

working at Camp Slayer in Baghdad, Iraq. He indicated that the hearing loss was caused by his proximity to loud random noises, including mortar round explosions, other explosive detonations and unmuffled generators. Appellant stated that he first became aware of his claimed condition on May 12, 2010 and that he first realized on that date that the condition was caused or aggravated by his work. He noted that he did not file his claim earlier because there was no exit health examination upon his return from Iraq and the termination of his employment.²

In an accompanying statement, appellant indicated that he worked as a combat contracting officer technical representative for the employing establishment from May 2004 to July 2005 in Baghdad.³ He stated that he was at his duty station around the clock during this period and that he worked 13-hour shifts for six days per week. Appellant was exposed to hazardous noise including random gunfire, mortar round explosion and constant unmuffled generator noise. The mortar explosions occurred both day and night and sometimes the explosions were in close proximity. Appellant indicated that no noise abatement safety devices were issued. He stated that the employing establishment denied his request for an out-processing medical examination when his employment was terminated. When appellant returned home, his wife began to notice that he had hearing problems.

By letter dated April 7, 2014, OWCP requested that appellant submit additional evidence in support of his hearing loss claim, including any audiograms from the testing of his hearing. Appellant was asked to provide additional detail regarding why he was not aware of a possible work-related cause for his hearing loss until May 12, 2010. OWCP indicated that it did not appear that appellant's claim was timely because it was not filed within three years of May 12, 2010, the date he reasonably would have been aware of the possible relationship between his claimed hearing loss and work factors. Moreover, there was no indication that an immediate supervisor had actual knowledge of a work-related medical condition within 30 days of the injury.

Appellant submitted an audiogram from a May 12, 2010 evaluation conducted by an audiologist for a private provider. It was indicated that appellant had slight to moderate hearing loss in his right ear and slight to moderate/severe hearing loss in his left ear. The audiogram was not signed or otherwise approved of by a physician. Appellant submitted other evidence including administrative documents regarding his work in Iraq, a February 21, 2014 rating for tinnitus from the Department of Veterans Affairs, letters from July and August 2013 that were sent between his senator and the employing establishment, and a May 25, 2014 statement from his wife regarding his worsening hearing loss after returning from Iraq.

² On the same form, Lori Derfler, a human resources specialist for the employing establishment, stated that appellant was terminated on May 3, 2004 at the end of his temporary appointment. She appears to have inadvertently listed an improper date for appellant's termination as other evidence of record shows that he worked for the employing establishment from May 3, 2004 to July 13, 2005. Ms. Derfler stated that appellant did not report his claimed condition to the employing establishment until March 7, 2014. A document in the record shows that a search by the employing establishment revealed that it had no case records regarding health matters for appellant.

³ The record contains notification of personnel action forms showing that appellant worked in this temporary position from May 3, 2004 to July 13, 2005. Appellant listed other federal and private industry jobs he held, but he indicated that he was not exposed to hazardous noise in these jobs.

In an April 9, 2014 statement, Ms. Derfler acknowledged that appellant would have been exposed to hazardous noise while he worked for the employing establishment between May 3, 2004 and July 13, 2005. She stated that the employing establishment had no record that appellant complained about his working environment at or around the time that he worked for the employing establishment.

In an April 25, 2014 statement, appellant asserted that he made attempts in late 2012 and early 2013 to inform the employing establishment about his hearing problems, but he acknowledged that he had not kept records of these attempts. He repeated his earlier statement that he did not become aware of his hearing loss until May 12, 2010 when he underwent audiological testing.

In a May 28, 2014 decision, OWCP denied appellant's hearing loss claim as it was untimely. It noted that May 12, 2010 was the date of appellant's awareness that the claimed hearing loss could be related to work factors, but that appellant did not file a claim for hearing loss until March 2014. Appellant failed to file a claim within three years of the claimed injury within the meaning of FECA or show that an immediate supervisor had actual knowledge of the injury within 30 days.

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 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.”⁵

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

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

⁵ 5 U.S.C. § 8122(a).

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

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

ANALYSIS

On March 28, 2014 appellant filed an occupational disease claim alleging that he sustained bilateral hearing loss (severe in his left ear and moderate in his right ear) while working in Iraq between May 2004 and July 2005. OWCP denied appellant's hearing loss claim as untimely.

The Board finds that the evidence of record establishes that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment and the claimed compensable disability on May 12, 2010. In his occupational disease claim, filed on March 28, 2014, appellant stated that he first became aware of his claimed condition on May 12, 2010 and that he first realized on May 12, 2010 that it was caused or aggravated by his work. In a supplemental statement dated April 25, 2014, he indicated that he did not become aware of his hearing loss until May 12, 2010 when he underwent audiological testing.¹² Appellant's explicit linking of work conditions with his development of hearing loss shows that he knew on May 12, 2010 of the possible relationship between these employment

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

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

⁸ *Larry E. Young*, *supra* note 6.

⁹ *Id.*

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

¹¹ *Debra Young Bruce*, 52 ECAB 315 (2001).

¹² The record contains a copy of a May 12, 2010 audiogram from a hearing evaluation conducted on that date. The employing establishment conducted a search of its records for appellant but it found no health-related files.

incidents and his claimed medical condition.¹³ He did not file his claim for an employment-related emotional condition until March 28, 2014 and therefore he did not file his claim within the requisite three years of his awareness of the possible relationship between the implicated employment incidents and the claimed medical condition.¹⁴

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.¹⁵

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 did not file a timely claim for work-related hearing loss.

¹³ Appellant was exposed to the implicated work factors no later than July 13, 2005, his last day of work before being terminated from his temporary appointment. There is no indication that he continued to be exposed to injurious working conditions after his awareness of a possible work-related cause of his claimed hearing loss. *See supra* notes 8 through 10.

¹⁴ Appellant noted that he did not file his claim earlier because there was no exit health examination upon his return from Iraq, but he did not show that truly exceptional circumstances prevented him from filing a timely claim. *See* 20 C.F.R. § 10.100(2).

¹⁵ 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* notes 5 through 7. Appellant submitted various documents, including administrative records regarding his work in Iraq, a February 21, 2014 rating for tinnitus from the Department of Veterans Affairs, letters from July and August 2013 that were sent between his senator and the employing establishment, and a May 25, 2014 statement from his wife regarding his worsening hearing after returning from Iraq. None of these documents show that appellant's immediate supervisor had the requisite notice within 30 days of the date of injury.

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board