United States Department of Labor
Employees' Compensation Appeals Board

T.M., Appellant	)	
and	)	**Docket No. 14-1631**
	)	**Issued: December 2, 2014**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 21, 2014 appellant filed a timely appeal from a February 24, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 appellant filed a timely claim for compensation under 5 U.S.C. § 8122.

On appeal, appellant contends that he underwent yearly hearing tests at the employing establishment which clearly showed that hearing loss was occurring. He claims that his failure to pass the hearing test was noted by the technician who administered the test and that he was scheduled by his supervisor to repeat the hearing test several times. Thus, appellant argues that

[1] 5 U.S.C. § 8101 *et seq.*

his supervisor had knowledge of the injury when it was occurring. He notes that, while he does not have copies of the audiograms to submit, they can be retrieved from the employing establishment. Appellant further contends that the ringing in his ears has gotten worse over time.

FACTUAL HISTORY

On December 16, 2013 appellant, then a 73-year-old retired rigger, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral hearing loss due to working around loud noise during the course of his federal employment. He stated that he first became aware of his condition on January 1, 1990 and first related his condition to his employment on that date. Appellant noted that he was not notified a claim for hearing loss compensation could be filed and that this was the reason for his delay in filing his claim. He retired effective March 31, 1993. Appellant reported that he received hearing aids in 2008 through a Veterans Administration claim.

In a January 3, 2014 letter, OWCP advised appellant of the deficiencies in his claim and requested additional evidence because the submitted evidence did not show that his claim was timely filed or that the noise exposure he experienced caused injury. It afforded him 30 days to submit additional evidence and respond to its inquiries.

Appellant submitted a position description, pay rate information, a job application and his employment history. The position description reflected appellant's duties as a rigger and described that the incumbent would be exposed to industrial noises generated or caused by shipboard operating machinery and equipment. Noise levels would be high due to high speed machinery. Appellant worked as a rigger from 1967 to 1993. From 1993 to 2000 he was a delivery driver with no significant noise exposure.

In a letter also dated January 3, 2014, OWCP informed the employing establishment of appellant's hearing loss claim and requested additional information, including copies of all medical examinations pertaining to hearing or ear problems, preemployment examination and all audiograms, and a statement indicating if he was in a hearing conservation program while employed. The employing establishment did not respond.

In a report dated October 14, 2013, Dr. Richard Seaman, a Board-certified otolaryngologist, diagnosed bilateral high frequency sensorineural hearing loss and tinnitus. He reviewed appellant's employment history and calculated his ratable binaural hearing loss according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* fifth edition at five percent. Dr. Seaman noted that no additional rating for tinnitus was indicated. He indicated that appellant's hearing loss could well have been caused by occupational noise damage, but could not make that determination without reviewing his occupational testing by the employing establishment.

By decision dated February 24, 2014, OWCP denied appellant's claim for an employment-related hearing loss as it was untimely filed. Appellant's claim was denied because the evidence did not support a finding that his claim was filed within three years of the date of injury or that his immediate supervisor had actual knowledge within 30 days of the date of

injury. The decision found that there was no evidence that appellant was part of a hearing conservation program.

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) [T]he 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) [W]ritten notice of injury or death as specified in section 8119 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 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]

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.[6]

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

[3] 5 U.S.C. § 8122(a).

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

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

[6] *See Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3a(3)(c) (March 2011) which states: If an agency, in connection with a recognized environmental hazard, has an employee testing program and a test shows the employee to have positive findings this should be accepted as constituting actual knowledge. For example, an agency where employees may be exposed to hazardous noise levels may give annual hearing tests for exposed employees. A hearing loss identified on such a test would constitute actual knowledge on the part of the agency of a possible work injury.

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 the condition and his or her 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.[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]

OWCP regulations and FECA procedure manual provide that, in the absence of a reply from the employing establishment, OWCP may accept the allegation of appellant as factual.[11]

ANALYSIS

The Board finds that this case is not in posture for decision.

On December 16, 2013 appellant filed an occupational disease claim alleging that he sustained a hearing loss due to factors of his federal employment. Regarding the relationship of the claimed condition to his work, appellant stated that he first became aware of his claimed condition and that it was caused or aggravated by his employment on January 1, 1990. He has not alleged that his hearing loss was a latent condition. Appellant retired from the employing establishment on March 31, 1993.

Although the date of appellant's injury was listed as January 1, 1990, the date of his last exposure to noise in his federal employment position was presumably his date of retirement on March 31, 1993. However, his claim for compensation was not filed until December 16, 2013, more than 20 years after he was last exposed to the claimed employment factors as a rigger for the employing establishment.

[7] *See Larry E. Young*, *supra* note 4.

[8] *Id.*

[9] 5 U.S.C. § 8122(b); *see Luther Williams, Jr.*, 52 ECAB 360 (2001).

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

[11] 20 C.F.R. § 10.117(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.10(a) (June 2011).

Appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate superior had actual knowledge of the injury within 30 days or under section 8122(a)(2) if written notice of injury was given to his immediate superior within 30 days as specified in section 8119. He claimed before OWCP and on appeal that his hearing loss was documented by the employing establishment. OWCP denied the claim based upon a finding that appellant had not established that he was as part of a hearing conservation program.

The Board notes, however, that OWCP requested employment and medical records from the employing establishment by letter dated January 3, 2014, specifically asking whether appellant participated in an employer hearing conservation program. The employing establishment did not respond. Appellant's claim would be timely if such a program were in place at the employing establishment.[12] OWCP advised the employer that no response would cause the claim to be accepted.

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While an employee has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence,[13] especially when such evidence is of the character normally obtained from the employing establishment or other government source.[14] It has the obligation to see that justice is done.[15] The evidence regarding any hearing conservation programs would be in the possession of the employer.

For these reasons, the Board finds that the case must be remanded to OWCP for further development. OWCP shall request that the employing establishment submit any and all medical records pertaining to appellant's claim in its possession relating to the hearing loss claim. After conducting such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[12] *Supra* note 6.

[13] *Claudia A. Dixon*, 47 ECAB 168 (1995).

[14] *R.L.*, Docket No. 12-86 (issued August 29, 2012); *S.A.*, Docket No. 09-1551 (issued January 21, 2010).

[15] *Id.; see also William J. Cantrell*, 34 ECAB 1233 (1983); *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: December 2, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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