

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

D.H., Appellant

and

**TENNESEE VALLEY AUTHORITY, PE-C F-H
MOD JOHNSONVILLE, Chattanooga, TN,
Employer**

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**Docket No. 09-371
Issued: August 24, 2009**

Appearances:
Appellant, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 4, 2008 appellant filed a timely appeal from a December 18, 2008 nonmerit decision of the Office of Workers' Compensation Programs' Branch of Hearings and Review that denied his request for an oral hearing. The Board also has jurisdiction over the October 2, 2008 merit decision of the Office that denied his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of appellant's claim.

ISSUES

The issues are: (1) whether appellant's hearing loss claim was timely filed; and (2) whether the Office properly denied his request for an oral hearing as untimely.

FACTUAL HISTORY

On April 2, 2008 appellant, a 52-year-old boilermaker welder, filed an occupational disease claim (Form CA-2) for hearing loss. He attributed his hearing loss to exposure to high

noise levels produced by machinery and tools. Appellant alleged that he first became aware of his hearing loss and its relationship to his federal employment in August 1982. He alleged that he did not file his claim within 30 days of realizing his hearing loss was caused or aggravated by his federal employment because he did not know he could file a workers' compensation claim for hearing loss until recently.

Appellant submitted reports from physical examinations conducted between September 27, 1978 and October 10, 1989. He also submitted results from three audiograms conducted by the employing establishment between September 1978 and July 1986, when appellant was employed by Tennessee Valley Authority (TVA).

Appellant submitted a letter dated May 13, 2008, containing a detailed history of work and conditions which he alleged contributed to his hearing loss. He reported that he first identified his hearing loss in August 1982 based on his inability to hear during normal conversations. Appellant also reported that he was no longer exposed to hazardous noise and that his date of last exposure was March 9, 2007.

Appellant's employment history demonstrated that appellant was employed by the TVA during intermittent periods October 2, 1979 through December 20, 1991. After December 20, 1991 he was employed by several nonfederal employers who had contracts to perform work at TVA facilities.

By decision dated October 2, 2008, the Office denied appellant's claim, finding that his claim was not filed in a timely manner as required by the Federal Employees' Compensation Act.

Appellant disagreed and requested an oral hearing. His request was postmarked November 14, 2008.

In a note dated October 28, 2008, appellant asserted that the application of the 30-day filing period for an oral hearing was unfair and did not reflect the reality of his experience. He alleged that the Office's October 2, 2008 decision was not mailed until October 10, 2008 and not received by him until the following week.

By decision dated December 18, 2008, the Office denied appellant's hearing request because his request was untimely filed.

LEGAL PRECEDENT -- ISSUE 1

In cases of injury on or after September 7, 1974, section 8122(a) of the Act states that an original claim for compensation for disability or death must be filed within three years after the injury or death.¹ Section 8122(b) of the Act 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

¹ 5 U.S.C. § 8122(b).

compensable disability.² 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 exposure.³

ANALYSIS -- ISSUE 1

In this case, the Office denied appellant's occupational disease claim on the grounds that it was not timely filed. Appellant indicated that he became aware of his hearing loss in August 1982. His last exposure to factors of his federal employment was December 12, 1991, the date he was last employed by TVA. Because appellant admits awareness of his hearing loss as of August 1982, none of the exceptions tolling the 30-day filing period for an oral hearing apply and appellant's claim was untimely filed.

While the record reflects that appellant had subsequent employment at TVA facilities, these exposures occurred during employment experiences when appellant was an independent contractor or an employee of an independent contractor. The Act excludes from the definition of "employee" independent contractors and individuals employed by an independent contractor.⁴ The Board has held that, if an employee continues to be exposed to injurious employing establishment working conditions⁵ after such awareness, the time limitation begins to run on the last date of this exposure.⁶ Because his contact with TVA facilities and exposure to employment-related noise after December 12, 1991 was in the capacity of an employee of an independent contractor, he does not qualify as an "employee" for purposes of the Act and, therefore, his date of last exposure is December 12, 1991, the last day he was employed by TVA. Therefore, the time limitations period began to run no later than December 12, 1991 and ended December 12, 1994. As appellant's hearing loss claim was filed on April 2, 2008, his claim was filed outside the three-year time limitation period and was untimely.

In the case of a latent disability, as in this case, the time for filing the claim does not begin to run until the employee has a compensable disability and is aware, or reasonably should have been aware, that his disability is causally related to his employment.⁷ In such a case, the time for giving notice of injury begins to run when the employee knows, or reasonably should have known, that he has a condition causally related to his employment, whether or not there is a compensable disability.⁸ Appellant, however, admits that he became aware of his hearing loss as

² *Garyleane A. Williams*, 44 ECAB 441 (1993).

³ *Larry E. Young*, 52 ECAB 264 (2001). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (April 1995).

⁴ 5 U.S.C. § 8101(1)(c).

⁵ Continued employment by another employer does not count as employing establishment exposure.

⁶ See *Willis E. Bailey*, 49 ECAB 511 (1998).

⁷ 5 U.S.C. § 8122(b).

⁸ *Id.*

early as 1982. Because he was aware of his hearing loss as of August 1982, the time for filing his claim commenced in 1991 when he was last exposed to noise in his federal employment.

However, a claim may also be allowed notwithstanding the time limitation if the employee's immediate supervisor had actual knowledge of the injury within 30 days of its occurrence, or if written notice of the injury was given within 30 days pursuant to 5 U.S.C. § 8119.⁹ The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program is sufficient to constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury.¹⁰ The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.¹¹ The Office's procedure manual, interpreting section 8122(a)(1) of the Act, states:

“If an agency, in connection with a recognized environmental hazard, has an employee testing program and a test shows the employee to have positive findings this should be accepted as constituting actual knowledge. For example, an agency where employees may be exposed to hazardous noise levels may give annual hearing tests for exposed employees. A hearing loss identified on such a test would constitute actual knowledge on the part of the agency of a possible work injury.”¹²

In the present case, audiograms were conducted by the employing establishment on September 27, 1978, October 10, 1981 and July 29, 1986, during which time appellant was employed by TVA. Again, the Board also notes that the district medical adviser reported that review of these audiograms revealed they demonstrated normal bilateral hearing at all frequencies. Because there is no evidence demonstrating that the employing establishment had knowledge, constructive or otherwise, of a hearing loss possibly related his federal employment, the constructive knowledge exception to the 30-day filing period does not apply. Appellant's claim for hearing loss was untimely filed.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that, before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.¹³ Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an

⁹ 5 U.S.C. §§ 8122(a)(1), 8122(a)(2).

¹⁰ See *Joseph J. Sullivan*, 37 ECAB 526, 527 (1986) (constructive knowledge of possible employment-related hearing loss provided by annual employing establishment audiograms); see also Federal (FECA) Procedural Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(c) (March 1993).

¹¹ *Kathryn A. Bernal*, 38 ECAB 470 (1987).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2. 801.7(d) (September 1990).

¹³ 5 U.S.C. § 8124(b)(1).

oral hearing or a review of the written record.¹⁴ The Office's regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.¹⁵

The Board has held that the Office, in its broad discretionary authority in the administration of the Act,¹⁶ has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹⁷ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.¹⁸

ANALYSIS -- ISSUE 2

Appellant's request for an oral hearing before the Branch of Hearings and Review was dated November 18, 2008, more than 30 days after the Office's October 2, 2008 decision. Therefore, his request for an oral hearing was not timely and he was not entitled to a hearing as a matter of right. The Branch of Hearings and Review exercised its discretion in denying appellant's request for an oral hearing by finding that he could request reconsideration and submit evidence not previously considered that establishes his claim was filed in a timely manner.

Appellant asserted that application of the 30-day filing period for an oral hearing was unfair and did not reflect the reality of his experience. He alleged that the Office's October 2, 2008 decision was not mailed until October 10, 2008 and not received by him until the following week. The Branch of Hearings and Review, in its December 18, 2008 decision, properly exercised its discretion in determining whether to grant appellant's hearing request and noted that it had reviewed his claim and found that the issues involved in his claim could be equally addressed through submitting additional evidence and requesting reconsideration or appeal to the Board.

Thus, the Board finds that the Branch of Hearings and Review did not abuse its discretionary authority in denying appellant's untimely request for a hearing.

¹⁴ 20 C.F.R. § 10.615.

¹⁵ *Id.* at § 10.616(a).

¹⁶ 5 U.S.C. §§ 8101-8193.

¹⁷ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹⁸ *Teresa M. Valle*, 57 ECAB 542 (2006). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

CONCLUSION

The Board finds that appellant has not established that he filed a timely claim. The Board also finds that the Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the December 18 and October 2, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 24, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board