

workplace.² He first became aware of his claimed condition on January 1, 2008 and first realized that it was caused or aggravated by his work on April 25, 2013 when he read a report of Dr. William A. Logan, an attending Board-certified otolaryngologist.³ On the form, an employing establishment claims representative noted that appellant first reported the claimed condition to the employing establishment on May 24, 2013 and that he was last exposed to employment conditions alleged to have caused his condition on October 30, 1990.

In an undated statement received on June 28, 2013, appellant noted that he worked as a boilermaker at the Sequoyah Nuclear Plant for intermittent periods between January 11, 1989 and October 30, 1990. He also worked at the Widow Creek fossil fuel plant from May 1 to 25, 1990. At both facilities, appellant was exposed to loud noise from boilers, water pumps and fans despite the fact that he wore earplugs at work. He noted that between 1988 and November 20, 2009 he also worked as a union boilermaker under contractor status for the employing establishment. Appellant worked at various employing establishment facilities, including nuclear and fossil fuel plants, where he was exposed to loud noises. He also reported various private sector jobs between 1965 and 1989, where he was exposed to some noise, as well as service in the U.S. Army in 1966 and 1967, where he was exposed to noise from rifle fire. Appellant stated that he “first noticed some problem with my hearing approximately [five] years ago,” but first learned that his hearing was related to his work when he reviewed an April 28, 2013 report of Dr. Logan.

In a February 28, 2013 report, Dr. Logan stated that appellant reported that he had “hearing loss for a number of years.” Appellant had trouble understanding people when they talked, especially if there was background noise or if more than one person was talking. Dr. Logan noted that appellant did not report ear drainage or ear pain and stated, “Worked in a noisy environment for many years. Was in the military for only about six months back in 1967. No significant tinnitus or dizziness.” Dr. Logan stated that an audiogram he obtained showed a bilateral steeply sloping high frequency sensorineural hearing loss with Type A tympanograms.⁴ He stated that discrimination scores were 100 percent on the left and 84 percent on the right. Dr. Logan diagnosed binaural sensorineural hearing loss. He noted that appellant was medically cleared for amplification if he so desired.

A January 11, 1989 audiogram for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 5, 5, 5 and 45 respectively and testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed

² The claim was dated May 7, 2013 but was not received until May 24, 2013.

³ Appellant indicated that, when he learned of the work related cause of his hearing loss, he notified the employing establishment by letter dated April 25, 2013. In this letter, he stated, “I have just been advised by a physician for the first time that I have a hearing loss that is related to my employment with TVA. Therefore, please be advised that I am filing a claim for federal workers’ compensation benefits based on this loss.” It is unclear when the employing establishment received this letter.

⁴ An attached February 28, 2013 audiogram indicated that testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 10, 10, 25 and 70 respectively and that testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 10, 10, 25 and 70 respectively.

decibel losses of 0, 10, 5 and 30 respectively. It appears that the audiogram was obtained by the employing establishment on appellant's first day of work.⁵

By decision dated July 19, 2013, OWCP denied appellant's hearing loss claim as untimely filed. It stated:

"The date of your injury is [January 1, 2008]. The claim for compensation was filed on May 7, 2013.⁶

"Although you indicate that on April 25, 2013, you were notified by a physician that hearing loss was due to your employment at [the employing establishment], you were aware of your hearing loss on January 1, 2008 according to the claim you filed. Additionally, you were not a part of the annual hearing loss program at [the employing establishment]. The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program was sufficient to constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury."

In a report dated August 5, 2013, Whitney K. Mauldin, an audiologist, reviewed the record for the employing establishment, stated that the evidence of record did not reflect that appellant's present hearing loss was work related.

Appellant requested a hearing before an OWCP hearing representative. During the December 9, 2013 hearing, he discussed his work history and testified that he first noticed a problem with his hearing "about five years" ago. Appellant testified that he did not know such problems were work related until he reviewed a report of Dr. Logan on April 25, 2013. He indicated that he retired in 2010.

In a letter dated January 10, 2014, Robin Daugherty, an employing establishment official, stated that the January 11, 1989 audiogram of record showed that appellant had preexisting hearing loss when he began working for the employing establishment.

In a January 16, 2014 letter, counsel argued that the time for filing a hearing loss claim does not begin to run until the claimant learns that his hearing loss is causally related to his employment. Although appellant knew of his a hearing loss on January 1, 2008, he did not realize that it was work related until he reviewed Dr. Logan's report on April 24, 2013. Counsel concluded that appellant's May 24, 2013 hearing loss claim was timely as it was filed within three years of when he became aware of a work relationship to his claimed condition.

In a February 7, 2014 decision, an OWCP hearing representative affirmed the July 19, 2013 decision finding that appellant's hearing loss claim was denied on the grounds that it was untimely filed.

⁵ The audiogram was obtained by an audiologist and it does not appear that it was signed by a physician.

⁶ It is noted that the claim was filed on May 24, 2013.

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.⁷ 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.”⁸

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 would be temporary or permanent.⁹ 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.¹⁰ 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.¹¹ The requirement to file a claim within three years is the claimant’s burden and not that of the employing establishment.¹²

ANALYSIS

On May 24, 2013 appellant filed an occupational disease claim alleging that he sustained a hearing loss due to exposure to noise in the workplace between 1989 and 2009. He first became aware of his claimed condition on January 1, 2008 and that it was caused or aggravated by his work on April 25, 2013 when he read a February 28, 2013 report of Dr. Logan, an attending Board-certified otolaryngologist. OWCP denied appellant’s hearing loss claim on the grounds it was untimely filed. It determined that in January 1, 2008 he was aware or reasonably

⁷ *Charles Walker*, 55 ECAB 238 (2004); see *Charles W. Bishop*, 6 ECAB 571 (1954).

⁸ 5 U.S.C. § 8122(a).

⁹ *Larry E. Young*, 52 ECAB 264 (2001).

¹⁰ *Id.*

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

¹² *Debra Young Bruce*, 52 ECAB 315 (2001).

should have been aware of a possible relationship between his condition and his employment and that, therefore, his May 24, 2013 claim was not filed within the requisite three years of obtaining such knowledge.

The Board finds that OWCP did not support its determination that appellant filed his hearing loss claim in an untimely manner. Although appellant indicated on the claim form that he became aware that he had a hearing loss on January 1, 2008,¹³ he advised that he was not aware of a work-related cause for his hearing loss until April 25, 2013 when he reviewed a February 28, 2013 report of Dr. Logan.¹⁴ While appellant was exposed to hazardous noise while working for the employing establishment directly or as a contractor between 1989 and 2009, OWCP did not adequately explain its determination that he was aware or should have been aware of a work related cause for his hearing loss in early 2008. Although appellant acknowledged that he was aware of his hearing loss on January 1, 2008, this knowledge coupled with the lack of contemporaneous indication that he might have a noise-induced hearing loss due to exposure to noise at work is insufficient to establish that he should have known earlier than April 25, 2013 that it was a work-related hearing loss. Appellant's indication that he first became aware of his hearing loss in early 2008 appears to be based upon his own observations about his hearing problems, rather than upon any medical evaluation. The only audiogram evaluation of record other than the February 28, 2013 evaluation of Dr. Logan is the January 11, 1989 audiogram contemporaneous to appellant's first day of work. OWCP has not identified any medical evidence of record which suggests that appellant was aware or should have been aware of a work-related cause of his hearing loss more than three years prior to his May 24, 2013 filing.¹⁵

In addition, OWCP has not identified any statements made by appellant showing that he was aware of a possible work-related cause for his claimed hearing loss more than three years prior to his May 24, 2013 filing. As noted, appellant indicated that he was not aware of a work-related cause for this hearing loss until April 25, 2013 when he reviewed a February 28, 2013 report of Dr. Logan. For these reasons, OWCP improperly denied his hearing loss claim on the grounds that it was untimely filed.

Therefore, the case shall be remanded to OWCP for consideration of appellant's claim as a timely claim for work-related hearing loss. It shall issue an appropriate decision regarding his claim that he sustained a hearing loss due to exposure to noise at work.

¹³ Appellant also indicated that he first noticed that he had a hearing loss about five years prior to filing his claim in May 2013.

¹⁴ In his February 28, 2013 report, Dr. Logan noted that appellant reported working "in a noisy environment for many years" and diagnosed "binaural sensorineural hearing loss."

¹⁵ For example, the current record does not contain contemporaneous evidence such as audiograms taken during federal employment which show significant progressive loss or which contain notations indicating a noise-induced hearing loss. See *William C. Oakley*, 46 ECAB 519 (2005).

CONCLUSION

The Board finds OWCP improperly denied appellant's hearing loss claim on the grounds that it was untimely filed. The case is remanded to OWCP for further development of the evidence.

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: August 15, 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