

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

J.B., Appellant

and

**DEPARTMENT OF THE NAVY, NORFOLK
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 10-2025
Issued: June 17, 2011**

Appearances:
David G. Jennings, Esq., for the appellant
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 August 3, 2010 appellant, through his attorney, filed a timely appeal from a June 10, 2010 decision of the Office of Workers' Compensation Programs which denied his claim as untimely filed. Pursuant to the Federal Employees' Compensation Act (FECA)¹ 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 claim for compensation for a hearing loss is barred by the applicable time limitation provisions of FECA.

On appeal, counsel contends that appellant's supervisor had actual knowledge of appellant's hearing loss as he was part of a hearing conservation program that reflected a hearing loss.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 25, 2010 appellant, then a 58-year-old former welder leader, filed an occupational disease claim (Form CA-2) alleging that on January 1, 1984 he first realized that he had hearing loss caused or aggravated by factors of his federal employment. He explained that he did not file his claim within 30 days because he was not aware that he could file a claim for hearing loss until recently.

By letter dated March 23, 2010, the Office advised appellant that the evidence submitted was insufficient to establish his claim and requested additional supporting evidence.

Appellant submitted his employment history and a notification of personnel action SF-50 of his retirement on January 3, 2007. He also submitted a series of audiograms from 1973 to 2009 and documentation of his participation in an annual hearing conservation program at the employing establishment as early as November 1, 1990.

In a November 2, 2000 hearing conservation disposition, S.E. Lewis, audiologist, diagnosed sensorineural hearing loss. He notified appellant that he had a 355 decibel (dB) total high-frequency hearing loss in two 270 dB rule employee notification forms dated November 9, 2001 and January 23, 2003.

On April 8, 2010 the employing establishment controverted appellant's claim.

By decision dated June 10, 2010, the Office denied appellant's claim finding that it was not timely filed under 5 U.S.C. § 8122. It found that he failed to file a claim within three years of the date of last exposure, January 3, 2007, the date of his retirement. Time began to run on January 3, 2007 and as appellant did not file the claim until February 25, 2010, this was beyond the three-year time limit.

LEGAL PRECEDENT

Under FECA,² as amended in 1974, a claimant has three years to file a claim for compensation.³ 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 condition and his employment.⁴ Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of his last exposure to the implicated factors.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

² 5 U.S.C. § 8122.

³ See *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); see also 20 C.F.R. § 10.101(b).

⁴ See *William C. Oakley*, 56 ECAB 519 (2005).

⁵ See *Larry E. Young*, 52 ECAB 264 (2001); *William D. Goldsberry*, 32 ECAB 536, 540 (1981).

his employment and the compensable disability.⁶ 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 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.⁷ 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.⁸

ANALYSIS

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

Appellant ceased to be exposed to the implicated employment factors when he retired on January 3, 2007. Therefore, the time limitations began to run at that time. Since appellant did not file a claim for hearing loss until February 25, 2010, his claim was filed outside the three-year time limitation period.⁹ However, his claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor had actual knowledge of the injury within 30 days of his last exposure to the implicated employment factors.

On appeal, appellant's attorney contends that appellant's supervisor had actual knowledge of appellant's hearing loss as he was part of a hearing conservation program and his hearing tests reflected a hearing loss. The evidence of record supports that appellant participated in an annual hearing conservation program as early as November 1, 1990, was diagnosed with sensorineural hearing loss by Mr. Lewis in November 2, 2000, and notified that he had a 355 dB total high-frequency hearing loss on November 9, 2001 and January 23, 2003.

The Board finds that the evidence of record is sufficient to establish that the employing establishment had actual knowledge of appellant's hearing loss. Consequently, the exception to the statute was met and appellant's claim for compensation for hearing loss was timely filed.¹⁰ The June 10, 2010 decision of the Office will be set aside. The case is remanded for further development of the claim.

⁶ 5 U.S.C. § 8122(b); *see also Bennie L. McDonald*, 49 ECAB 509, 514 (1998).

⁷ *See Duet Brinson*, *supra* note 3; *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

⁸ *See Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3c and 6c (October 2010) which states: "If the employing establishment gave regular physical examinations which might have detected signs of illness (for example, regular x-rays or hearing tests), the employing establishment should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results. [If the claimant was still exposed to employment hazard on or after September 7, 1974 and the employing establishment's testing program disclosed the presence of an illness or impairment, this would constitute actual knowledge on the part of the agency, and timeliness would be satisfied even if the employee was not informed . . .]."

⁹ 5 U.S.C. § 8122(b).

¹⁰ *See Gerald A. Preston*, 57 ECAB 270 (2005).

CONCLUSION

The Board finds that appellant timely filed a claim for hearing loss on February 25, 2010.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2010 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further action consistent with this decision.

Issued: June 17, 2011
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