

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

C.C., Appellant)

and)

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

**Docket No. 06-1384
Issued: October 6, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 15, 2006 appellant filed a timely appeal of an April 28, 2006 decision of the Office of Workers' Compensation Programs denying merit review of a July 18, 2005 merit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case as well as the April 28, 2006 decision denying merit review.

ISSUES

The issues are: (1) whether appellant's claim for compensation was filed within the time limitation of 5 U.S.C. § 8122; and (2) whether the Office properly determined that appellant's request for reconsideration was insufficient to warrant further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 1, 2005 appellant filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss as a result of his federal employment. Appellant indicated that he

had begun to have problems hearing, as well as ringing in the ears. He became aware of the condition and its relationship to his employment on March 1, 2005. On a hearing loss checklist form, appellant reiterated that he became aware of the hearing loss and its relationship to his employment on March 1, 2005. Appellant submitted a March 1, 2005 audiogram with the following results: for the right ear at 500, 1,000, 2,000 and 3,000 hertz (Hz), decibel levels of 40, 45, 25, 25; for the left ear, 15, 10, 30 and 40.

The record contains audiograms from the employing establishment in 1973, 1977, 1978 and 1985. On May 19, 2005 the employing establishment controverted appellant's hearing loss claim on the grounds that it was untimely. The employing establishment indicated that appellant was last exposed to noise on August 2, 1988.¹ According to the employing establishment, the employment audiograms did not document a hearing loss injury and therefore it did not have timely notice of an injury. The employing establishment also asserted that if appellant had any hearing loss due his employment, he would have known about it in 1988.

In a report dated June 15, 2005, an Office medical adviser stated that the earliest employment audiograms showed mild low frequency hearing loss on the right, which was not in the pattern of noise-induced hearing loss. The medical adviser opined that the employment audiograms showed no progression of hearing loss.

By decision dated July 18, 2005, the Office denied the claim for compensation on the grounds that the claim was barred by the time limitation set forth at 5 U.S.C. § 8122. The Office noted that appellant last worked on August 2, 1988 and "you should have been aware of a relationship between your employment and the claimed condition by August 2, 1991."

Appellant requested reconsideration and argued that his claim was timely. By decision dated November 18, 2005, the Office determined that the request was insufficient to warrant further merit review of the claim. Appellant again requested reconsideration, which was denied without merit review of the claim by decision dated April 28, 2006.

LEGAL PRECEDENT -- ISSUE 1

Section 8122(a) of the Federal Employees' Compensation Act states, "An original claim for compensation or death must be filed within three years after the injury or death."² This section also indicates that a claim not filed within three years will not be allowed unless the immediate supervisor had actual knowledge of the injury or death within 30 days or written notice of injury was given within 30 days.³ 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

¹ Appellant indicated on the hearing loss claim checklist that he worked as a steamfitter at the employing establishment until 1993.

² 5 U.S.C. § 8122(a).

³ *Id.*

reasonable diligence should have been aware, of the causal relationship between his employment and the compensable disability.⁴

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.⁵

ANALYSIS -- ISSUE 1

The Office made a determination that the claim filed on March 1, 2005 was untimely because the employing establishment audiograms did not establish actual knowledge of an employment-related hearing loss, and appellant should have been aware of his hearing loss and its relationship to his employment by August 2, 1991. Since this was three years after the employing establishment indicated that appellant was last exposed to noise in federal employment, it appears that the Office found that appellant should have known of a causal relationship between hearing loss and his employment as of August 2, 1988, and therefore he had until August 2, 1991 to timely file a claim.

On the issue of when appellant was aware, or reasonably should have been aware, of causal relationship between hearing loss and employment noise exposure, the Office provided no explanation for its findings. As the Office medical adviser opined, the employing establishment audiograms did not show a progressive noise-induced hearing loss, and there is no evidence of record that appellant should have been aware of an employment-related hearing loss when his federal employment ended. The record indicated only that appellant reported he had increasing difficulty hearing conversations and an audiogram was performed on March 1, 2005. The audiogram did reveal additional hearing loss. Appellant indicated that he became aware of a possible employment-related hearing loss on March 1, 2005 and there is no probative evidence of record contrary to this finding.

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 hearing loss and his employment. The Office has not explained why appellant should have known of a causal relation between his hearing loss and his work by August 2, 1991 and the Board finds no evidence currently of record to make such a finding. Accordingly, as appellant in fact became aware of such relationship on March 1, 2005, the Board finds that the claim was timely filed. In view of the Board's finding, the reconsideration issue is moot.

⁴ 5 U.S.C. § 8122(b).

⁵ *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 [establishment] 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 claim was timely filed based on the evidence currently of record.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 18, 2005 is reversed.

Issued: October 6, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board