United States Department of Labor
Employees' Compensation Appeals Board

S.A., Appellant	)	
and	)	**Docket No. 09-1551**
	)	**Issued: January 21, 2010**
TENNESEE VALLEY AUTHORITY, HEAVY EQUIPMENT, Muscle Shoals, AL, Employer	)	

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 June 1, 2009 appellant filed a timely appeal from a May 22, 2009 merit decision of the Office of Workers' Compensation Programs denying his hearing loss claim. 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 claims as untimely under section 8122 of the Federal Employees' Compensation Act.

FACTUAL HISTORY

On December 23, 2008 appellant, a 61-year-old truck driver, filed an occupational disease claim (Form CA-2) for a hearing loss. He alleged that he first realized his condition and that it was caused by his employment on November 5, 2008. Appellant's date of last exposure was October 16, 1994.

By letters dated December 24, 2008, the Office requested that appellant and the employing establishment provide further factual and medical information. The employing

establishment was specifically requested to provide copies of all medical examination reports pertaining to hearing loss.

In response to the Office's request, appellant submitted a record of his employment history, including results from an audiogram dated November 5, 2008.

In a telephone memorandum dated May 20, 2009, the Office noted a conversation held on that day with the employing establishment, requesting "medical from TVA Health Unit." The memorandum noted that "they will try to get any available medical records to us asap! I asked that these be sent within the next week."

By decision dated May 22, 2009, the Office denied the claim because it was not timely filed. It found that appellant should have been aware of the relationship between his hearing loss and his employment by the date of his last exposure, October 16, 1994.

LEGAL PRECEDENT

The Act[1] provides that the United States shall pay compensation as specified by this subchapter for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] A claimant seeking compensation under the Act must establish the essential elements of his claim, including that he was an employee within the meaning of the Act.[3]

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.[4] 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 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.[5] 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.[6]

[1] 5 U.S.C. §§ 8101-8193.

[2] *Id.* at § 8102(a).

[3] *Tim G. Baysinger*, 54 ECAB 762 (2003).

[4] 5 U.S.C. § 8122(a).

[5] *Id.* at § 8122(a).

[6] *Roger D. Dicus*, 56 ECAB 290 (2005).

ANALYSIS

Appellant's date of last exposure was October 16, 1994 and appellant alleges he has not been exposed to hazardous noise since 1994. He alleges that he did not become aware of his hearing loss until November 5, 2008. The Board finds this case is not in posture for decision.

Although it is the burden of appellant to establish his or her claim, the Office also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[7] Once the Office has begun investigation of a claim, it must pursue the evidence as far as reasonably possible, particularly when such evidence is in the possession of the employing establishment and is, therefore, more readily accessible to the Office.[8]

In this case, the Office requested by letter dated December 24, 2008 that the employing establishment submit all medical records pertaining to appellant's hearing loss or problems. It followed up by telephone conference on May 20, 2009 and requested that the employing establishment submit these records within a week, the employer informed the Office that it would submit the records as soon as possible. Nonetheless, the Office however denied the claim two days later. As such, the Office did not "pursue the evidence as far as reasonably possible."

The employing establishment health unit medical records pertaining to hearing examinations are necessary in this case because these records can establish whether appellant knew or should have known of his hearing loss prior to 2008. These records can assist the Office in determining whether the employing establishment had notice of appellant's hearing loss prior to his retirement in 1994.

Therefore, the Office's May 22, 2009 decision is set aside and the case remanded. On remand the Office, following whatever further development it deems appropriate, shall issue a *de novo* decision evaluating the medical evidence of record.[9]

CONCLUSION

The Board finds that the case is not in posture for decision.

[7] *R.E.*, 59 ECAB ___ (Docket No. 07-1604, issued January 17, 2008); *Truda Lee Murray Moles*, 7 ECAB 791 (1956).

[8] *Marco A. Padilla*, 51 ECAB 202, 208 (1999); *Leon C. Collier*, 37 ECAB 378, 379 (1986).

[9] Further evidence was received by the Office subsequent to the May 22, 2009 decision. The Board's review is limited to the evidence in the case record that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2009 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: January 21, 2010
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