

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

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R.L., Appellant

and

TENNESSEE VALLEY AUTHORITY,  
BROWNS FERRY NUCLEAR PLANT,  
Chattanooga, TN, Employer

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**Docket No. 13-1177  
Issued: July 17, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 17, 2013 appellant filed a timely appeal from the March 25, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for a hearing loss as untimely. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 claim for a work-related hearing loss is barred by the applicable time limitation provisions of FECA.

**FACTUAL HISTORY**

On November 6, 2012 appellant, then a 68-year-old retired painter, filed an occupational disease claim alleging that he sustained a hearing loss due to factors of his federal employment. Regarding the relationship of the claimed condition to his work, appellant stated, "I begin [sic] having problems hearing [television] and radio. Loud speaking in loud tones, repeating words

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

during conversation.” Appellant first became aware of his claimed condition on October 26, 2012 and he first realized that it was caused or aggravated by his employment on that date.

Appellant submitted evidence showing that he periodically had federal employment as a painter from 1968 to 1984 with the Tennessee Valley Authority.<sup>2</sup> During this period, he was exposed to hazardous noise from sand blasters, electric grinders, paint guns and other machines. Appellant last worked for his federal employer on February 17, 1984 and then held a series of jobs with private employers from 1988 to 2008.<sup>3</sup>

Appellant submitted a January 29, 1968 audiogram taken by the employing establishment when he started working for it. The audiogram showed that testing for the left ear at the frequency levels of 500, 1,000, 2,000, 3,000 and 4,000 cycles per second revealed decibel losses of 15, 15, 20, 25 and 60 respectively. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, 3,000 and 4,000 cycles per second revealed decibel losses of 15, 10, 20, 20 and 20 respectively.

The record also contains audiograms dated February 28, 1977, March 6, 1978, February 28, 1980, September 22, 1982 and October 26, 2012. All of the audiograms of record, except for the one dated October 26, 2012, were obtained for the employing establishment. The February 28, 1977, March 6, 1978, February 28, 1980 and September 22, 1982 audiograms do not show appreciably greater losses than those found in the January 29, 1968 audiogram. However, the October 26, 2012 audiogram shows significantly higher hearing loss in both ears than the earlier audiograms.

In letters dated December 26, 2012 and February 11, 2013, OWCP requested that appellant submit additional evidence because the submitted evidence did not show that his claim was timely filed. In a brief February 25, 2013 statement, appellant asserted that his claim was filed “within the guidelines of the procedures” of the employing establishment.

In a March 15, 2013 letter, the employing establishment controverted appellant’s claim for work-related hearing loss, noting that it was untimely filed. The employing establishment indicated that his last date of possible exposure to noise from federal employment was February 17, 1984 and stated that the audiograms from the period of federal employment did not show a worsening of his hearing that would have placed the employing establishment on notice.

On March 19, 2013 Dr. Eric Puestow, a Board-certified internist serving as an OWCP medical adviser, reviewed the evidence of record. He noted that the audiograms of record showed that there was no significant deterioration in appellant’s hearing during his federal employment. Dr. Puestow stated, “The significant loss of hearing in 2012 is likely due to other factors including noise exposure in the time following his retirement from federal employment.”

In a March 20, 2013 report, Dr. Whitney R. Mauldin, a Board-certified audiologist for the employing establishment, noted that appellant’s exposure to noise in federal employment over 28 years prior could not be the source of the hearing loss observed in October 2012. He stated that appellant’s hearing only changed significantly after he began working for private employers.

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<sup>2</sup> Appellant did not work for the employing establishment during various periods between 1976 and 1980.

<sup>3</sup> Appellant’s private jobs also included work as a painter.

In a March 25, 2013 decision, OWCP denied appellant's claim for a work-related hearing loss as it was untimely filed. Appellant's claim was denied because the evidence did not support a finding that his claim was filed within three years of the date of injury or that his immediate supervisor had actual knowledge within 30 days of the date of injury. Although the date of appellant's injury was listed as October 26, 2012, the date of his last exposure to noise in his federal employment was February 17, 1984. OWCP determined that appellant's claim for compensation was not filed until November 6, 2012, some 28 years after he was last exposed to the claimed employment factors.

### **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.<sup>4</sup> 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.”<sup>5</sup>

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.<sup>6</sup> Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.<sup>7</sup>

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.<sup>8</sup> Where the employee continues

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<sup>4</sup> *Charles Walker*, 55 ECAB 238 (2004); see *Charles W. Bishop*, 6 ECAB 571 (1954).

<sup>5</sup> 5 U.S.C. § 8122(a).

<sup>6</sup> *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

<sup>7</sup> *Laura L. Harrison*, 52 ECAB 515 (2001).

<sup>8</sup> *Larry E. Young*, *supra* note 6.

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.<sup>9</sup> 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.<sup>10</sup> The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.<sup>11</sup>

### ANALYSIS

On November 6, 2012 appellant filed an occupational disease claim alleging that he sustained a hearing loss due to factors of his federal employment. Regarding the relationship of the claimed condition to his work, appellant stated that he began having problems hearing television and radio and understanding conversations. He first became aware of his claimed condition and that it was caused or aggravated by his employment on October 26, 2012.

The Board finds that appellant has not shown that his claim for work-related hearing loss was filed in a timely manner. The evidence does not support a finding that his claim was filed within three years of the date of injury or that his immediate supervisor had actual knowledge within 30 days of the date of injury. Although the date of appellant's injury was listed as October 26, 2012, the date of his last exposure to noise in his federal employment position was February 17, 1984. Appellant submitted an October 26, 2012 audiogram that showed increased hearing loss since the last audiogram of record, dated in 1982.<sup>12</sup> He did not explain why he believed that his hearing loss was related to his federal employment which he had not held for more than 28 years. Appellant's claim for compensation was not filed until November 6, 2012, some 28 years after he was last exposed to the claimed employment factors, hazardous noise from his job as a painter for the employing establishment.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate superior had actual knowledge of the injury within 30 days or under section 8122(a)(2) if written notice of injury was given to his immediate superior within 30 days as specified in section 8119. Appellant has not made any claim that he has satisfied either of these provisions, nor does the record support a finding that he has satisfied either of them.<sup>13</sup> The audiograms from the time of appellant's federal employment do not show a notable worsening of his hearing during his federal employment such that his immediate superior would have gained actual knowledge of his claimed injury. This finding is supported by the medical reports of record, including a March 19, 2013 of Dr. Puestow, a Board-certified internist serving as an

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<sup>9</sup> *Id.*

<sup>10</sup> 5 U.S.C. § 8122(b); *see Luther Williams, Jr.*, 52 ECAB 360 (2001).

<sup>11</sup> *Debra Young Bruce*, 52 ECAB 315 (2001).

<sup>12</sup> The October 26, 2012 audiogram did not contain any opinion on the cause of the observed hearing loss.

<sup>13</sup> There is no indication in the record that appellant provided a statement to his immediate superior such that he satisfied the provisions of sections 8119 and 8122(a) of FECA. *See supra* note 5 and accompanying text.

OWCP medical adviser, and a March 20, 2013 report of Dr. Mauldin, a Board-certified audiologist for the employing establishment.

For these reasons, appellant's claim for a work-related hearing loss on the grounds that it was untimely filed is denied. Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

**CONCLUSION**

The Board finds that appellant's claim for a work-related hearing loss is barred by the applicable time limitation provisions of FECA.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 25, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 17, 2013  
Washington, DC

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

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

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