United States Department of Labor
Employees' Compensation Appeals Board

DANIEL M. HALLMAN, Appellant	)	
and	)	**Docket No. 06-464**
	)	**Issued: May 5, 2006**
TENNESSEE VALLEY AUTHORITY, BROWNS FERRY NUCLEAR PLANT, Decatur, AL, Employer	)	

Appearances:
Daniel M. Hallman, pro se
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 December 27, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated February 11, July 8 and November 28, 2005, which denied his hearing loss claim as untimely. 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 appellant filed a timely claim for compensation under the Federal Employees' Compensation Act.

FACTUAL HISTORY

On January 26, 2004 appellant, then a 62-year-old retired engineer, filed a Form CA-2, occupational disease claim, alleging that exposure to high levels of noise during his federal employment caused a hearing loss. He was first aware of the condition and its relationship to his employment in 1996 and that, because he had lived out of state since retirement, he did not know

he could file a claim. Appellant retired on September 30, 1996. In an attached statement, appellant described the noise exposure and stated: "[t]he first time I ever noticed a hearing loss was approximately six or seven years ago when I began to frequently ask people to repeat what they had said. The last six or seven years would be 1996 to 1997 time frame." He also submitted employment records showing that he had worked for the Department of the Navy from 1971 to 1978 but stated that his noise exposure there was limited and a January 13, 2004 Beltone audiogram.

In a controversion dated April 8, 2004, the employing establishment conceded noise exposure and noted that when appellant was first employed on November 5, 1978 an audiogram obtained which, when compared with an audiogram of 1992, there was a slight improvement and it showed no ratable loss. The employing establishment further noted that an employing establishment physician reported on his initial examination that appellant had an abnormal audiogram and submitted a review of the audiograms by an employing establishment nurse practitioner. A physical examination report dated November 6, 1978, included a notation "abn[ormal] audio."[1] Employing establishment audiograms dating from 1978 to 1992 were also submitted. On April 21, 2004 an Office medical adviser reviewed the employing establishment audiograms and opined that they showed no significant threshold shift and opined that appellant's hearing loss did not occur during his time of employment from November 5, 1978 to September 30, 1996. By decision dated August 16, 2004, the Office denied the claim on the grounds that appellant's hearing loss was not employment related.

On September 14, 2004 appellant requested reconsideration and submitted an Office Form CA-35B checklist and copies of evidence previously of record. In a December 20, 2004 decision, the Office again denied the claim, but modified the August 16, 2004 decision to find that the claim had not been timely filed. On January 29, 2005 appellant requested reconsideration, alleging that his hearing loss was latent as he was not aware of his hearing loss until the January 13, 2004 audiogram. He also submitted an impairment calculator and internet publications. By decision dated February 11, 2005, the Office denied modification of the December 20, 2004 decision, noting that on his claim form appellant stated that he was first aware of his condition and its relation to his employment in 1996 and also stated that he had a hearing problem for six or seven years.

Appellant again requested reconsideration on March 20, 2005, stating that he was confused by the instructions on Office CA-2 and CA-35b forms regarding his claim and that the time should not begin to run until the January 2004 audiogram. He again submitted the January 13, 2004 audiogram, which now contained a comment by a Beltone audiologist that appellant's hearing loss was caused by long-term exposure to excessive noise. An employing establishment audiologist reviewed appellant's claim and advised that there was no threshold shift in appellant's audiograms from 1978 to 1992 and, therefore, the employing establishment was not put on notice that appellant had an employment-related hearing loss. By letter dated June 2, 2005, appellant repeated his contentions that he did not know he had a hearing loss until the January 2004 audiogram and, as it was a latent condition, his claim was timely filed. In a decision dated July 8, 2005, the Office denied modification of the February 11, 2005 decision.

[1] The physician's signature is illegible.

On July 16, 2005 appellant requested reconsideration, again noting that the 1996 date on his claim form was in error and should have been January 13, 2004. In a November 28, 2005 decision, the Office denied modification of the July 8, 2005 decision.

LEGAL PRECEDENT

In cases of injury on or after September 7, 1974, section 8122(a) of the Act[2] 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) the 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) written notice of injury or death as specified in section 8119 was given within 30 days."[3]

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.[4] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[5]

Section 8122(b) provides that the time for filing in latent disability cases 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 and the Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.[6] For actual knowledge of a supervisor to be regarded as timely filing, a 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.[7]

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[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8122(a).

[4] 5 U.S.C. § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

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

[6] *Delmont L. Thompson*, 51 ECAB 155 (1999).

[7] 5 U.S.C. § 8122(b); *Duet Brinson*, 52 ECAB 168 (2000).

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 or she 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 the employee 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 which has been adversely affected by factors of federal employment, 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]

In interpreting section 8122(a)(1) of the Act, the Office procedure manual states that, if the employing agency gives regular physical examinations, which might have detected signs of illness, such as hearing tests, it should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results.[11]

ANALYSIS

In this case, the Office found that appellant had not filed a timely claim for compensation under the Act. When he filed his claim for compensation on January 26, 2004, appellant indicated that he was first aware of his hearing loss and its relationship to his employment in 1996. In a statement accompanying his claim, he advised that the first time he noticed a hearing loss was "approximately six or seven years ago when I began to frequently ask people to repeat what they had said," or in the 1996 to 1997 time frame. Appellant therefore maintained that in 1996 he was aware or reasonably should have been aware of a possible relationship between his hearing loss and factors of his federal employment. In January and March 2005, appellant contended that his hearing loss was latent condition and he was not aware of it until his January 2004 audiogram. He stated that the answer he gave on his claim form "did not mean I was aware or should have been reasonably aware at the date given that I had an employment[-]related hearing loss. I only gave a time frame for my gradual hearing loss because I could not remember an exact date." He then stated that "no date was given" regarding the question on the claim form regarding the date he was first aware that his hearing loss was related to employment. The claim form submitted by appellant, however, clearly shows "96" in the answer to question 12, the "date you first realized the disease or illness was caused or aggravated by your employment." Appellant also argued that his noting that he was first aware of his hearing loss in 1996 was in error and if he had known he had employment-related hearing loss in 1996, he would have filed a claim at that time.

[8] *Larry E. Young, supra* note 4.

[9] *Id.*

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

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6(c) (March 1993); *see James A. Sheppard*, 55 ECAB ____ (Docket No. 03-692, issued May 5, 2004).

The Board has held that 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 employment, such awareness is competent to start the running of the time limitations period even though he does not know the precise nature of the impairment or whether the ultimate result of such adverse effect would be temporary or permanent.[12] Appellant reported being aware of his hearing loss and, its relationship to his employment in 1996 and in a personal statement, appellant advised that he first noticed a hearing loss in 1996 to 1997. While he later argued that this was in error, the Board finds that the date appellant placed on his claim for compensation, 1996, is more probative as the date he first became aware of his condition and its relationship to his federal employment.

As noted above, however, if an employee continues to be exposed to injurious working conditions, the time limitation begins to run on the date of the last exposure.[13] Therefore, the time for filing appellant's claim did not begin to run until September 30, 1996, the date he retired. Accordingly, the three-year statute of limitations would have expired no later than September 30, 1999 and appellant's January 26, 2004 claim for compensation is thus barred by this exception to the statute of limitations.[14]

The record also does not support that appellant's "immediate superior had actual knowledge of the injury or death within 30 days."[15] In this case, there is no evidence of record that establishes that appellant's supervisor had actual knowledge of any injury within 30 days or that written notice of the injury was given with 30 days. The employing establishment noted that in November 1978, when appellant was first employed, his audiogram was abnormal. His employing establishment audiograms dating from 1978 to 1992 were reviewed by an Office medical adviser who found no evidence of a threshold shift such that would put the employing establishment on notice that appellant had sustained a hearing loss caused by his employment.[16] Thus, this is not a case where the employing establishment had constructive knowledge of an employment-related hearing loss[17] and it is not enough that the employing establishment knew that appellant suffered from a hearing loss at the time he began his employment in 1978; appellant also has to show that his supervisors knew or reasonably should have known that this condition was caused by his employment.[18] In this case, there is no probative evidence to

[12] *Richard Narvaez*, 55 ECAB ____ (Docket No. 04-1077, issued August 24, 2004).

[13] *Larry E. Young*, *supra* note 4.

[14] *Supra* note 3.

[15] 5 U.S.C. § 8122(a)(1); *see also Duet Brinson*, *supra* note 7.

[16] These reports were also reviewed by an employing establishment nurse practitioner and an employing establishment audiologist who agreed that the studies did not demonstrate a threshold shift. Neither a nurse practitioner nor an audiologist is defined as a "physician" under section 8101(2) of the Act and their opinions cannot be considered a medical opinion by a qualified physician. *See Janet L. Terry*, 53 ECAB 570 (2002); *Thomas Lee Cox*, 54 ECAB 509 (2003).

[17] *Compare James A. Sheppard*, *supra* note 11.

[18] *See David R. Morey*, 55 ECAB ____ (Docket No. 04-967, issued August 16, 2004).

establish that appellant's superior had constructive knowledge sufficient to be reasonably put on notice that his hearing loss was work related within 30 days of September 30, 1996, the day he retired. Accordingly, appellant's claim, which is clearly outside the three-year time limitation period, is untimely.[19]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 28, July 8 and February 11, 2005 be affirmed.

Issued: May 5, 2006
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

[19] *See Richard Narvaez, supra* note 12.