

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

W.D., Appellant

and

**TENNESSEE VALLEY AUTHORITY,
DIVISION OF NUCLEAR POWER,
Chattanooga, TN, Employer**

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**Docket No. 12-945
Issued: September 5, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 16, 2012 appellant filed a timely appeal from the March 2, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his hearing loss claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 met his burden of proof to establish that he sustained a hearing loss in the performance of duty.

FACTUAL HISTORY

On November 4, 2011 appellant, then a 55-year-old former laborer, filed an occupational disease claim alleging that he sustained a hearing loss due to exposure to excessive noise at

¹ 5 U.S.C. §§ 8101-8193.

work. He indicated that he first became aware of his claimed condition on November 1, 2011 and that he first became aware that it was caused or aggravated by his federal employment on November 1, 2011. Appellant stated that he began to have trouble hearing television and radio and that he began to need to have words repeated in conversations. In an addition to the form made on November 9, 2011, Aldora Bell, a health services official from the employing establishment, indicated that appellant was last exposed to the conditions alleged to have caused his claimed hearing loss condition on July 30, 1981. She indicated that appellant's claimed hearing loss condition was first reported to her on November 9, 2011.

In a hearing loss questionnaire completed on November 21, 2011, appellant indicated that he first noticed his hearing loss on November 1, 2011 and that he first related his hearing loss to his work exposure on November 1, 2011.² He submitted a November 1, 2011 audiogram from an unidentified source which shows hearing loss at various frequencies between 250 and 8,000 Hertz. This audiogram was not approved by a physician as being accurate.

In a January 13, 2012 letter, OWCP advised appellant that he needed to submit additional factual and medical evidence in support of his claim. It informed him that he had not submitted sufficient evidence to show that his claim was filed in a timely manner.

In a January 23, 2012 letter, Ms. Bell indicated that appellant was last exposed to factors to which he attributed his hearing loss on August 3, 1981, the date he last worked for the employing establishment. She stated that the audiograms taken by the employer did not document hearing loss and that, therefore, it was not possible for the employing establishment to have any immediate actual knowledge of injury. A noise exposure statement from the employer indicated that appellant would have been exposed to noise at work from tools such as wagon drills and chipping tools for about six hours per day, five days per week.

The record contains three audiograms obtained by the employing establishment on the following dates: March 23, 1977, January 24 and May 20, 1980. There is no indication that any of the audiograms were approved by a physician as being accurate.

On February 29, 2012 an OWCP medical adviser indicated that he had reviewed the March 23, 1977, January 24 and May 20, 1980 audiograms and stated, "All show normal hearing thresholds for all frequencies bilaterally. No evidence of [hearing loss]."

In a March 2, 2012 decision, OWCP denied appellant's claim for a work-related hearing loss on the grounds that his claim was not filed in a timely manner. It noted that his claim was denied because the evidence did not support that his claim was filed within three years of the date of injury or that his immediate supervisor had actual knowledge within 30 days of the date of injury. OWCP noted that the date of appellant's last exposure to noise at the employing

² In an undated hearing loss form submitted on November 28, 2011, appellant detailed his work history, noting that he last worked for the employing establishment in 1981.

establishment was August 3, 1981 and indicated that his claim for compensation was filed on November 4, 2011. It stated:

“In order to satisfy the time limitations statutory filing requirements the agency, in connection with a recognized environmental hazard, has an employee testing program and a test shows the employee to have positive findings, which would constitute that the [employing establishment] had actual knowledge of your hearing loss in a timely manner. However, the medical testing provided from your employment with [the employing establishment] shows that your hearing was within normal limits. Your employment with [the employing establishment] ended on August 3, 1981. Any exposure to noise after this date would not be considered as related to your [employing establishment] position, in this claim.”

LEGAL PRECEDENT

The schedule award provision of FECA³ and its implementing regulations⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁵ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁶ OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁷ As medical issues can only be resolved by medical opinion evidence, the reports of a nonphysician cannot be considered by the Board in adjudicating such issues.⁸

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.⁹ In cases of injury on or after September 7, 1974, section 8122(a) of FECA provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ *Id.*

⁶ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁷ A.M.A., *Guides* 248-60 (6th ed. 2009).

⁸ *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993).

⁹ *Charles Walker*, 55 ECAB 238 (2004); *see Charles W. Bishop*, 6 ECAB 571 (1954).

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.”¹⁰

Section 8119 of FECA 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.¹¹ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.¹²

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.¹³ 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.¹⁴ Section 8122(b) of FECA 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.¹⁵ The requirement to file a claim within three years is the claimant’s burden and not that of the employing establishment.¹⁶

¹⁰ 5 U.S.C. § 8122(a).

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

¹² *Laura L. Harrison*, 52 ECAB 515 (2001).

¹³ *Larry E. Young*, *supra* note 11.

¹⁴ *Id.*

¹⁵ 5 U.S.C. § 8122(b); *see Luther Williams, Jr.*, 52 ECAB 360 (2001).

¹⁶ *Debra Young Bruce*, 52 ECAB 315 (2001).

ANALYSIS

On November 4, 2011 appellant filed an occupational disease claim alleging that he sustained a hearing loss due to exposure to excessive noise at work. He indicated that he first became aware of his claimed condition on November 1, 2011 and that he first became aware that it was caused or aggravated by his federal employment on November 1, 2011. In a March 2, 2012 decision, OWCP denied appellant's claim for a work-related hearing loss on the grounds that his claim was not filed in a timely manner.

The Board finds that OWCP did not adequately explain its determination that appellant filed his claim in an untimely manner and the record does not otherwise clearly show that it was untimely filed. OWCP essentially supported its finding of untimely filing by noting that appellant's date of last possible exposure to hazardous noise was August 3, 1981 and that he did not file his hearing loss claim until November 4, 2011.¹⁷ However, it did not identify specific evidence (such as appellant's statements, statements of supervisors/coworkers or medical evidence of record) which supported its determination under the relevant standards for gauging the timeliness of occupational injury claims, *i.e.*, whether appellant first becomes aware, or reasonably should have been aware, of a possible relationship between his condition and his employment more than three years before the November 4, 2011 filing of his claim.¹⁸ In the present case, appellant consistently indicated that he first became aware of his claimed condition on November 1, 2011 and that he first became aware that it was caused or aggravated by his federal employment on November 1, 2011.¹⁹ There is no substantial evidence of record that appellant was aware or reasonably should have been aware of a possible relationship between his hearing loss and work factors more than three years before November 4, 2011. For these reasons, appellant's hearing loss claim was timely filed.

Despite the fact that the Board has found that appellant filed a timely hearing loss claim and the record shows exposure to hazardous noise at work, the Board further finds that his claim is denied on the basis that he did not submit sufficient medical evidence to show that he sustained a hearing loss in the performance of duty.

The record contains four audiograms dated March 23, 1977, January 24 and May 20, 1980 and November 1, 2011. However, these audiograms do not constitute probative medical evidence because they were not approved by a physician as accurate.²⁰ Appellant did not submit any valid medical evidence to support his claim that workplace noise exposure, which ended no

¹⁷ The employing establishment initially indicated that appellant's last date of exposure was July 30, 1981, but it later confirmed that the actual date was August 3, 1981.

¹⁸ This is not a case where appellant's immediate supervisor had actual knowledge within 30 days of the date of injury. *See supra* notes 11 and 12.

¹⁹ The November 1, 2011 date coincides with the date of an audiogram which shows hearing loss at various frequencies between 250 and 8,000 Hertz. With respect to the audiograms obtained before appellant was last exposed to hazardous noise at work on August 3, 1981, an OWCP medical adviser stated, "All show normal hearing thresholds for all frequencies bilaterally. No evidence of [hearing loss]."

²⁰ *See supra* note 8. *See also J.H.*, 59 ECAB 377 (2008).

later than August 3, 1981, caused or contributed to his claimed hearing loss. For this reason, he did not meet his burden of proof to establish that he sustained a work-related hearing loss.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a hearing loss in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2012 decision of the Office of Workers' Compensation Programs is affirmed as modified to reflect that appellant filed a timely hearing loss claim but did not submit sufficient medical evidence to establish his claim.

Issued: September 5, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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