United States Department of Labor
Employees' Compensation Appeals Board

L.B., Appellant	)	
and	)	**Docket No. 12-1548**
	)	**Issued: January 10, 2013**
DEPARTMENT OF THE AIR FORCE, GEORGIA NATIONAL GUARD, 165th AIR WING, Garden City, GA, Employer	)	

Appearances:
David G. Jennings, Esq., for appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 11, 2012 appellant, through his attorney, filed a timely appeal from a June 18, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying his occupational disease claim on the grounds it was not timely 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 OWCP properly determined that appellant's claim for occupational hearing loss is barred by the applicable time limitation provisions of FECA.

On appeal, counsel asserts that appellant's claim was timely filed as annual hearing conservation program audiograms gave the employing establishment actual notice of a work-related hearing loss.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 7, 2012 appellant, then a 70-year-old former supervisory air operations technician, filed an occupational disease claim (Form CA-2) claiming that he sustained a bilateral hearing loss due to hazardous noise exposure at work on or before January 1, 1988. He first became aware of his hearing loss and its relationship to his federal employment on January 1, 1988. Appellant explained that he attributed the hearing loss to occupational noise exposure as it "couldn't be anything else." He delayed filing his claim for more than 30 days after January 1, 1988 as he learned only recently that he could file a claim. Appellant retired from federal employment on September 1, 1998.

In a May 22, 2012 letter, OWCP requested that appellant submit a detailed history of his occupational noise exposure, describe any nonoccupational exposure to hazardous noise and submit medical reports and audiograms from any treatment for hearing loss. It advised him that he must also submit evidence to establish that his claim was filed within three years of the date he first related his condition to his employment. OWCP afforded appellant 30 days to submit the requested evidence.

On May 29, 2012 appellant filed a schedule award claim. OWCP advised him to submit the evidence requested in its May 22, 2012 letter. In response, appellant stated that he was exposed to aircraft engine noise at the employing establishment from 1971 to 1998, with earplugs provided through 1986. He was last exposed to hazardous noise in 1998. Appellant noted that from 1961 to 1966 he served in the U.S. Air Force as an administrative specialist. From 1998 to 2002, he was chief airfield manager for the National Guard Reserves.

Appellant submitted two undated excerpts from fitness-for-duty examinations, with audiometric findings of bilateral high frequency hearing loss "not due to an active or progressive disease." A third excerpt, from a report prepared after February 1985, showed progression of a bilateral hearing loss and recommended retesting. The February 6, 1993 and June 7, 1998 employing establishment audiograms performed as part of a fitness-for-duty examination showed ratable high frequency binaural hearing loss.[2] A June 7, 1998 audiometric test at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed decibel losses of 15, 5, 60 and 60 decibels on the left and 5, 10, 65 and 70 decibels on the right. A January 10, 2002 fitness-for-duty audiogram and November 11, 2009 audiogram from a private audiologist also showed ratable binaural hearing loss.

In a June 18, 2012 decision, OWCP denied appellant's claim finding that it was not timely filed under the three-year time limitation at section 8122 of FECA. It found that he did not file his claim until May 7, 2012, more than three years after his last exposure to hazardous noise in 1998. OWCP further found that the evidence did not establish that the employing establishment had actual notice of the hearing loss within 30 days of the date of injury.

[2] Under FECA, hearing loss impairments are determined by the average of the hearing levels at 500, 1000, 2000 and 3,000 cycles per second. *See* American Medical Associations, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2008) at section 11.2d, page 250. If the average is less than 25, the hearing impairment is not ratable. In a February 6, 1993 report, audiometric testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 10, 5, 60 and 60 decibels on the left and 5, 10, 55 and 60 decibels on the right.

LEGAL PRECEDENT

Under section 8122 of FECA,[3] as amended in 1974, a claimant has three years to file a claim for compensation.[4] In a case of occupational disease, the Board has held that 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 or her condition and his or her 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 or her federal employment, such awareness is competent to start the limitation period even though he or she does not know the nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[5] Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of his or her last exposure to the implicated factors.[6] 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 his or her employment and the compensable disability.[7]

Even if the claim is not filed within the three-year period, it may be regarded as timely under section 8122(a)(1) if appellant's immediate supervisor had actual knowledge of his or her alleged employment-related injury within 30 days such that the immediate superior was put reasonably on notice of an on-the-job injury or death.[8] In interpreting section 8122(a)(1) of FECA, OWCP procedure manual states that, if the employing establishment provides 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.[9] The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program for hazardous noise exposure 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] A hearing loss identified on such a test would constitute actual knowledge on the part of the employing establishment of a possible work injury.[11]

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[3] 5 U.S.C. § 8122.

[4] *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); *see* 20 C.F.R. § 10.101(b).

[5] *Larry E. Young*, 52 ECAB 264 (2001); *Duet Brinson*, *supra* note 4.

[6] *See Larry E. Young*, *id*.

[7] 5 U.S.C. § 8122 (b); *Bennie L. McDonald*, 49 ECAB 509, 514 (1998).

[8] *William C. Oakley*, 56 ECAB 519 (2005); *Duet Brinson*, *supra* note 4; *Delmont L. Thompson*, 51 ECAB 155 (1999).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6(c) (March 1993); *L.C.*, 57 ECAB 740 (2006); *Ralph L. Dill*, 57 ECAB 248 (2005).

[10] *James W. Beavers*, 57 ECAB 254 (2005); *Ralph L. Dill*, *supra* note 9.

[11] *See* 5 U.S.C. § 8122(a)(1); Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.801(3); *Ralph L. Dill*, *supra* note 9; *Larry E. Young*, *supra* note 5; *Roger D. Dicus*, 56 ECAB 290 (2005).

ANALYSIS

Appellant stated that he was aware of a relationship between his claimed hearing loss and his federal employment as of January 1, 1988. Under section 8122(b), the time limitation begins to run when he became aware of causal relationship, or, if he continued to be exposed to noise after awareness, the date he was no longer exposed to noise. Appellant retired from federal employment on September 1, 1998. Therefore, the three-year time limitation began to run on September 1, 1998. As appellant did not file his occupational disease claim until May 7, 2012, the Board finds that it was not filed within the three-year time period under section 8122(b).

Appellant's 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 noise, *i.e.*, within 30 days of September 1, 1998.[12] The Board finds that the employing establishment conducted a program of audiometric testing for which appellant submitted a series of audiograms obtained prior to his retirement. These audiograms obtained as part of a periodic fitness-for-duty examination, are sufficient to establish actual knowledge of the claimed hearing loss within 30 days of September 1, 1998. Of note, a June 7, 1998 audiogram, testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 15, 5, 60 and 60 decibels on the left and 5, 10, 65 and 70 decibels on the right. The ratable bilateral hearing loss[13] constitutes actual knowledge by the employing establishment of a possible work-related hearing loss within 30 days of September 1, 1998.[14] Therefore, appellant's hearing loss claim is considered timely.

The case will be remanded for OWCP to address the merits of the claim. After any further development deemed necessary, OWCP should issue an appropriate decision.

On appeal, counsel asserts that appellant's claim was timely filed as annual hearing conservation program audiograms gave the employing establishment timely actual notice of a work-related hearing loss. As noted the June 7, 1998 employing establishment audiogram, performed at an employing establishment dispensary as part of a periodic fitness-for-duty examination, was sufficient to provide timely actual notice of a possible occupational hearing loss within 30 days of appellant's retirement on September 1, 1998.

CONCLUSION

The Board finds that appellant's claim for hearing loss was timely filed. The employing establishment had actual knowledge of a possible work-related hearing loss within 30 days of September 1, 1998, the date appellant was last exposed to hazardous noise at work.

[12] *See* 5 U.S.C. § 8122(a)(1); Federal (FECA) Procedure Manual, *supra* note 11; *Ralph L. Dill*, *supra* note 9; *Larry E. Young*, *supra* note 5.

[13] *See* A.M.A., *Guides* 250.

[14] Federal (FECA) Procedure Manual, *supra* note 9; *Ralph L. Dill*, *supra* note 9; *Larry E. Young*, *supra* note 5; *Roger D. Dicus*, *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 18, 2012 is set aside, and the case remanded for further development in accordance with this decision.

Issued: January 10, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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