United States Department of Labor
Employees' Compensation Appeals Board

W.A., Appellant	)	
and	)	**Docket No. 14-1197**
	)	**Issued: December 19, 2014**
TENESEE VALLEY AUTHORITY, PARADISE FOSSIL PLANT, Drakesboro, KY, Employer	)	

Appearances:
Ronald K. Bruce, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 29, 2014 appellant, through counsel, filed a timely appeal from an April 9, 2014 decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for hearing loss as untimely. 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 this case.

ISSUE

The issue is whether OWCP properly determined that appellant's claim for occupational hearing loss is barred by the applicable time limitation provisions of FECA.

FACTUAL HISTORY

On March 12, 2013 appellant, then a 55-year-old former boilermaker and welder, filed an occupational disease claim (Form CA-2) alleging that he sustained a bilateral hearing loss due to hazardous noise exposure at work prior to his retirement on May 22, 1991. He stated that he first

[1] 5 U.S.C. § 8101 *et seq.*

became aware of his hearing loss on January 1, 2003 and of its possible relationship to his federal employment on March 1, 2013 when he consulted Dr. William A. Logan, an attending Board-certified otolaryngologist. Appellant submitted a March 1, 2013 letter to the employing establishment asserting that he had "just been advised by a physician for the first time that [he had] an occupational hearing loss" related to his federal employment.

In an April 2, 2013 letter, OWCP advised appellant of the evidence needed to establish his claim, including a medical report diagnosing a hearing loss and explaining how that loss was related to his federal employment.

In response, appellant submitted an April 3, 2013 statement noting that, from 1982 to 1991, he was exposed to hazardous noise from "gouging, jack hammers, hammering on metal, turbines, large fans, large pumps, large air compressors, and conveyor belts." He "occasionally wore earplugs." Appellant also described noise exposure from private sector employment in chemical plants and paper mills. He did not provide the dates of these exposures. Appellant again asserted that he first noticed his hearing loss "approximately 10 years ago" and first related it to his federal employment on March 1, 2013.

Appellant submitted a January 15, 1982 employing establishment audiogram performed as part of his initial employment screening. At the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second (cps), the audiogram revealed decibel (dB) losses of 10, 0, 10, and 5 in the right ear, and 5, 0, 10, and 5 in the left ear.[2]

In a January 18, 2013 report, Dr. Logan noted appellant's history of occupational noise exposure. He obtained an audiogram. At the frequency levels of 500, 1,000, 2,000, and 3,000 cps, the audiogram revealed dB losses of 20, 20, 30, and 35 in the right ear and 25, 25, 35, and 50 in the left ear. Dr. Logan diagnosed a bilateral high frequency mild to moderate sensorineural hearing loss.

In a May 10, 2013 letter, the employing establishment asserted that appellant did not timely file his claim within three years of the date of injury. It asserted that he was last federally employed on May 20, 1991. Appellant worked intermittently for the employing establishment from January 8, 1982 to May 22, 1991. The employing establishment provided his work history showing that he worked with boilers and related equipment from January 1977 through May 22, 1991 when he was laid off. Appellant was rehired as a contractor on May 22, 1991 and continued working as a boilermaker through September 19, 2012. The employing establishment noted that he only had one audiogram during his federal employment, which did not constitute actual notice to the employing establishment within 30 days of the injury. It acknowledged that industrial hygiene surveys showed that noise levels for the boilermaker craft were between 60 and 96 dB, with exposure for an average four to six hours a day. Employees in the boilermaker craft were provided earplugs and required to wear them.

[2] He also provided employing establishment nurse's notes dated March 29, 1982 to November 1, 1989 unrelated to hearing loss or noise exposure.

In a May 20, 2013 report, an OWCP medical adviser opined that the January 15, 1982 audiogram was normal. The medical adviser noted that the January 18, 2013 audiogram was the earliest evidence documenting a hearing loss.

By decision dated July 23, 2013, OWCP denied appellant's claim on the grounds that it was not timely filed under the three-year time limitation at section 8122 of FECA. It found that he did not file his claim until March 12, 2013, more than three years after January 1, 2003, the date he first became aware of the connection between the claimed hearing loss and his employing establishment. OWCP further found that the evidence did not establish that the employing establishment had actual notice of the hearing loss within 30 days of the date of injury.

In a July 30, 2013 letter, counsel requested a telephonic hearing, held January 23, 2014. At the hearing, appellant described noise from motors, turbines, heavy equipment, grinding, and hammering. He also performed contract work "out of a union hall." Appellant asserted that he first noticed a hearing loss approximately 10 years previously but did not seek medical attention until March 1, 2013. He described difficulty understanding conversations and hearing high pitched sounds. Counsel asserted that appellant's claim was timely under *William C. Oakley*,[3] in which the Board held that a claimant was not required to file a claim "until he learned from a physician that his hearing loss was work related." He also contended that under the Board's rulings in *Beth C. Chaput*[4] and *Glen C. Chasteen*,[5] "if any part of the impairment or hearing loss [was] due to noise exposure with a [employing establishment] the entire loss is to be considered compensable and employment related."[6]

Following the hearing, counsel submitted a March 4, 2014 report from Dr. Logan opining that appellant's occupational noise exposure at the employing establishment contributed to his hearing loss. The employing establishment submitted February 28, 2014 comments to the hearing transcript asserting that appellant was issued appropriate ear protection due to his exposure to hazardous noise.

By decision dated and finalized April 9, 2014, an OWCP hearing representative affirmed its July 23, 2013 decision finding that appellant's claim was not timely filed. The hearing representative found that appellant provided no "reasonable explanation as to why [appellant] would have waited 10 years after noting hearing loss before seeking a medical opinion on that loss." The hearing representative further found that, as appellant was required to wear ear defenders at work, he "should have been on notice that exposure to hazardous noise could potentially contribute to hearing loss." The hearing representative also noted that there was no

[3] 56 ECAB 519 (2005).

[4] 37 ECAB 158 (1985).

[5] 42 ECAB 493 (1991).

[6] Following the hearing, counsel provided a copy of the Board's decision and order in *supra* note 3. Counsel submitted minor corrections to the transcript and a March 4, 2014 response to the employing establishment's comments, asserting that the claim was timely filed.

evidence of record that appellant sustained a hearing loss prior to leaving federal employment in 1991.

LEGAL PRECEDENT

Under section 8122 of FECA,[7] as amended in 1974, a claimant has three years to file a claim for compensation.[8] In a case of occupational disease, the Board has held that 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 employing establishment. 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 employing establishment, such awareness is competent to start the limitation period even though he or she does not know the nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[9] Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of his or her last exposure to the implicated factors.[10] Section 8122(b) provides that, in latent disability cases the time limitation 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 his employment and the compensable disability.[11]

Even if the claim is not filed within the three-year period, it may be regarded as timely under section 8122(a)(1) if appellant's immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days such that the immediate supervisor was put reasonably on notice of an on-the-job injury or death.[12] In interpreting section 8122(a)(1) of FECA, OWCP's procedure manual states 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.[13] The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program for hazardous noise exposure is 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.[14] A hearing loss

[7] 5 U.S.C. § 8122.

[8] *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); *see* 20 C.F.R. § 10.101(b).

[9] *Larry E. Young*, 52 ECAB 264 (2001); *Duet Brinson*, *id*.

[10] *See Larry E. Young*, *id*.

[11] 5 U.S.C. § 8122 (b); *Bennie L. McDonald*, 49 ECAB 509, 514 (1998).

[12] *William C. Oakley*, 56 ECAB 519 (2005); *Duet Brinson*, *supra* note 8; *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6(c) (March 1993); *L.C.*, 57 ECAB 740 (2006); *Ralph L. Dill*, 57 ECAB 248 (2005).

[14] *Ralph L. Dill*, *id.; James W. Beavers*, 57 ECAB 254 (2005).

identified on such a test would constitute actual knowledge on the part of the employing establishment of a possible work injury.[15]

ANALYSIS

Appellant asserted in his March 1, 2013 claim, an April 3, 2013 letter and at the January 23, 2014 hearing that he first realized he had a hearing loss in early 2003. He explained that he was aware of the hearing loss because he had difficulty hearing conversations and high-pitched sounds. In these same documents, appellant asserted that he was unaware of a possible relationship between his hearing loss and occupational noise exposure until March 1, 2013, the date he first consulted Dr. Logan, an attending Board-certified otolaryngologist. He did not explain why he delayed seeking medical treatment for 10 years after first noticing his hearing loss.

Under section 8122(b), the three-year time limitation begins to run when appellant became aware of causal relationship, or if he continued to be exposed to noise after awareness, the date he is no longer exposed to noise. He retired from federal employment on May 22, 1991. Therefore, the three-year-time limitation began to run on May 22, 1991.

Appellant contended that, although he was aware of some hearing loss in early 2003, he did not realize until March 1, 2013 that it could have been caused by noise exposure at work. The Board finds that, under the circumstances of the case, it is not reasonable for him to assert that he did not know that his work as a boilermaker between January 1977 and May 22, 1991, with exposure to turbines, jackhammers, large air compressors, and hammering on metal, could have caused a hearing loss, until Dr. Logan mentioned it on March 1, 2013. The employing establishment required appellant to wear ear protection. This should have indicated to appellant prior to his retirement in 1991 that tool and machine noise at work was loud enough to damage his hearing. The Board therefore finds that the claim was not filed within the three-year-time period under section 8122(b).

As set forth above, appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate supervisor, another employing establishment official or employing establishment physician or dispensary had actual knowledge of the injury within 30 days of his last exposure to noise, *i.e.*, within 30 days of May 22, 1991.[16] The record contains a January 15, 1982 employing establishment audiogram, taken in conjunction with his hiring physical. This audiogram did not demonstrate a hearing loss. It does not put the employing establishment on notice that appellant sustained a hearing loss.

Appellant has not submitted evidence demonstrating that the employing establishment had actual notice of the claimed hearing loss within 30 days of his retirement on May 22, 1991.

[15] *See* 5 U.S.C. § 8122(a)(1); Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 2.801(3); *Ralph L. Dill*, *supra* note 13*; Roger D. Dicus*, 56 ECAB 290 (2005); *Larry E. Young*, *supra* note 9.

[16] *Ralph L. Dill*, *supra* note 13; *see* 5 U.S.C. § 8122(a)(1); Federal (FECA) Procedure Manual, *id.* at Chapter 2.801(3); *Larry E. Young*, *supra* note 9.

Therefore, the Board finds that his claim was not timely filed within the three-year time limitation under section 8122 of FECA.[17]

On appeal, counsel asserts that appellant's claim was timely filed under the Board's ruling in *William C. Oakley*,[18] which held that under section 8122(b), in latent disability cases, the time limitation does not begin to run until the claimant is aware, or should reasonably have been aware, of the causal relationship between employment and the claimed condition. He contends that, under *Oakley*, the three-year time limitation in this case should begin to run on March 1, 2013, the date that Dr. Logan first told appellant that his hearing loss could be related to hazardous noise exposure at work. The Board finds, however, that the present case is clearly distinguishable from *Oakley* because here appellant did not have a latent condition. Appellant stated in his claim form, in an April 3, 2013 statement, and at the January 23, 2014 hearing that he was aware of his hearing loss in early 2003, upon difficulty understanding conversations and hearing high-pitched sounds. The condition had clearly manifested. In contrast, the Board found that *Oakley's* hearing loss was a latent disability as he was unaware that he had hearing loss until a medical examination approximately nine years after he retired. Therefore, *Oakley* is not applicable to the present case.

Counsel also contends that the lack of employing establishment industrial hygiene audiograms in the present case prejudiced appellant's claim. The Board notes, however, that annual employing establishment audiograms obtained as part of a testing program for hazardous noise exposure are sufficient to give an employing establishment actual notice of an occupationally-related hearing loss.[19] In the present case, the only employing establishment audiogram of record was taken as part of a hiring physical in 1982. There is no evidence that appellant was part of an industrial hygiene program to monitor possible hearing loss.

Counsel also asserts that the employing establishment did not provide adequate hearing protection. However, he did not submit any factual evidence to support this allegation or how it relates to the timeliness issue.

Counsel also argues that under the Board's holdings in *Beth C. Chaput*[20] and *Glen C. Chasteen*,[21] it was "not necessary to prove that employment factors significantly contributed to a condition for the purpose of establishing a causal relationship." The Board notes that he is correct insofar that there is no apportionment under FECA. However, this doctrine does not relieve a claimant of the burden of establishing a timely claim. As appellant's claim is not timely, it is premature to address the medical issue of causal relationship in this case.

[17] The Board notes that, even if the time for filing a claim began to run when appellant first noted being aware of his hearing loss, in early 2003, the claim filed in 2013 would still be untimely.

[18] 56 ECAB 519 (2005).

[19] *James W. Beavers*, *supra* note 14.

[20] *See supra* note 4.

[21] *See supra* note 5.

Counsel also asserts that OWCP's conclusion that the claim was not timely filed was "contrary to logic and deductions from established facts" under *William F. Osborne*,[22] *Francis H. Smith*[23] and *Leslie M. Collins*,[24] cases which discuss the abuse of discretion standard. As explained above, appellant did not timely file his claim within the three-year time limitation which began to run on May 22, 1991. Therefore, OWCP's finding that the claim was not timely filed is appropriate under the law and facts of the case and does not constitute an abuse of discretion.

CONCLUSION

The Board finds that appellant's claim for hearing loss was not timely filed.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 9, 2014 is affirmed.

Issued: December 19, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[22] 46 ECAB 198 (1994).

[23] 46 ECAB 392 (1995).

[24] 46 ECAB 1028 (1995).