United States Department of Labor
Employees' Compensation Appeals Board

N.N., Appellant	)	
and	)	**Docket No. 13-1525**
	)	**Issued: December 13, 2013**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 13, 2013 appellant filed a timely appeal from an April 3, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 the 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 December 12, 2012 appellant, then a 68-year-old retired production controller, filed an occupational disease claim alleging that working around loud noise in his federal employment

[1] 5 U.S.C. § 8101 *et seq.*

caused hearing loss. He indicated that he was first aware of his hearing loss and that it was caused or aggravated by his employment in January 1997. The employing establishment indicated that appellant retired on September 30, 2003.

Appellant submitted his employment history,[2] in which he denied any safety devices were used to protect against noise exposure; a Standard Form 50-B Notification of Personnel Action; and a December 18, 2012 medical report and December 12, 2012 audiogram from Dr. Gerald Randolph, a Board-certified otolaryngologist.

In a February 6, 2013 letter, OWCP advised appellant of the deficiencies in his claim and requested additional evidence because the submitted evidence did not show that his claim was timely filed or that the noise exposure he experienced caused injury.

In a letter also dated February 6, 2013, OWCP informed the Puget Sound Naval Yard of appellant's hearing loss claim and requested additional information, including copies of all medical examinations pertaining to hearing or ear problems, preemployment examination and all audiograms and a statement indicating if he was in a hearing conservation program while employed.

In a February 14, 2013 statement, appellant stated that he was informed sometime in 1997 that he had hearing loss exposure to loud noise. He stated that his claim was filed in a timely manner as his immediate supervisor had actual knowledge of the injury. Appellant related that his supervisor scheduled him for additional hearing testing after hearing changes were noted on his yearly hearing test.

In a March 25, 2013 electronic mail, Joanne S. Brown, Human Resource Specialist, stated that appellant's medical records were requested and, upon review of the medical folder, two medical reports of physical examination, both dated 1978 were of record. However, there were no hearing loss records, audiograms, etc. There was also no indication that appellant had been part of the Hearing Conservation Program.

OWCP received medical reports from the employing establishment health unit dated February 25, 1974 and February 7, 1978.

By decision dated April 3, 2013, 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. The decision found that there was no evidence that appellant was part of the Hearing Conservation Program.

[2] Appellant's employment history indicates that he was employed by the Puget Sound Naval Shipyard from 1972 until 1982 as a machinist-test director and production controller; and by the NAVSEA Command as a production controller from 1982 until 2002.

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.[3] 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) [T]he 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) [W]ritten notice of injury or death as specified in section 8119 was given within 30 days."[4]

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.[5] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[6]

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 the ultimate result of such affect would be temporary or permanent.[7] 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.[8] 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

---

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

[4] 5 U.S.C. § 8122(a).

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

[6] *Laura L. Harrison*, 52 ECAB 515 (2001).

[7] *Larry E. Young*, *supra* note 5.

[8] *Id.*

the causal relationship between the employment and the compensable disability.[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 this case is not in posture for decision.

On December 12, 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 first became aware of his claimed condition and that it was caused or aggravated by his employment on January 1, 1997. He has not alleged that his hearing loss was a latent condition. Appellant retired from the employing establishment on September 30, 2003.

Although the date of appellant's injury was listed as January 1, 1997, the date of his last exposure to noise in his federal employment position was presumably his date of retirement on September 30, 2003. However, his claim for compensation was not filed until December 12, 2012, more than nine years after he was last exposed to the claimed employment factors as a production controller 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. He claimed before OWCP and on appeal that his hearing loss was documented by the employing establishment. OWCP denied the claim based upon a finding that appellant had not established that he was as part of a hearing conservation program. While participation in a hearing conservation program can establish constructive notice of injury, there is no evidence in the record demonstrating such a program in place at this employing establishment.

The Board notes that, while OWCP requested employment and medical records from the employing establishment, which did not reflect any audiogram results, it failed to request similar records from NAVSEA Command. Given the lapse of time of the records submitted by the employment establishment and the claimed time of the hearing loss, the Board is unable to determine the timeliness of this claim without these same records pertaining to his later employment at the NAVSEA Command, during the years 1982 to 2003. For these reasons, the Board finds that the case must be remanded to OWCP for further development. OWCP shall request that the NAVSEA Command submit any and all medical records pertaining to appellant's claim, in its possession. After such further development as necessary OWCP shall thereafter address whether audiograms were performed at the employing establishment during appellant's employment and whether they demonstrated actual knowledge of appellant's hearing loss. It shall thereafter issue an appropriate decision.

[9] 5 U.S.C. § 8122(b); *see Luther Williams, Jr.*, 52 ECAB 360 (2001).

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

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this opinion.

Issued: December 13, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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