United States Department of Labor
Employees' Compensation Appeals Board

G.E., Appellant	)	
and	)	**Docket No. 14-768**
	)	**Issued: July 29, 2014**
TENNESSEE VALLEY AUTHORITY, NUCLEAR POWER, Soddy Daisy, TN, Employer	)	

Appearances:
Ronald K. Bruce, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 21, 2014 appellant, through his attorney, filed a timely appeal from the January 16, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim as untimely filed. Pursuant to the Federal Employees' Compensation Act[1] (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's occupational disease claim is barred by the applicable time-limitation provisions of FECA.

FACTUAL HISTORY

On February 19, 2013 appellant, then a 66-year-old boilermaker/welder, filed an occupational disease claim alleging that he sustained hearing loss due to noise exposure at work.

[1] 5 U.S.C. § 8101 *et seq.*

He initially became aware of his condition on January 1, 2003 and attributed it to his federal employment duties on January 28, 2013. Appellant explained that, on that day, his otolaryngologist informed him that his hearing loss was employment related. He was last exposed to the conditions alleged to have caused his hearing loss on June 20, 2003, the date that he retired.

In a January 28, 2013 statement, appellant noted that he was just advised by his physician for the first time that he had an occupational hearing loss related to his employment at the employing establishment.

By letters dated March 11, 2013, OWCP requested that appellant and the employing establishment submit additional factual and medical information, including evidence that he timely provided notice of his alleged injury.

On March 18, 2013 appellant responded by describing his history of noise exposure while working for the employing establishment as a laborer from 1970 to 1975 and as a boilermaker from 1975 to May 10, 1990. He noted daily exposure to loud noise during his employment. Appellant reiterated that he first related his hearing loss to his work duties on January 28, 2013. He stated that he had an automobile accident at age seven which caused complete right ear deafness.

In an accompanying January 9, 2013 report, Dr. William A. Logan, a Board-certified otolaryngologist, noted appellant's history which included complete deafness in his right ear since a motor vehicle accident at age seven. He advised that appellant related that his left ear hearing had progressively worsened over the years. Dr. Logan indicated that appellant's work history included noise exposure due to having worked as a boilermaker for a number of years. He determined that appellant had no otorrhea, no otalgia and no previous otologic surgery. Dr. Logan indicated that appellant noted that he had "trouble understanding people when they talk especially in background noise." He examined appellant and found some squamous debris in the right ear. Dr. Logan indicated that the tympanomembrane was intact with tympanosclerosis and no effusion. Regarding the left ear, he advised no discharge and found the tympanomembrane intact with tympanosclerosis and no effusion. Dr. Logan noted that the audiogram showed a dead ear on the right and a borderline sloping to moderate sensorineural loss on the left, Type A tympanograms on the left, flat tympanograms on the right. Appellant had a discrimination score of 96 percent on the left. Dr. Logan opined that appellant had sensorineural hearing loss in the left ear which was clinically most consistent with occupational noise exposure. He advised that appellant avoid unnecessary exposure to loud noise, use ear protection when unavoidably around loud noise and consider amplification for his left ear if he desired. An audiogram from January 9, 2013 was also received.

OWCP received noise exposure data from the employing establishment covering the period from 1976 to 1984, appellant's work history as a boilermaker and welder, applications for employment with the employing establishment. The employing establishment audiograms included a July 16, 1973 audiogram which showed the following decibel losses at 500, 1,000, 2,000 and 3,000 Hertz (Hz) for the left ear: -5, 0, 0 and 0. A September 8, 1981 audiogram revealed the following decibel losses at the same frequencies in the left ear: 15, 10, 10 and 20;

while a January 27, 1987 employer audiogram showed left ear decibel losses of 25, 15, 15 and 50.

A conference call was held on April 12, 2013. OWCP determined that appellant worked for the employing establishment from September 18, 1985 through June 20, 1994. Appellant worked as a contractor for the employing establishment from June 20, 1994 to June 20, 2003.[2]

Thereafter, OWCP received an April 10, 2013 letter from Dr. Whitney R. Mauldin, an employing establishment audiologist, who controverted the claim. Dr. Mauldin noted the history of appellant's intermittent federal work from December 22, 1970 to May 10, 1990, along with intermittent periods of nonfederal employment. She argued that appellant was last exposed to factors as a federal employee on May 10, 1990. Dr. Mauldin stated that appellant worked in the private sector as boilermaker/welder in 2003 and he was not a federal employee for the previous 23 years. She also argued that appellant received hearing examinations during his federal employment and that the changes in hearing did not exceed that which was expected for his age during his employment. Dr. Mauldin noted that when appellant was rehired in 1987 after two years in the private sector, his "rehire exam[ination] indicates a significant change in his hearing thresholds in both ears." She argued that in order for a work-related hearing loss injury to occur, appellant must experience a threshold shift of 10 decibels or greater at 2,000, 3,000 and 4,000 frequencies. Dr. Mauldin noted that there was no evidence of a permanent threshold shift documented during his federal employment. She challenged the timeliness of the claim and indicated that the employing establishment could not have had any immediate, actual knowledge of a work-related injury or illness. Dr. Mauldin also noted that Dr. Logan did not distinguish between appellant's federal employment 23 years ago and his civilian employment since 1990.

By decision dated April 29, 2013, OWCP denied appellant's claim on the grounds that he was not a federal employee at the time of the injury and had not been since June 20, 1994.

In a letter dated April 29, 2013, Aldora Bell, a workers' compensation claims representative with the employing establishment, indicated that appellant began his employment with the employing establishment on December 22, 1970. She noted that he worked intermittently until April 3, 1989 and was rehired on March 1, 1990. Ms. Bell advised that appellant worked until May 10, 1990 and was hired as a contractor on June 20, 1994, working intermittently until June 20, 2003. She provided copies of his audiograms and hearing records.

On May 8, 2013 appellant, through his attorney, requested a telephonic hearing, which was held on October 9, 2013. During the hearing, appellant described his employment history. He noted that he occasionally engaged in hunting and shooting with a rifle and used earmuffs. Appellant confirmed that the first time he was aware that his hearing loss was work related was in 2013. His attorney also noted that the audiograms from the employing establishment revealed

[2] In a letter dated April 23, 2013, appellant's representative noted that he had received the conference memorandum and advised that there were errors with regard to the dates of employment. He noted that appellant began working for the employing establishment in 1970 as a laborer until 1975; as a boilermaker from 1975 until 1981 and the following periods: May 17 to 28, 1982; September 11, 1985 to October 4, 1985; March 5 to 6, 1990; March 10 to May 10, 1990.

a progression of hearing loss during appellant's work for the employing establishment noting that he had no left ear hearing loss when he began working for the employing establishment but had increased hearing loss as shown in the September 8, 1981 and January 21, 1987 audiograms. Counsel argued that the employing establishment had notice of the loss based on the audiogram in 1987.

In a letter dated October 22, 2013, appellant's attorney enclosed a new report from Dr. Logan. In a report dated September 18, 2013, Dr. Logan noted that he had reviewed his prior report and audiogram. He opined that the hearing loss in appellant's left ear was "to a reasonable degree of medical certainty primarily due to his long history of occupational noise exposure." Dr. Logan noted that appellant engaged in recreational shooting and explained that he suspected the hearing loss contributed from this was minimal in comparison to the long history of occupational noise exposure. He determined that appellant had a 28.1 percent hearing loss in the left ear.

In a letter dated November 27, 2013, Robin Daugherty, an employing establishment workers' compensation manager, controverted the claim. She noted that appellant worked for the employing establishment intermittently from December 22, 1970 to May 10, 1990. Ms. Daugherty argued that his hearing loss was not employment related.

In a letter dated December 12, 2013, appellant's attorney noted that the employing establishment was attempting to suggest that appellant worked for the employing establishment for a short time. However, he indicated that appellant worked directly for the employing establishment for at least 13 years and was exposed to loud noises on a regular basis. Counsel also clarified that, while appellant went hunting, it was on an occasional basis with earmuffs. Furthermore, he argued that appellant was not required to file his claim for hearing loss until he learned from his physician, Dr. Logan, that the hearing loss was related to his employment. Counsel argued that appellant's claim was timely filed when he notified the employing establishment of his hearing loss upon learning that it was work related from his physician. He argued that appellant's claim was timely filed. Counsel also noted that Ms. Mauldin was an audiologist and not a physician.

By decision dated January 16, 2014, an OWCP hearing representative affirmed as modified the April 29, 2013 decision. She found that, while appellant participated in a hearing conservation program, he did not show that the employing establishment had knowledge of his claimed injury prior to his June 8, 1983 retirement.[3] The hearing representative further determined that he did not file his claim within three years from 1994, when he left federal service, and that he reasonably should have known that his hearing loss was due to workplace noise exposure at this time.

[3] The hearing representative also indicated that appellant's last work for the employing establishment occurred in May 1990.

LEGAL PRECEDENT

Section 8122(a) of FECA[4] provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.[5] 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.[6] 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 this exposure.[7] Even if a claim is not timely filed within the three-year period of limitation, it would still be regarded as timely under section 8122(a)(1) if the immediate superior had actual knowledge of his alleged employment-related injury within 30 days or written notice of the injury was provided within 30 days pursuant to section 8119.[8] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.[9] The Board has indicated that an employee need only be aware of a possible relationship between his condition and his employment to commence the running of the applicable statute of limitations.[10] The Board has also 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.[11]

In interpreting section 8122(a)(1) of FECA, OWCP procedures provide 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.[12]

ANALYSIS

The Board finds that appellant's claim was timely filed. As noted above, if an employee continues to be exposed to injurious working conditions, the time limitation begins to run on the

[4] 5 U.S.C. § 8101 *et seq.*

[5] *Id.* at § 8122(a).

[6] *Id.* at § 8122(b).

[7] *See Linda J. Reeves*, 48 ECAB 373 (1997).

[8] 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); *see also Larry E. Young*, 52 ECAB 264 (2001).

[9] *Willis E. Bailey*, 49 ECAB 509 (1998).

[10] *Edward C. Horner*, 43 ECAB 834, 840 (1992).

[11] *See J.B.*, Docket No. 10-2025 (issued June 17, 2011); *Jose Salaz*, 41 ECAB 743 (1990).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(a)(3)(c) and 6(c) (March 1993); *see also James A. Sheppard*, 55 ECAB 515 (2004).

date of last exposure.[13] Appellant ceased to be exposed to work-related noise when he left federal service on June 20, 1994. Therefore, the time limitation provisions began to run on that date. As appellant did not file a claim for hearing loss until February 19, 2013, his claim was filed outside the three-year time limitation period.[14] However, his claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate supervisor had actual knowledge of the injury within 30 days of his last exposure to the implicated employment factors. To have actual knowledge, the supervisor must be aware that appellant attributed his hearing loss to an injury sustained in the performance of duty or to some other factor of employment.[15]

On appeal appellant's attorney contends that his supervisor had constructive or actual knowledge of his hearing as he was part of a hearing conservation program. The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with employee testing programs 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.[16] OWCP's procedure manual, interpreting section 8122(a)(1) of FECA 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."[17]

The record supports that appellant participated in an annual hearing conservation program as early as 1976 and that the results indicated various levels of hearing loss. Numerous audiograms were submitted which document the testing. The employing establishment confirmed that appellant worked for it intermittently from December 22, 1970 to May 10, 1990. Dr. Mauldin, an audiologist, argued that the changes in hearing did not exceed that which was expected for his age. She also noted that, when appellant was rehired in 1987, after two years in the private sector, "his rehire exam[ination] indicates a significant change in the thresholds in both ears."[18] As noted, the audiograms of record performed for the employing establishment

[13] *See supra* note 8.

[14] 5 U.S.C. § 8122(b).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(a)(3)(b) (March 1993).

[16] *See Joseph J. Sullivan*, 37 ECAB 526 (1986); *see also Federal* (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(c) (March 1993).

[17] Federal (FECA) Procedure Manual, *id.* at 2.801.3(a)(3)(c).

[18] Dr. Mauldin also argued that appellant had to have a threshold shift of 10 decibels or greater for a work-related hearing loss to occur and that Dr. Logan did not distinguish between hearing loss from his federal and contractor employment. However, to the extent that she purports to offer a medical opinion, she is not a physician and her opinion is of no probative medical value. *See* 5 U.S.C. § 8101(2) (defines the term physician); *M.P.*, Docket No. 13-1790 (issued December 17, 2013) (an audiologist is not a physician under FECA and the audiologist's opinion regarding the medical cause of a claimant's hearing loss is of no probative medical value).

document a progression of hearing loss. A July 16, 1973 audiogram showed the following decibel losses at 500, 1,000, 2,000 and 3,000 Hz for the left ear: -5, 0, 0 and 0. A September 8, 1981 employing establishment audiogram revealed the following decibel losses at the same frequencies in the left ear: 15, 10, 10 and 20; while a January 27, 1987 employing establishment audiogram showed left ear decibel losses of 25, 15, 15 and 50. The Board finds that this is sufficient to establish that the employing establishment had notice of the loss based on the audiogram in 1987.

As noted, OWCP procedures provide 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.[19] The Board finds that the evidence of record is sufficient to establish that the employing establishment had actual knowledge of the hearing loss. While it is not clear how much of appellant's hearing loss resulted from his federal employment, there is no provision for apportionment under FECA.[20]

The Board also notes that to the extent that appellant was not aware of these results; his claim would also be timely based on the January 9, 2013 report of Dr. Logan. As noted above, 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.[21] The record reflects that, upon reviewing the report of Dr. Logan on January 28, 2013, appellant immediately filed his claim on February 19, 2013. He filed the claim upon being apprised that his hearing loss was most consistent with occupational noise exposure. The Board notes that the claim was filed on February 19, 2013 and was within three years of Dr. Logan's January 9, 2013 report and his review on January 28, 2013.

Consequently, appellant's claim for compensation was timely filed.[22] The case will be remanded to OWCP for further development to determine if he sustained hearing loss causally related to factors of his federal employment. Following such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant's claim was timely filed.

[19] *Supra* note 12.

[20] *B.G.*, Docket No. 14-76 (issued April 16, 2014).

[21] 5 U.S.C. § 8122(b).

[22] *See Gerald A. Preston*, 57 ECAB 270 (2005); *James A. Sheppard, supra* note12.

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 29, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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