

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

C.F., Appellant)

and)

DEPARTMENT OF THE NAVY, NAVAL)
SUPPLY CENTER, Bremerton, WA, Employer)

Docket No. 13-1807
Issued: January 6, 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 July 29, 2013 appellant filed a timely appeal from a June 25, 2013 merit decision of the Office of Workers' Compensation Programs. 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.

ISSUE

The issue is whether appellant filed a timely claim for compensation under 5 U.S.C. § 8122(a).

FACTUAL HISTORY

On December 12, 2012 appellant, then a 72-year-old forklift operator, filed an occupational disease claim alleging that on January 1, 1995 he first became aware of his bilateral hearing loss and realized that it was caused or aggravated by loud noise at work. He retired from

¹ 5 U.S.C. § 8101 *et seq.*

the employing establishment on September 30, 1999. Appellant stated that his claim was not filed within 30 days of his injury because he was not notified that he could file a claim. A supervisor, whose signature is illegible, indicated on the claim form that appellant first reported his claimed injury to the employing establishment on January 28, 2013.

In a federal occupational hearing loss claim checklist dated December 12, 2012, appellant stated that he was exposed to constant ringing at work. On December 12, 2012 he described his federal and nonfederal work history and exposure to noise from 1958 to 1999.

An October 17, 2012 audiogram showed 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 15, 20, 20 and 55 respectively. Testing for the left ear at the same frequency levels revealed decibel losses of 15, 20, 25 and 60 respectively.

In a December 17, 2012 medical report, Dr. Gerald G. Randolph, a Board-certified otolaryngologist, advised that appellant had bilateral sensorineural hearing loss. He determined that appellant had no impairment to the right ear and 7.5 percent impairment to the left ear, resulting in a 1.25 percent binaural hearing loss under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Dr. Randolph further determined that appellant had one percent impairment due to tinnitus. He recommended bilateral fitting of appropriate hearing aids. Dr. Randolph noted that appellant had retired in 1999 and requested the opportunity to review the prior industrial audiograms to determine the extent of his hearing loss at or near the time he left employment and whether hearing aids would have been indicated at that time.

By letter dated March 8, 2013, OWCP requested that appellant submit additional evidence to establish his claim. It noted that the submitted evidence did not establish that he provided timely notification of his work injury or that he was injured while in the performance of duty. Appellant was afforded 30 days to submit the requested evidence. It also requested that the employing establishment submit factual and medical evidence regarding his occupational noise exposure. No further information was received.

In a June 25, 2013 decision, OWCP denied appellant's hearing loss claim as it was untimely filed. There was no evidence to support a finding that his claim was timely 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. OWCP found that the date of appellant's injury was January 1, 1995 and his claim for compensation was not filed until December 12, 2012.

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

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

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.”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 For actual knowledge of a supervisor to be regarded as timely filed, an employee must show not only that the immediate superior knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.⁶

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, and the Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.⁷

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 or she has a condition which has been adversely affected by factors of his 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.⁸ Where the employee continues

³ 5 U.S.C. § 8122(a).

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

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

⁶ *Delmont L. Thompson*, 51 ECAB 155 (1999).

⁷ 5 U.S.C. § 8119(b); *Delmont L. Thompson*, *supra* note 6.

⁵ *Id.* at § 8122(b); *see Luther Williams, Jr.*, 52 ECAB 360 (2001).

⁸ *Larry E. Young*, *supra* note 4.

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.⁹ The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.¹⁰

The time limitations in section 8122(a) and (b) do 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 grounds that such notice could not be given because of exceptional circumstances."¹¹

ANALYSIS

The Board finds that appellant has not established that his hearing loss claim was filed in a timely manner.

On December 12, 2012 appellant filed an occupational disease claim alleging a bilateral hearing loss due to his federal employment on January 1, 1995, more than four years prior to his resignation from the employing establishment on September 30, 1999. The time limitation for filing the claim began to run on the date of his last exposure on September 30, 1999.¹² Appellant had three years from September 30, 1999 to timely file his claim. As his claim was not filed until December 12, 2012, the Board finds that it was not timely filed within the three-year period of limitation.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate supervisor had actual knowledge of the injury or if he provided written notice within 30 days of his last exposure to noise, *i.e.*, within 30 days of September 30, 1999.¹³ The record does not reflect that appellant provided written notice of injury prior to filing the instant claim, and a supervisor advised that the employing establishment did not receive notice of appellant's injury until January 28, 2013. The Board finds, therefore, that appellant has not established that the employing establishment had knowledge of a hearing loss within 30 days of his last exposure in 1999.

Appellant contended that he was not notified that he could file a claim for his hearing loss. The Board has held that an employee's unawareness of possible entitlement, lack of access to information or ignorance of the law or one's rights and obligations under it do not constitute

⁹ *Id.*

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

¹¹ 5 U.S.C. § 8122(d).

¹² *See Larry E. Young*, *supra* note 4.

¹³ *See* 5 U.S.C. § 8122(a)(1); *Ralph L. Dill*, 57 ECAB 248 (2005).

exceptional circumstances that excuse a failure to file a timely claim.¹⁴ Appellant was not under 21 years old and provided no evidence to show that he was incompetent or was prevented from giving notice by exceptional circumstances. He did not timely file a claim for compensation.¹⁵

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant's claim is barred by the applicable time limitation provisions of FECA.

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 6, 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

¹⁴ *B.J.*, 59 ECAB 660 (2008).

¹⁵ *Id.*