

FACTUAL HISTORY

On October 9, 2013² appellant, then a 72-year-old retired deckhand leaderman, filed an occupational disease claim alleging that on June 15, 1975 he first became aware of his hearing loss, but was not aware of its connection to his employment until September 15, 1977. The employing establishment noted that he stopped work on June 15, 1975 and has not worked for them since that date.³

The employing establishment controverted the claim on November 4, 2013, stating that appellant's personnel records did not provide any evidence of a hearing loss and that there was no record of appellant having participated in a hearing conservation program. It noted that he filed his claim 36 years after the date of awareness of his hearing loss and its relationship to his federal employment.

By letter dated November 4, 2013, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised as to the medical and factual evidence required to establish his claim and given 30 days to provide such information. OWCP informed him that the evidence submitted was insufficient to establish that he had timely filed his claim.

OWCP received audiogram records listing results from audiological tests from "M/V Mississippi" for the period February 20, 1997 to May 11, 2006. It also received medical records from the U.S. Public Health Service and factual evidence, including statements describing appellant's exposure to noise at work. Appellant stated on November 19, 2013 that his right ear gave him trouble in 1973 while working in the reel room with no ear protection from 1969 to 1974. He also noted that he assisted in cleaning up the engine room two hours per day with no ear protection from 1976 until 1985. In an October 28, 2013 statement, appellant noted that he began wearing earplugs in 1980 or 1981 but that his hearing was already bad. He also noted that his hearing was tested every year beginning in 1985 or 1986 at "MV Mississippi."

A May 11, 2006 Department of the Army Medical Surveillance report by a physician whose signature is illegible listed that appellant had high frequency hearing loss. Appellant also submitted audiometric results for annual testing from August 12, 1976 to August 23, 1979 and April 17, 1990 to March 4, 1996 and intermittently from August 10, 1983 to June 2, 1988. An undated audiogram also accompanied these documents.

By decision dated December 19, 2013, OWCP denied appellant's hearing loss claim as untimely filed.

² The original date on the form was September 19, 2013.

³ Appellant stated he retired effective December 31, 2006.

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.⁵ 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.”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 or her condition and his or her 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 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

⁴ *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002).

⁵ *W.L.*, 59 ECAB 362 (2008); *Gerald A. Preston*, 57 ECAB 270 (2005); *Laura L. Harrison*, 52 ECAB 515 (2001).

⁶ 5 U.S.C. § 8122(a). See *J.M.*, Docket No. 09-1563 (issued February 26, 2010); *J.P.*, 59 ECAB 178 (2007); *Cory W. Davis*, 57 ECAB 674 (2006).

⁷ *Larry E. Young*, 52 ECAB 264 (2001).

⁸ *Id.*

⁹ 5 U.S.C. § 8122(b).

¹⁰ *Gerald A. Preston*, 57 ECAB 270 (2005); *Debra Young Bruce*, 52 ECAB 315 (2001).

ANALYSIS

On October 9, 2013 appellant filed an occupational disease claim alleging that his hearing loss was a result of noise exposure in his federal employment. He first realized that he had a hearing loss on June 15, 1975, but did not realize that it was caused or aggravated by his employment until September 15, 1977. The employing establishment contested the claim on the grounds that appellant failed to timely file his claim. On the back of appellant's claim form, it noted that he had not worked since June 15, 1975, although he stated that he retired from the employing establishment on December 31, 2006.

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 the date of his last exposure, whether it is June 15, 1975, the date the employing establishment indicated was the last day he worked for them or December 31, 2006, the date he claimed he retired from the employing establishment, to file his claim. His October 19, 2013 claim is thus untimely under either date as he had until June 15, 1978, based on the June 15, 1975 date noted by the employing establishment or December 31, 2009, based on the December 31, 2006 date appellant stated that he retired from the employing establishment, to timely file his occupational disease claim. Thus, the Board finds that appellant did not timely file his occupational disease claim within the three-year period of limitation.

However, there is evidence of record suggesting that appellant's immediate supervisor had actual knowledge of the injury within 30 days of the injury. 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.¹¹

Appellant submitted audiogram records for the periods August 12, 1976 to August 23, 1979, April 17, 1990 to March 4, 1996, intermittently from August 10, 1983 to June 2, 1998, February 20, 1997 to May 11, 2006 from August 12, 1976 to August 23, 1979. The record contains a May 11, 2006 Department of the Army Medical Surveillance report by a physician, whose signature is illegible, diagnosing a high-frequency hearing loss. Appellant submitted materials which indicate that he worked through 1986 and underwent hearing testing by his employing establishment. The Board finds that his materials were not forwarded to the employing establishment for review as to any hearing conservation program. The case will be remanded for further development of this aspect of the case.

The Board will set aside the December 19, 2013 OWCP decision and remand the case for further development as to whether appellant's claim was timely filed. After such development as necessary, OWCP shall issue a *de novo* decision.

¹¹ *Roger D. Dicus*, 56 ECAB 290 (2005); *Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2013 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision.

Issued: August 19, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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