United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 11-673**
	)	**Issued: January 10, 2012**
DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND, Patuxent River, MD, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 21, 2011 appellant, through his attorney, filed a timely appeal from a December 6, 2010 decision of the Office of Workers' Compensation Programs (OWCP) which denied his claim as untimely 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 appellant's claim for compensation for a hearing loss is barred by the applicable time limitation provisions of FECA.

On appeal, counsel contends that the audiograms of record, particularly a 1989 audiogram, established appellant's participation in a hearing conservation program and the employing establishment's actual knowledge of his employment-related hearing loss.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 9, 2010 appellant, then a 52-year-old former aircraft sheetmetal worker, filed an occupational disease claim (Form CA-2) alleging that on August 22, 1977 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. The employing establishment indicated that appellant's last date of exposure was November 17, 1989.

Appellant submitted a March 4, 2010 hearing loss questionnaire, a list of medications, his employment history and a series of appointment affidavits and notifications of personnel action, including an SF-50 of his discharge on November 17, 1989. He also submitted a September 9, 1989 audiogram which was part of a U.S. Civil Service Commission Certificate of Medical Examination and a January 4, 2010 audiogram obtained from a private physician.

By letter dated June 30, 2010, OWCP advised appellant that the evidence submitted was insufficient to establish his claim and requested additional supporting evidence. It allotted 30 days for submission.

On June 10, 2010 appellant filed a claim for a schedule award.

On September 16, 2010 the employing establishment submitted a report of noise dosimetry results based on appellant's statement of exposure.

By letter dated October 13, 2010, OWCP advised appellant that the evidence submitted was insufficient to establish his claim and requested additional supporting evidence. It allotted 15 days for submission.

Subsequently, appellant resubmitted an audiogram dated September 9, 1989.

By decision dated December 6, 2010, OWCP denied appellant's claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. It found that he had failed to file a claim within three years of the date of injury, August 22, 1977. OWCP further noted that there was no evidence that a supervisor had actual knowledge of appellant's claim within 30 days of the date of injury.

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 an 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 the condition and his or her employment.[4] Where the

[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).

employee continues in the same employment after such awareness, the time limitation begins to run on the date of 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 his or her 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 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.[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 did not timely file a claim for compensation under FECA. Appellant reported on the Form CA-2 that he was aware of a relationship between the claimed condition and employment as of August 22, 1977. Under 5 U.S.C. § 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 is no longer exposed to noise. According to the record, appellant last worked in federal employment on November 17, 1989. Therefore, in this case, the three-year time limitation began to run on November 17, 1989 and expired no later than November 17, 1992. Since appellant did not file the claim until June 9, 2010, he did not file the claim within the requisite three-year time limitation.

Although appellant's claim for compensation was not timely filed within the three-year statute of limitations, his claim would be regarded as timely if his immediate supervisor had actual knowledge or written notice that he sustained an employment-related injury within 30 days. He provided no evidence to establish that his supervisor had actual knowledge of the injury within 30 days or that written notice of the injury was given to the supervisor within 30 days.

On appeal, counsel contends that the audiograms of record, particularly the September 9, 1989 audiogram, establishes appellant's participation in a hearing conservation program at the employing establishment and hence the supervisor's actual knowledge of an employment-related hearing loss. The Board finds that the September 9, 1989 audiogram is an exit audiogram

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

[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 2.801.3a(3)(c) (March 2011) which states: "If an agency, in connection with a recognized environmental hazard, has an employee testing program and a test shows the employee to have positive findings this should be accepted as constituting actual knowledge. For example, an agency where employees may be exposed to hazardous noise levels may give annual hearing tests for exposed employees. A hearing loss identified on such a test would constitute actual knowledge on the part of the agency of a possible work injury."

obtained in support of appellant's separation from federal service, effective November 17, 1989, and was not obtained as part of a hearing conservation program by the employing establishment. The Board finds no probative evidence to establish that his supervisors had actual knowledge, sufficient to put them reasonably on notice, that his claimed hearing loss was related to his federal employment within 30 days of November 17, 1989, the day he last worked in federal employment and the date of last exposure.

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 constitute exceptional circumstances that excuse a failure to file a timely claim.[9] Appellant was not under 21 years old and provided no evidence to show that he was incompetent or was prevented from giving notice by exceptional circumstances. Thus, he did not timely file a claim for compensation.[10]

CONCLUSION

The Board finds that appellant did not file a timely claim for compensation and, therefore, his claim is barred by the applicable time limitation provisions of FECA.

[9] *B.J.* (B.J.), 59 ECAB 660 (2008).

[10] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the December 6, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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