

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

ODESTER WILSON, Appellant

and

**TENNESSEE VALLEY AUTHORITY,
BROWNS FERRY NUCLEAR PLANT,
Decatur, AL, Employer**

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**Docket No. 05-1792
Issued: November 18, 2005**

Appearances:
Odester Wilson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On August 30, 2005 appellant filed a timely appeal of a July 5, 2005 decision of the Office of Workers' Compensation Programs, denying modification of a prior finding that his claim for a hearing loss was untimely filed. Pursuant to 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 claim for compensation on the grounds that it was not timely filed.

FACTUAL HISTORY

On October 16, 2004 appellant, then a 78-year-old former steamfitter, filed an occupational disease claim (Form CA-2), alleging that he sustained hearing loss and ringing in the ears as a result of his federal employment. He first realized the condition was causally related to his employment on October 6, 2004. Appellant submitted an audiogram dated

October 6, 2004. The reverse of the claim form indicated that he was last exposed to noise in his federal employment on March 15, 1989.

The record contains an employing establishment medical report dated April 14, 1981; the diagnosis included “hearing impairment.” An audiogram of the same date reported the following decibel levels for the right ear at 500, 1,000, 2,000 and 3,000 hertz, respectively: 10, 15, 20, 40. For the left ear, the results were 5, 30, 15, 10 at the same levels. A second audiogram from the employing establishment dated November 4, 1985 revealed decibel levels, for the right ear of, 10, 20, 15 and 15; for the left ear, 10, 30, 15 and 15.

In a letter dated January 14, 2005, the employing establishment indicated that appellant was employed from April 15, 1981 to March 15, 1989. In response to an Office inquiry, appellant indicated that he had last worked in 1988. In response to a question as to when he first noticed the hearing loss and when he first related it to his federal employment, appellant responded “1988[;] speaking in loud tone, repeating words, ringing in ears, [employing establishment] and radio loud.”

By decision dated February 8, 2005, the Office denied appellant’s claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. The Office determined that he should have been aware of the relationship between the claimed hearing loss and his federal employment March 15, 1989 when he stopped working at the employing establishment.

Appellant requested reconsideration of his claim on March 7, 2005 and argued that his claim was timely filed. He indicated that coworkers had their claims accepted by the Office. The Office referred the evidence to an Office medical adviser, who stated in a June 29, 2005 report that the 1981 audiogram showed a mild high frequency loss on the right and mild low frequency hearing loss on the left. He opined that the two audiograms did not document a worsening of the condition from 1981 to 1985.

By decision dated July 5, 2005, the Office denied modification of the February 8, 2005 decision, finding that appellant’s claim was not timely filed.

LEGAL PRECEDENT

Section 8122(a) of the Federal Employees’ Compensation Act provides, “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

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

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

In the present case, appellant initially reported awareness of an employment-related hearing loss as of October 6, 2004. He did acknowledge, however, that at the time he stopped working he was aware of causal relationship between a hearing condition and his federal employment. Appellant stated that the year was 1988, although he also reported 1988 as the year he stopped working and the employing establishment indicated that he continued to work until March 15, 1989. Under section 8122(b), the time limitation begins to run when appellant became aware of causal relationship or, if he continued to be exposed to noise after awareness, the date he is no longer exposed to noise. In this case, the date the three-year time limitation begins to run on March 15, 1989 was the date of his last exposure to work factors. Since appellant did not file the claim until October 16, 2004, he did not file the claim within the three-year time limitation.

As noted above, a claim may be found to be timely, notwithstanding the failure to file within three years, if a program of annual audiometric examinations constructively gave actual knowledge to the employing establishment of hearing loss. In this case, however, the record contains only two employing establishment audiograms, dated April 14, 1981 and November 4, 1985. The Office medical adviser noted that the 1985 audiogram did not show any progression of hearing loss from the initial audiogram performed when appellant was hired.⁴ The audiometric evidence from the employing establishment does not demonstrate an employment-related hearing loss and, therefore, it does not constructively provide actual notice to the employing establishment. Pursuant to section 8122, appellant's claim is untimely. The Office properly denied the claim.

CONCLUSION

The Board finds that the Office properly determined that appellant's claim for compensation was not timely filed.

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).

⁴ The Board notes that, under the formula used to determine hearing loss impairment, neither the 1981, nor 1985 audiogram would result in a ratable hearing impairment. See the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), 250.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 5 and February 8, 2005 are affirmed.

Issued: November 18, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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