

¹ 5 U.S.C. § 8101 *et seq.*

bilateral hearing loss and tinnitus and first realized that it was caused or aggravated by duties of his federal employment. He noted that he was never informed that he could or should file a claim for compensation. The employing establishment noted that appellant had retired on December 31, 1999.

In a form checklist for filing a federal occupational hearing loss claim dated June 26, 2013, appellant stated that he had retired on December 31, 1999 and became aware of his hearing loss and its connection to his federal employment in April 1985. He stated that he worked for the United States Navy as an electronics technician from 1958 through 1978 working on submarines, where he was exposed to noise for more than eight hours per day without hearing protection; and at Naval Submarine Base Bangor in Silverdale, Washington as an engineering technician from 1979 through 1999, where he was exposed to noise for more than eight hours per day with hearing protection provided by the employing establishment.

In a report dated July 9, 2013, Dr. Gerald G. Randolph, a Board-certified otolaryngologist, diagnosed appellant with sensorineural hearing loss. He reviewed appellant's employment history and calculated his ratable bilateral hearing loss according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* sixth edition at 10.31 percent. Dr. Randolph noted that no additional rating for tinnitus was indicated. He stated that he would like to review appellant's audiograms from at or near the time that he left federal employment to determine how much hearing loss he had at that time.

On October 23, 2013 the employing establishment challenged appellant's claim. It stated that he had not filed his claim in a timely manner, as he stated on the Form CA-2 that he first realized his hearing loss was caused or aggravated by his employment in April 1985 and did not file a claim until October 22, 2013.

On November 7, 2013 OWCP requested that appellant submit additional evidence to establish his claim. It noted that the evidence of record did not establish that he provided timely notification of his work injury. OWCP also requested that the employing establishment submit any factual and medical evidence related to appellant's noise exposure.

In a letter dated November 19, 2013, the employing establishment stated that appellant had first realized that his condition was caused or aggravated by his employment in 1985 and that he had retired in 1999. It noted that management officials from that time period were no longer employed and that their records did not concur with his allegations.

By decision dated January 3, 2014, OWCP denied appellant's claim for hearing loss as untimely filed. It found that his claim was not timely filed within three years of the date of injury or that his immediate supervisor had actual knowledge within 30 days of the day of injury. OWCP found that the date of appellant's injury was April 19, 1985 and that his claim for compensation was not filed until June 26, 2013.

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.² 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 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.³

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.⁴ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.⁵ For actual knowledge of a supervisor to be regarded as timely filed, 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.⁶

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 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.⁷

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 or her 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

² *Charles Walker*, 55 ECAB 238, 239 (2004); see *Charles W. Bishop*, 6 ECAB 571, 571 (1954).

³ 5 U.S.C. § 8122(a).

⁴ *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264, 266 (2001).

⁵ *Laura L. Harrison*, 52 ECAB 515, 517 (2001).

⁶ *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

⁷ 5 U.S.C. § 8122(b); see *Luther Williams, Jr.*, 52 ECAB 360, 361 (2001).

the ultimate result of such affect would be temporary or permanent.⁸ 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.⁹ The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.¹⁰

ANALYSIS

The Board finds that appellant's claim was not filed in a timely manner.

On October 22, 2013 appellant filed an occupational disease claim alleging hearing loss due to factors of his federal employment. He stated that he first became aware of the condition's relationship to his employment on April 19, 1985 and continued working at the employing establishment until his retirement on December 31, 1999. As appellant continued to be exposed to the alleged employment factors after he learned of his condition and of its relationship to his employment, the time limitation for filing the claim began to run on the date of his last exposure on December 31, 1999.¹¹ He had three years from December 31, 1999 to timely file his claim. As appellant's claim was not filed until October 22, 2013, the Board finds that it was not timely filed within the three-year period of limitation.

Appellant's claim would still be regarded as timely under section 8122(a) of FECA if his immediate supervisor had actual knowledge of the injury or if he provided written notice, within 30 days of his last exposure to the employment factors alleged to have caused or aggravated his injury, *i.e.*, within 30 days of December 31, 1999.¹² The record does not reflect that he provided written notice of injury prior to filing the instant claim and there is no evidence of record to indicate that a supervisor had actual knowledge within 30 days of December 31, 1999. OWCP did query the employing establishment regarding prior notice of injury, but did not receive any evidence which would substantiate such notice as it indicated that all management officials from that time period were no longer employed and that the records did not concur with its allegations. The Board finds, therefore, that appellant did not establish that his immediate supervisor had actual knowledge or that he had provided written notice, of his injury within 30 days of his last exposure on December 31, 1999.

Appellant contended that he was not informed that he could or should file a claim for hearing loss. The Board has held that an employee's unawareness of possible entitlement, lack of access to information or ignorance of the law or one's rights and obligations under it, do not

⁸ *Larry E. Young*, *supra* note 4.

⁹ *Id.*

¹⁰ *Debra Young Bruce*, 52 ECAB 315, 317 (2001).

¹¹ *See Larry E. Young*, *supra* note 4.

¹² *See* 5 U.S.C. § 8122(a); *Ralph L. Dill*, 57 ECAB 248, 251 (2005).

constitute exceptional circumstances that excuse a failure to file a timely claim.¹³ Thus, appellant did not file a timely claim for compensation.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 25, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees Compensation Appeals Board

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

¹³ See R.A., Docket No. 12-1339 (issued December 6, 2012).