

FACTUAL HISTORY

On April 25, 2012 appellant, then a 59-year-old retired customs inspector, filed an occupational disease claim alleging that exposure to noise from weapons, vehicles and airplanes while at work caused a hearing loss. He stated that he first became aware of the condition on March 15, 1998 and its relationship to employment on June 27, 2002 and that his hearing examination was lost when he first submitted a claim. The employing establishment indicated that appellant retired on January 5, 2008. Appellant attached a statement in which he indicated that he began work as a customs inspector trainee in 1980 and described his employment and training, including firearms training.

In a June 22, 2012 letter, OWCP informed appellant of the type evidence needed to support his claim and asked that the employing establishment forward medical treatment notes to OWCP, if treated at the employing establishment.

On July 14, 2012 appellant stated that he was not aware that there was a time frame for filing his claim and that throughout his career he had been checked for hearing problems. He maintained that the copies of the examinations had been lost in one of his attempts to file for a hearing loss through his employer. Appellant again described his employment-related noise exposure.

By decision dated September 18, 2012, OWCP denied the claim on the grounds that it was not timely filed.

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.² 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 of this title was given within 30 days.”³

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

² *Charles Walker*, 55 ECAB 238 (2004); see *Charles W. Bishop*, 6 ECAB 571 (1954).

³ 5 U.S.C. § 8122(a).

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.⁴ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.⁵

Section 8122(b) 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 and the Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.⁶ For actual knowledge of a supervisor to be regarded as timely filing, an employee must show not only that the immediate superior knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.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. 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.⁸ Where the employee continues in the same employment after he reasonably should have been aware that he 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 The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.¹⁰

In interpreting section 8122(a)(1) of FECA, OWCP procedures provide that if the employing establishment gives regular physical examinations which might have detected signs of illness, such as hearing tests, it should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results.¹¹

⁴ *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

⁵ *Laura L. Harrison*, 52 ECAB 515 (2001).

⁶ 5 U.S.C. § 8119(b); *Delmont L. Thompson*, 51 ECAB 155 (1999).

⁷ *Id.* at § 8122(b); *Duet Brinson*, 52 ECAB 168 (2000).

⁸ *Larry E. Young*, *supra* note 4.

⁹ *Id.*

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

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6(c) (March 1993); *see James A. Sheppard*, 55 ECAB 515 (2004).

ANALYSIS

In this case, OWCP found that appellant had not filed a timely claim for compensation under FECA. When appellant filed his claim for an employment-related hearing loss on April 25, 2012, he indicated that he was first aware of the condition on March 15, 1998 and its relationship to his employment on June 27, 2002. He therefore indicated that on June 27, 2002 he was aware or reasonably should have been aware of a possible relationship between his hearing loss and factors of his federal employment. The Board finds that the date appellant placed on his claim for compensation, June 27, 2002, is probative evidence as the date he first became aware that his condition was related to his federal employment.

As noted above, however, if an employee continues to be exposed to injurious working conditions, the time limitation begins to run on the date of the last exposure.¹² Therefore, the time for filing appellant's claim did not begin to run until January 5, 2008, the date he retired. Accordingly, the three-year statute of limitations would have expired no later than January 5, 2011, and his April 25, 2012 claim is thus barred by this exception to the statute of limitations.¹³

The record also does not support that appellant's "immediate superior had actual knowledge of the injury or death within 30 days."¹⁴ There is no evidence of record that establishes that his supervisor had actual knowledge of any injury within 30 days or that written notice of the injury was given within 30 days.

Even if the employing establishment knew that appellant suffered from a hearing loss during his period of employment, appellant also has to show that his supervisors knew or reasonably should have known that this condition was caused by his employment.¹⁵ In this case, there is no probative evidence to establish that his superior had constructive knowledge sufficient to be reasonably put on notice that his hearing loss was work related within 30 days of January 5, 2008, the day he retired. Accordingly, appellant's claim, which is outside the three-year time limitation period, is untimely.¹⁶

The Board also notes that appellant stated that he had submitted old medical evidence to the employing establishment and it was lost. Appellant, however, submitted no current medical evidence to show that he had a hearing loss.

Appellant asserts on appeal that he was not aware there were time limitations for filing a claim. 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

¹² *Larry E. Young, supra* note 4.

¹³ *Supra* note 4.

¹⁴ 5 U.S.C. § 8122(a)(1); *see also Duet Brinson, supra* note 7.

¹⁵ *See David R. Morey, 55 ECAB 642 (2004).*

¹⁶ *See Richard Narvaez, 55 ECAB 661 (2004).*

constitute exceptional circumstances that excuse a failure to file a timely claim.¹⁷ 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.¹⁸

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 is barred by the applicable time limitation provisions of FECA.

ORDER

IT IS HEREBY ORDERED THAT the September 18, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 27, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁷ *B.J.*, 59 ECAB 660 (2008).

¹⁸ *Id.*