United States Department of Labor
Employees' Compensation Appeals Board

G.Y., Appellant	)	
and	)	**Docket No. 13-1558**
	)	**Issued: May 9, 2014**
TENNESSEE 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:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 18, 2013 appellant, through his attorney, filed a timely appeal from an April 8, 2013 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's claim for a work-related hearing loss is barred by the applicable time limitation provisions of FECA.

On appeal, appellant, through counsel, contends that the July 19, 2013 report of the audiologist for the employing establishment should be stricken from the record. He also contends that his claim was timely filed as he did not know that his hearing loss was related to

[1] 5 U.S.C. § 8122(a).

his federal employment until he reviewed the medical report of his otolaryngologist. Finally, appellant contends that OWCP had actual knowledge of his hearing loss.

FACTUAL HISTORY

On August 8, 2012 appellant, then a 65-year-old former pipefitter (B-maker-AS), filed an occupational disease claim alleging that he suffered from a hearing loss as a result of his federal employment. He contended that he first became aware of his hearing loss on January 1, 1997 and related it to his federal employment on June 25, 2012 when he reviewed a medical report by Dr. Uday Dave, a Board-certified otolaryngologist. The employing establishment controverted the claim and argued that the claim was untimely filed. It noted that appellant's date of last exposure was May 2, 1989 and that he retired effective June 2, 1989. The employing establishment advised that he was not in a hearing conservation program.

By decision dated September 21, 2012, OWCP denied appellant's claim as it was not timely filed. It found that he was aware or reasonably should have been aware of an employment-related hearing loss on January 1, 1997.

On September 24, 2012 appellant submitted a May 17, 2012 report by Dr. Dave, wherein he assessed appellant with chronic bilateral sensorineural hearing loss, not controlled. Dr. Dave noted that appellant complained of difficulty hearing for the past 10 years. In discussing the history of appellant's illness, he briefly addressed appellant's work at the employing establishment. In a July 24, 2012 report, Dr. Dave indicated that he looked at appellant's audiological evaluation dated May 17, 2012 and calculated the hearing loss for binaural hearing at 22.8 percent.

Appellant submitted a statement on September 24, 2012 wherein he indicated that he worked for the employing establishment, where he was exposed to loud noises on a daily basis that were produced by the turbines, large pumps, large fans and hammering. He indicated that he worked as a pipefitter from 1976 to 1978, 1981, 1982, 1984 and 1989. Appellant stated that, while he first noticed some hearing loss in approximately 1997, he did not learn that his hearing loss was related to his employment until June 25, 2012 when he reviewed Dr. Dave's report.

By letter dated October 3, 2012, appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

In an October 23, 2012 report, Dr. Whitney R. Mauldin, a Board-certified audiologist for the employing establishment, reviewed appellant's employment history and noise exposure. He contended that appellant's sole purpose for filing this claim is to knowingly and fraudulently obtain compensation for a hearing loss that he knew existed prior to his federal employment. Dr. Mauldin noted that appellant had no federal employment for the past 23 years. He stated that appellant's initial employment examination in October 14, 1976 showed mild-to-moderate bilateral hearing loss in both ears, that upon rehire in 1989, after intermittent federal employment from August 31, 1977 to July 15, 1985 and no federal employment for four years from July 15, 1985 to March 28, 1989, his reemployment hearing examination indicated decreased thresholds compared to his 1976 examination indicating that his nonfederal employment had exacerbated his hearing loss. Dr. Mauldin indicated that, while working for the employing establishment,

appellant was provided hearing protection and was not exposed to standard threshold shift of 10 decibels or greater at 2,000, 3,000 and 4,000 frequencies, so the employing establishment would not have had any actual knowledge of the work relatedness of the hearing loss. He also disputed appellant's contention that he was not aware of the relationship of his hearing loss and its relation to his federal employment until 2012. Dr. Mauldin argued that audiological tests conducted on appellant when he was first hired already showed a hearing loss and that subsequent tests by the employing establishment, which also showed hearing loss, would have been discussed with appellant. Dr. Mauldin noted that, in a March 27, 1989 form, appellant checked a box indicating that he was aware of preexisting hearing loss upon his rehire to his federal employment. Attached to his opinion are various employee medical reports on appellant. In the March 27, 1989 report, in the medical questionnaire portion, appellant indicates that he suffers from hearing loss.

In a letter to the employing establishment dated June 25, 2012, appellant stated that he has been advised by his physician for the first time that he has an occupational hearing loss related to his employment with the employing establishment.

The record contains medical examination records of the employing establishment. In the medical questionnaire section of the form appellant completed on October 14, 1976, he checked a box indicating that he had no ear disease or injury or hearing loss. In the medical questionnaire completed by appellant for the employing establishment on March 27, 1989 he checked the box indicating that he had ear disease, injury or hearing loss and circled hearing loss.

In a January 29, 2013 letter, Dr. William A. Logan, a Board-certified otolaryngologist, stated that he reviewed Dr. Yeiser's audiogram and that appellant's hearing loss was consistent with hearing loss due to noise exposure and that he believed that appellant's occupational noise exposure at the employing establishment would have contributed to his hearing loss.

At the oral hearing, held before an OWCP hearing representative on February 12, 2013, appellant discussed his federal employment and noted that he was exposed to noise from turbines, boilers, pumps, fans, bail mills and conveyors. He noted that initially he did not wear earplugs and that, although they were provided later, they did not keep the noise out. Appellant testified that he first learned that his hearing loss was related to his employment when he got the report from Dr. Dave. He testified that the employing establishment never gave him the results of any hearing tests. Appellant stated that he knew that noise exposure could cause hearing loss, but did not realize that the noise exposure at his employment had, in fact, caused a hearing loss.

By decision dated April 8, 2013, the hearing representative affirmed OWCP's September 21, 2012 decision.

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 case of injury on or after September 7, 1974, section 8122(a) of FECA provides that an original claim for compensation

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

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 in 30 days.[3]

Section 8119 of FECA provides that 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]

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. 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.[6] 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.[7] 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.[8] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[9]

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[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); *see also R.L.*, Docket No. 13-1177 (issued July 17, 2013).

[6] *Larry E. Young*, *supra* note 4.

[7] *Id.*

[8] 5 U.S.C. § 8112(b); *see Luther Williams, Jr.*, 52 ECAB 360 (2001).

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

ANALYSIS

On August 8, 2012 appellant filed an occupational disease claim alleging that he sustained a hearing loss due to factors of his federal employment. His claim for an occupational disease is considered timely filed if it is filed within three years after he became aware or should have become aware of the relationship between his employment and this hearing loss.[10] The evidence establishes that appellant was last exposed to noise during his federal employment on May 2, 1989. He contended that he first became aware that his hearing loss was connected to his employment on June 25, 2012, when he reviewed the report of Dr. Dave and realized that he had employment-related hearing loss. OWCP's hearing representative determined that appellant first became aware that he sustained a hearing loss and that it was related to his employment at least by March 27, 1989, when he reapplied for employment at the employing establishment and completed a medical questionnaire advising that he had hearing loss.

The Board finds that appellant has not shown that his claim for an employment-related hearing loss was filed in a timely manner as the evidence does not support a finding that the 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 date appellant listed for becoming aware that he had hearing loss was January 1, 1997 and he indicated that he related his hearing loss to his federal employment on June 25, 2012. However, he indicated that on March 27, 1989 on the medical examination record for the employing establishment that he had hearing loss. Furthermore, appellant testified that he was exposed to noise from turbines, boilers, pumps, fans, bail mills and conveyors and that he was not initially provided with noise protection. These factors would indicate that he should have been aware of his hearing loss and its relationship to his employment at least by March 27, 1989. The appropriate standard is that appellant knew or should have known. The Board finds that he should reasonably have been expected to know by March 27, 1989 of the causal relationship between his hearing loss and employment factors.

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) or if written notice of injury was given to his immediate superior within 30 days as specified in section 8119. There is no evidence that appellant satisfied either criteria. There is no evidence of written notice pursuant to section 8119. There is no evidence that audiograms from the time of appellant's federal employment showed such a notable worsening of his hearing during his federal employment such that the immediate superior would have gained actual knowledge of the claimed injury.

Finally, appellant's counsel alleges that the report of Dr. Mauldin must be stricken from the record because no additional evidence submitted after the date of OWCP's decision is to be reviewed pursuant to 20 C.F.R. § 501.2(c)(1). This section of the regulations indicate that the Board's jurisdiction is limited to evidence in the case record that was before OWCP at the time of its final decision and that evidence not before OWCP will not be considered by the Board for

[10] *N.N.*, Docket No. 13-1525 (issued December 13, 2013).

the first time on appeal.[11] Dr. Mauldin's report was submitted to OWCP prior to the issuance of the April 8, 2013 decision. Accordingly, counsel's argument is without merit.

For these reasons, the Board finds that appellant's claim was untimely filed. 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 for a work-related hearing loss is barred by the applicable time limitation provisions of FECA.

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

[11] 20 C.F.R. § 501.2(c)(1).