United States Department of Labor
Employees' Compensation Appeals Board

D.H., Appellant	)	
and	)	**Docket No. 09-452**
	)	**Issued: September 17, 2009**
TENNESSEE VALLEY AUTHORITY, BROWNS FERRY NUCLEAR PLANT, Decatur, AL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 4, 2008 appellant filed a timely appeal from a November 4, 2008 decision of the Office of Workers' Compensation Programs that denied his hearing loss claim as untimely. 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 appellant filed a timely claim for compensation under the Federal Employees' Compensation Act.[1]

On appeal appellant argues that his claim is timely because his sworn statement corrected his CA-2 claim form. He contends that the evidence establishes that January 13, 2004 was the date he first became aware that his condition was employment related, as supported by his attending Board-certified otolaryngologist, Dr. William McFeely, Jr.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has been before the Board on two prior occasions. By decision dated May 5, 2006, the Board found that appellant's claim was barred by the applicable time limitation provisions of the Act.[2] On October 20, 2006 the Board denied his reconsideration request. Appellant subsequently requested reconsideration before the Office. In merit decisions dated August 4 and October 12, 2007, the Office denied modification of the prior decisions. In decisions dated January 16 and April 17, 2008, it denied appellant's requests for reconsideration. By merit decision dated November 4, 2008, the Office denied modification of the prior decision. On May 12, 2008 appellant filed an appeal with the Board, docketed as 08-1573. On September 26, 2008 he requested reconsideration before the Office and submitted additional evidence. On October 14, 2008 appellant notified the Board that he wished to withdraw his appeal. By order dated February 23, 2009, the Board dismissed his appeal docketed in 08-1573. The law and the facts of the previous Board decisions and orders are incorporated herein by reference.

Evidence submitted by appellant includes an employing establishment August 15, 1985 physical examination form report with an illegible signature.[3] Appellant checked a box "no" indicating that he had no ear disease, injury or hearing loss. It was noted that he was exposed to loud noises in the Navy when he worked around diesel engines on a submarine. The examination noted that appellant had bilateral tinnitus, probably due to some hearing loss in the right ear. A severe hearing loss of the right ear was diagnosed. Appellant also submitted a February 27, 2008 audiogram from North Alabama ENT Associates, and a February 27, 2008 letter addressed to Dr. McFeely describing his federal employment. He related that he worked in a Navy shipyard and aboard submarines from 1968 to 1978. In a February 27, 2008 report, Dr. McFeely noted that appellant was diagnosed with high frequency hearing loss in 1978, confirmed by a 1985 audiogram, more pronounced on the right. He advised that appellant was exposed to loud noise while working for the Navy from 1968 to 1978. Dr. McFeely noted that a February 27, 2008 audiogram demonstrated slight progression of appellant's hearing loss at the high and middle frequencies, stating:

> "I do believe to a high degree of medical probability that [appellant's] hearing loss is primarily noise induced. [Appellant] certainly did not have any other risk factors prior to the audiogram in 1978 to explain his hearing loss. The progression in hearing loss over the years may be attributed to advancing age. There may be some question also as to whether chemotherapy given for multiple myeloma may have contributed more recently. [Appellant] of course did not have any of these risk factors prior to the 1978 audiogram. In summary, I do feel that the intensity and duration of the noise exposure from the Navy employment reported onboard submarines was sufficient to have caused the hearing loss documented in 1978."

[2] Docket No. 06-464 (issued May 5, 2006).

[3] The signature appears to be by a nurse, signing for a physician.

On May 7, 2008 Dr. McFeely discussed the audiogram and reviewed appellant's work history with the Navy, the employing establishment and his medical records. He advised that appellant's hearing loss from 1978 to 1992 was unchanged in the lower frequencies but from 1992 to 2004, a mild hearing loss was noted. Dr. McFeely advised that, since no audiograms were available between 1992 and 2004, he was unable to provide a date when the change might have occurred, stating that appellant noticed a problem with his hearing in 1996 or 1997 when he asked people to repeat what they said. He stated:

> "In my opinion, it would have been impossible for [appellant] to have known or even suspected the cause of his reported condition in 1996. [He] had over 25 years of exposure to loud noises at work, and never noticed his condition until 1996 or 1997. [Appellant] was 54 years old at that time, and could not have reasonably ruled out other possible causes for his condition without an ear examination. He had no reason to suspect that his employment was the cause of his condition."

Dr. McFeely found "to a high degree of medical probability" that appellant's hearing loss was primarily noise induced and that it would have been impossible for appellant to have known the cause of his hearing loss since no one provided him with a medical diagnosis at that time. In an August 26, 2008 report, Dr. Keith C. Anderson, an osteopath Board-certified in physiatry, utilized a January 13, 2004 audiogram and provided an impairment rating for appellant's hearing loss based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

Appellant submitted an affidavit dated September 18, 2008 in which he swore that when completing the CA-2 claim form he entered "_/_/96" in error in Box 12, and that the correct date should have been January 13, 2004, the date of an audiogram which was the first to show that he had a ratable hearing loss under A.M.A., *Guides*. He was last exposed to excessive noise at work on September 30, 1996 at the employing establishment. Appellant argued that the 2004 audiogram was the first obtained since 1992, and was characteristic of hearing loss due to long-term exposure to excessive noise. Thus, January 13, 2004 was the date he was first aware that the cause of his hearing loss was noise exposure at work.

Appellant also contended that section 2.801.6(c) of employing establishment procedures established that his hearing loss claim was timely, noting that employing establishment physical examination reports on November 6, 1978 and August 3, 1995 revealed a high frequency hearing loss. The employing establishment audiograms from 1978 to 1992 showed that his hearing worsened at high frequencies. Therefore, the employing establishment had both constructive and actual notice because its medical records disclosed an illness. Appellant noted that from 1968 to 1978 he was employed by the Navy where he had much more intense noise exposure than any encountered at the employing establishment. While his hearing loss may have preexisted his employment with the employing establishment, it knew his condition was caused by federal employment with the Navy and the Office erred by not considering the totality of his federal employment in his claim. Appellant also contended that the reports of Dr. McFeely established causal relationship. He reiterated the first date he was reasonably aware of his employment-related hearing loss was January 23, 2004, when he had an audiogram that Dr. Anderson found

ratable. While he made a mistake in Box 12 of the CA-2 claim form, he corrected it with his affidavit.

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.[4] In cases of injury on or after September 7, 1974, section 8122(a) of the Act 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) [T]he 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) [W]ritten notice of injury or death as specified in section 8119 of this title was given within 30 days."[5]

Section 8119 of the Act 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.[6] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[7]

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, and the Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.[8] For actual knowledge of a supervisor to be regarded as timely filing, 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.[9]

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

[5] 5 U.S.C. § 8122(a).

[6] *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

[7] *Laura L. Harrison*, 52 ECAB 515 (2001).

[8] 5 U.S.C. § 8119(b); *Delmont L. Thompson*, 51 ECAB 155 (1999).

[9] 5 U.S.C. § 8122(b); *Duet Brinson*, 52 ECAB 168 (2000).

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.[10] 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.[11] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[12]

In interpreting section 8122(a)(1) of the Act, the 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.[13]

ANALYSIS

The Board finds that appellant's claim is barred by the applicable time limitation provisions of the Act. Appellant contends that his September 18, 2008 affidavit corrected his CA-2 claim form to establish that the date he first realized his hearing loss condition was employment related was January 13, 2004, rather than in 1996, as noted on the claim form. The Board, however, notes that in addition to stating that he was aware that his hearing loss was employment related in 1996 on his 2004 claim, in a statement he provided with his claim, he described his employment history including noise exposure, and stated that he first noticed a hearing loss in the 1996 to 1997 time frame.

When an employee becomes aware or reasonably should have been aware that he has a condition 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.[14] The Board finds the claim form and statement provided by appellant in 2004 more probative than the affidavit submitted in 2008 to establish when he was aware or reasonably should have been aware of the possible relationship between his hearing loss and

[10] *Larry E. Young*, *supra* note 6.

[11] *Id.*

[12] *Debra Young Bruce*, 52 ECAB 315 (2001).

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

[14] *Richard Narvaez*, 55 ECAB 661 (2004).

factors of his federal employment. The Board previously addressed this argument in its May 5, 2006 decision.[15]

Nonetheless, if an employee continues to be exposed to injurious working conditions, the time limitation begins to run on the date of the last exposure.[16] The three-year statute of limitations began to run in this case on September 30, 1996, the date appellant retired and would have expired no later than September 30, 1999. Thus, appellant's January 26, 2004 claim for compensation is barred by this exception to the statute of limitations.[17] Furthermore, as discussed by the Board in its May 5, 2006 decision, the record does not support that appellant's "immediate superior had actual knowledge of the injury or death within 30 days."[18] While the employing establishment noted that in November 1978, when appellant was first employed, his audiogram was abnormal and that he had high frequency hearing loss, in August 1985 the employing establishment also noted that appellant was exposed to loud noise with his previous employer, the Department of the Navy, when he worked around diesel engines on submarines. The hearing loss was also noted in August 1985. 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.[19]

Audiograms were performed by the employing establishment on November 6, 1978, August 18, 1981, August 19, 1983, March 5, 1990, August 29, 1991 and July 29, 1992. These were reviewed by an Office medical adviser but showed no evidence of a threshold shift such that would put the employing establishment on notice that appellant had sustained a hearing loss caused by this employment rather than his previous employment. Thus, this is not a case where the employing establishment had constructive knowledge of an employment-related hearing loss,[20] and it is not enough that the employing establishment knew that appellant suffered from a hearing loss at the time he began his employment in 1978; appellant also has to show that his supervisors knew or reasonably should have known that this condition was caused by his employment with the employing establishment.[21] The Board further notes that Dr. McFeely advised on February 27, 2008 that appellant's hearing loss was caused by noise exposure during his employment with the Navy prior to 1978, when be began to work for the employing establishment.

The Board finds that there is no probative evidence to establish that appellant's superior had constructive knowledge sufficient to be reasonably put on notice that his hearing loss was

[15] *Supra* note 1.

[16] *Larry E. Young*, *supra* note 6.

[17] *Id.*

[18] 5 U.S.C. § 8122(a)(1); *see also Duet Brinson*, *supra* note 9.

[19] *Roger D. Dicus*, 56 ECAB

[20] *Compare James A. Sheppard*, *supra* note 13.

[21] *See David R. Morey*, 55 ECAB

caused by work with the employing establishment within 30 days of September 30, 1996, the day he retired. Accordingly, appellant's claim is untimely.[22]

CONCLUSION

The Board finds that appellant's claim is barred by the applicable time limitation provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 4, 2008 be affirmed.

Issued: September 17, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

[22] *See Richard Narvaez, supra* note 14.