

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

B.C., Appellant

and

**TENNESSEE VALLEY AUTHORITY, BROWN
FERRY NUCLEAR PLANT, Muscle Shoals, AL,
Employer**

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**Docket No. 07-1305
Issued: September 26, 2007**

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 April 16, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 15, 2006 merit decision denying his claim as untimely filed and the March 23, 2007 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these issues.

ISSUES

The issues are: (1) whether the Office properly determined that appellant's claim for compensation is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act; and (2) whether the Office properly refused to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 18, 2006 appellant, a 70-year-old retired iron worker, filed an occupational disease claim, alleging that exposure to noise during his federal employment caused a bilateral

hearing loss. He first realized that he had a hearing loss and that the loss was caused or aggravated by his employment on April 24, 2006. Appellant alleged that he began having problems hearing in both ears; had difficulty hearing the television and radio; and had to ask people to repeat words during conversations. He retired on October 4, 1991. The employing establishment indicated that the condition was first reported on July 27, 2006.

Appellant also submitted an April 24, 2006 audiogram. In an undated statement, he indicated that he had worked for the U.S. Army from 1958 to 1960 and for the employing establishment from 1960 to 1990. Appellant alleged that he was exposed to loud noise eight hours per day, five to seven days per week, from hammering, drilling, grinding, welding and ping-pong. He stated that he was exposed to noise from turbines, air compressors and tuggers and that no safety devices were provided. Appellant first noticed his hearing loss and that it was related to his employment, on April 24, 2006, when he received the results of the audiogram.

By letter dated August 15, 2006, the Office informed appellant that the information submitted was insufficient to establish his claim. The Office asked appellant to provide additional medical and factual information relating to his hearing loss, including an explanation as to how he first realized the loss was causally related to factors of employment. In an undated statement, appellant reiterated that, in his job as an iron worker, he was exposed to loud noise from industrial machinery every day.

On October 20, 2006 the Office informed appellant that the information submitted indicated that his claim was not timely, in that it was filed more than three years after the date of his last exposure to work-related noise. The Office asked appellant to provide evidence that his supervisor was aware of his hearing loss within 30 days of his last exposure.

The employing establishment controverted appellant's claim on the grounds that it was untimely filed. It contended that it had no immediate actual knowledge of injury, as the audiograms performed by the establishment did not document any hearing loss or shifts in hearing to signify evidence of injury. The employing establishment submitted applications for employment dated April 5, 1960 and August 31, 1983; an employment history; reports from audiograms dated March 7, 1979, October 10, 1984, August 11, 1987 and November 1, 1989; and medical examination records dated March 7, 1979, October 10, 1984, August 11, 1987 and November 1, 1989, reflecting appellant's representation that he had never had any hearing loss. An employing establishment audiometric record showed that, pursuant to testing on the above-referenced dates, appellant had a zero percent binaural hearing loss. In an October 30, 2006 statement, appellant indicated that his former supervisors were deceased.

The Office forwarded the employing establishment audiograms from 1979 to 1987 to the district medical adviser for review. On November 9, 2006 an Office medical adviser stated that a comparison of the earliest and latest employing establishment audiograms did not document a worsening of appellant's hearing loss.

By decision dated December 15, 2006, the Office denied appellant's claim on the grounds that it was not timely filed. It advised him that the date of injury was the date of his last occupational exposure, namely October 4, 1991, the date of his retirement and that he should have been aware of a relationship between his employment and the claimed condition by that

date. The Office further found that any worsening appellant experienced after his last exposure to the noise, would not demonstrate that any hearing loss had occurred during his employment. As appellant's claim was filed in 2006, more than 14 years after the date of injury, the Office found that it was untimely filed. It further found that his immediate supervisor did not have actual knowledge of the injury within 30 days.

On December 26, 2006 appellant requested reconsideration, stating that he filed his claim as soon as he learned of his hearing loss.

By decision dated March 23, 2007, the Office denied appellant's request for reconsideration without a review of the merits, finding that it neither raised substantial legal questions, nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

In cases of injury on or after September 7, 1974, section 8122(a) of the Act¹ 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.”²

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.³ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.⁴

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. The

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8122(a).

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

⁴ *Laura L. Harrison*, 52 ECAB 515 (2001).

Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.⁵ In order to establish that a supervisor had actual knowledge, an 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.⁶

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.⁷ 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,⁸ 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, Office procedure manual states that, if the employing establishment 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 did not file a timely claim for compensation for his hearing loss. It determined that appellant was last exposed to the employment conditions which allegedly caused his hearing loss on October 4, 1991, the date of his retirement. Since appellant did not file a claim until May 18, 2006, the Office concluded that his claim was not timely filed within the three-year period of limitation.

The Board finds that appellant's claim was timely filed. The Board has held that, when an employee becomes aware, or reasonably should have been aware, that he has a condition

⁵ *Delmont L. Thompson*, 51 ECAB 155 (1999).

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

⁷ *Larry E. Young*, *supra* note 3.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993); *see James A. Sheppard*, 55 ECAB 515 (2004).

⁹ *Id.*

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

¹¹ Federal (FECA) Procedure Manual, at 2.801.6(c) (March 1993).

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 In his claim for compensation, appellant stated that he only became aware of a hearing loss after obtaining an April 24, 2006 hearing test, which accompanied his claim. He alleged that he began having problems hearing in both ears; had difficulty hearing the television and radio; and had to ask people to repeat words during conversations.

The Office found that the date of injury was the date of his last occupational exposure, namely October 4, 1991, the date of his retirement and that he should have been aware of a relationship between his employment and the claimed condition by that date. The Board finds, however, that the Office's determination is in error. The medical evidence from the employing establishment admittedly did not document any hearing loss or shifts in hearing to signify that appellant had a hearing loss prior to his retirement in 1991. On November 9, 2006 an Office medical adviser stated that a comparison of the earliest and latest employing establishment audiograms did not document a worsening of appellant's hearing loss. There is no evidence of record indicating that appellant was aware of a hearing loss, or that such a loss was causally related to factors of his employment, prior to April 24, 2006. The Board finds that appellant first became aware, or reasonably should have been aware, of a possible relationship between a diagnosed hearing loss and factors of his federal employment on April 24, 2006.¹³

The evidence does not establish that appellant was aware, or should have been aware, of the causal relationship between his federal employment and his hearing loss until April 24, 2006. Therefore, the time limitations began to run at that time. As appellant filed his claim on May 18, 2006, the Board finds that his claim was timely filed within the three-year period after April 24, 2006.¹⁴

CONCLUSION

The Board finds that appellant's claim for a hearing loss was timely filed.

¹² See *Larry E. Young*, *supra* note 3.

¹³ See *L.C.*, 57 ECAB ____ (Docket No. 06-1190, issued September 18, 2006) (The Board found that, although appellant's last exposure to noise in the workplace occurred in 1987, when he retired, time limitations for filing purposes began to run in 2004, when he became aware of the causal relationship between his hearing loss and his federal employment).

¹⁴ Due to the Board's disposition of this issue, the second issue is moot and will not be addressed by the Board.

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2007 and December 15, 2006 decisions of the Office of Workers' Compensation Programs are reversed. The case is remanded to the Office for further proceedings regarding the merits of his claim.

Issued: September 26, 2007
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