exposure to the implicated employment condition. Although appellant indicated that he noticed hearing loss on October 17, 1994 he stated he was unaware that it was employment related until he saw Dr. Dave's medical report on August 26, 2003 and he then promptly notified the employing establishment.

With regard to whether appellant, through the exercise of reasonable diligence, should have known of his hearing loss within three years of October 17, 1994, the record reflects that the employing establishment indicated that he had worked as a heavy equipment operator from June 1972 through October 1994 and had about 20 to 30 hours of noise exposure weekly. Appellant underwent audiograms with the employing establishment dating from 1976 to 1994. The Office medical adviser found that such employing establishment audiograms did not show significant progression, although the February 10, 1976 audiogram showed a single mild-elevation of thresholds at 6,000 hertz for both ears. The Board notes that such audiograms did not contain any evidence to suggest that appellant was diagnosed with hearing loss, such as notations or remarks indicating that he sustained noise-induced hearing loss, nor do they indicate that any information was communicated to appellant, which indicated that he had a hearing loss or excessive noise exposure.[9] Although he may have been aware that he had some hearing loss on October 17, 1994 this knowledge coupled with the lack of contemporaneous indication that he had a noise-induced hearing loss, is insufficient to establish that he should have known earlier than August 26, 2003 that he had an employment-related condition. The July 22, 2003 medical report from Dr. Dave, in which he opined that appellant had neurosensory hearing loss bilaterally with significant history of noise exposure, is the first indication that appellant had any notification that he may have sustained a noise-induced hearing loss.[10] This evidence, therefore, is insufficient to show that appellant reasonably should have known that he had an employment-related hearing loss within three years of October 17, 1994. There are no other medical reports, audiograms or other evidence prior to Dr. Dave's medical report of July 22, 2003 which suggested that appellant had a noise-induced hearing loss. Additionally, the Office's decision did not cite any evidence or provide any reasoning to support a finding that appellant was aware or reasonably should have been aware, of the relationship between his employment and his hearing loss on October 17, 1994 the date of last exposure to noise at work.

Since the record establishes that appellant first had knowledge that his hearing loss was an occupational disease resulting from exposure to noise at work on or about August 26, 2003, when he learned of Dr. Dave's medical report and this was the first time the record establishes

[9] As it appears that the employing establishment audiograms did not show an impairment, Office procedures regarding employee testing programs constituting actual knowledge on the part of the employing establishment for purposes of timely filing a claim do not apply. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6c (March 1993).

[10] Although Dr. Dave did not opine that appellant had a noise-induced hearing loss, his opinion is of sufficient probative value to put him on notice that he may have a noise-induced hearing loss.

that he reasonably should have been aware that his hearing loss was due to occupational exposure, his claim filed on September 11, 2003 was within three years of his August 26, 2003 date of awareness and is, therefore, timely. The case must, therefore, be remanded for the Office to address the merits of the claim. After any further development that it deems necessary, the Office should issue a *de novo* decision.

CONCLUSION

The Board finds that appellant's claim filed on September 11, 2003 is timely.

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2004 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further action consistent with this decision.

Issued: May 6, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member