

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

L.S., Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Vicksburg, MS, Employer**

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**Docket No. 14-54
Issued: April 10, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 17, 2013 appellant filed a timely appeal from the June 11, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied his claim for compensation as untimely filed. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case. The Board also has jurisdiction to review OWCP's July 11, 2013 nonmerit decision denying reconsideration.

ISSUES

The issues are: (1) whether appellant's occupational disease claim was timely filed pursuant to the time limitation provisions of FECA; and (2) whether OWCP properly denied his reconsideration request.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 14, 2013 appellant, a former deck hand, filed an occupational disease claim alleging that the ringing in his ears was a result of exposure to noise in his federal employment. He first became aware of the disease or illness on September 18, 1987. Appellant indicated that he first realized, on that same date, that the disease or illness was caused or aggravated by his employment.

The employing establishment advised that appellant retired in 1993. Appellant confirmed that he was last exposed to hazardous noise at work on December 14, 1993.

OWCP informed appellant that his claim did not appear timely. It asked him to submit evidence that his claim was filed within the applicable time limitation.

OWCP also asked the employing establishment to submit additional information, including comments from a knowledgeable supervisor and copies of all medical examinations pertaining to hearing or ear problems.

Appellant explained that he went through doctors' tests "and my medical report is in the letter that was sent to me."

OWCP received a November 1, 1993 correspondence from the State of Louisiana Department of Social Services, Office of Family Support, Disability Determinations Services. The correspondence informed appellant that the Social Security Administration had forwarded his disability claim for a determination. "After review of your claim, we find that we need more medical evidence about your back/eyesight/lungs/dizzy/ring in ears condition." The correspondence notified appellant of a psychological examination to be conducted by Dr. Frank Bennett on December 14, 1993.

In a decision dated June 11, 2013, OWCP denied appellant's claim. It found that his claim for compensation was untimely filed. It found no evidence that the employing establishment had knowledge of the claimed medical condition.

On June 21, 2013 OWCP received appellant's reconsideration request. Appellant noted that his injury was an occupational injury and that he was sending in a copy of his social security card.

In a decision dated July 11, 2013, OWCP denied appellant's reconsideration request. It found that it did not warrant a merit review of his case.

On appeal, appellant described the work he performed as a deck hand. He stated that Dr. Bennett performed an examination and determined that he had loss of hearing and ringing in his ears "and they have never stopped."

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking compensation under FECA has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence,² including that he or she filed his or her claim within the applicable time limitation.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) 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.”⁴

The three-year period begins to run from the time the employee is aware, or by the exercise of reasonable diligence should have been aware, that his condition is causally related to the employment. To establish actual knowledge by an immediate superior, an employee must show not only that the immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.⁵

Even if an original claim for compensation for disability or death is not filed within three years after the injury or death, compensation for disability or death may be allowed if written notice of injury or death as specified in section 8119 was given within 30 days. Section 8119 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.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

² *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

³ *Paul S. Devlin*, 39 ECAB 715 (1988); *Emmet L. Pickens*, 33 ECAB 1807 (1982); *Kathryn A. O'Donnell*, 7 ECAB 227 (1954).

⁴ 5 U.S.C. § 8122(a).

⁵ *Duet Brinson*, 52 ECAB 168 (2000).

⁶ *Larry E. Young*, 52 ECAB 264 (2001).

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

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 has a condition which has been adversely affected by factors of his federal employment, the limitation period begins to run even if the employee does not know the precise nature of the impairment or whether the ultimate result of such affect will 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 the federal employment awareness, the time limitation begins to run on the date of the last exposure to the implicated factors.⁹

The time limitation in section 8122(a) does not (1) begin to run against a minor until he reaches 21 years of age or has had a legal representative appointed, (2) run against an incompetent individual while he is incompetent and has no duly appointed legal representative or (3) run against any individual whose failure to comply is excused by the Secretary on the ground that such notice could not be given because of exceptional circumstances.¹⁰

ANALYSIS -- ISSUE 1

Appellant filed an occupational disease claim alleging that the ringing in his ears was a result of noise exposure in his federal employment. He first realized on September 18, 1987 that the disease or illness was caused or aggravated by his federal employment. Appellant clarified that the date of his last exposure to hazardous noise was December 14, 1993, which was when he retired.

As the time limitation for filing an occupational disease claim began to run on the date of his last exposure to the implicated factors, appellant had three years from December 14, 1993, or until December 14, 1996, to file his claim. His March 14, 2013 claim is thus over 16 years late.

There is no evidence that appellant's immediate superior had actual knowledge of his occupational disease within 30 days of the date of last exposure, that is, knowledge not only that appellant was injured, but also knowledge that the injury was an on-the-job injury.

Further, there is no evidence that written notice of injury, as specified in section 8119 of FECA, was given within 30 days.

Accordingly, appellant's failure to file his occupational disease claim within three years of the date of his last exposure renders his claim untimely. As there appears to be no basis for tolling the statute of limitations for incompetency or exceptional circumstances, the Board will affirm OWCP's June 11, 2013 decision denying appellant's claim

⁸ *Larry E. Young, supra* note 6.

⁹ *Supra* note 4.

¹⁰ *Id.* at § 8122(d).

On appeal, appellant notes that Dr. Bennett performed an examination and determined that he had loss of hearing and ringing in his ears that never stopped. It appears that Dr. Bennett examined appellant as part of social security disability determination. His findings are not a part of the record, and it is unclear how this evidence would satisfy the requirement that appellant's immediate superior had actual knowledge of his occupational disease within 30 days of the date of last exposure.

As the Board explained in the case of *Hazelee K. Anderson*,¹¹ the Social Security Act and FECA have different standards of medical proof on the question of disability. Disability under one statute does not prove disability under the other. Furthermore, under FECA, the claimant's conditions must be shown to be causally related to federal employment. Under the Social Security Act, conditions which are not employment related may be taken into consideration in rendering a disability determination.¹² Thus, even the identification of hearing loss or ringing in the ears, together with a finding of disability by the Social Security Administration, would not alone establish that appellant's immediate superior had knowledge of an on-the-job injury within 30 days.

LEGAL PRECEDENT -- ISSUE 2

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.¹³ An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁴

A request for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.¹⁵ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁶

¹¹ 37 ECAB 277 (1986).

¹² *Id.* at 277, 282-83 (1986) (citations omitted).

¹³ 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(3).

¹⁵ *Id.* at § 10.607(a).

¹⁶ *Id.* at § 10.608.

ANALYSIS -- ISSUE 2

OWCP received appellant's reconsideration request within one year of the June 11, 2013 denial of his claim. His request was therefore timely. The question for determination, therefore, is whether that request met at least one of the three standards for obtaining a merit review of appellant's case.

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that OWCP erroneously applied or interpreted it.

Appellant did not advance a relevant legal argument not previously considered by OWCP. He noted that his was an occupational disease claim, not a traumatic injury claim. Appellant did not explain how this in any way supported that his claim was timely. Even under the rules for filing occupational disease claims, he missed the deadline by 16 years.

A claimant may be entitled to a merit review by submitting evidence that constitutes relevant and pertinent new evidence not previously considered by OWCP. Appellant submitted a copy of his social security card, but this is not relevant or pertinent to whether his immediate superior had actual knowledge of his occupational disease within 30 days of the date of last exposure.

Accordingly, the Board finds that appellant did not meet any of the requirements for obtaining a merit review of his case. The Board will therefore affirm OWCP's July 11, 2013 nonmerit decision.

CONCLUSION

The Board finds that appellant's occupational disease claim is untimely filed. The Board also finds that OWCP properly denied his reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the July 11 and June 11, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 10, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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