United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	**Docket No. 14-276**
	)	**Issued: May 2, 2014**
DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, VA, Employer	)	

Appearances:
David G. Jennings, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 20, 2013 appellant, through his attorney, filed a timely appeal from July 3 and October 23, 2013 merit decisions of the Office of Workers' Compensation Programs (OWCP) denying his claim as untimely filed. 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 occupational disease claim is barred by the applicable time limitation provisions of FECA.

FACTUAL HISTORY

On February 27, 2013 appellant, then a 70-year-old pipefitter general foreman, filed an occupational disease claim alleging that he sustained bilateral hearing loss due to noise exposure

[1] 5 U.S.C. § 8101 *et seq.*

at work. He initially became aware of his condition and attributed it to his federal employment duties on January 1, 1982. Appellant was last exposed to the conditions alleged to have caused his hearing loss on April 3, 1997, the date that he retired. He indicated that he was only recently aware that he could file a hearing loss claim.

By letter dated April 3, 2013, OWCP requested that appellant submit additional factual and medical information, including evidence that he timely provided notice of his alleged injury.

In an April 17, 2013 response, appellant described his history of noise exposure while working for the employing establishment from 1966 to 1997. He again indicated that he first related his hearing loss to his work duties in 1982 as it could not "be anything else." Appellant submitted a March 16, 2012 audiogram showing moderate-to-severe hearing loss on the right and high-frequency hearing loss on the left.

The employing establishment obtained audiograms on appellant from March 1960 onward. A March 24, 1978 audiogram revealed moderate-to-severe sensorineural hearing loss on the right. A July 19, 1978 audiogram showed normal findings for the left ear and moderate-to-severe mixed hearing loss of the right ear with a large conductive component. An April 28, 1980 audiogram showed a "sharply downward sloping loss" on the right side. A June 10, 1980 audiogram revealed moderate-to-severe sensorineural hearing loss. Appellant underwent audiograms dated 1986 to 1997 as part of a hearing conservation program by the employing establishment.

On March 26, 2013 the employing establishment confirmed that appellant was exposed to noise during the course of his employment and wore hearing protection. It challenged the timeliness of the claim.

By decision dated July 3, 2013, OWCP denied appellant's claim on the grounds that it was not timely filed.

On July 25, 2010 appellant, through his attorney, requested reconsideration. Counsel resubmitted audiograms obtained by the employing establishment from 1986 to 1997 and asserted that the audiograms demonstrated that his employer had actual knowledge of his noise-induced hearing loss.

In a report dated July 19, 1978, received by OWCP on August 9, 2013, a physician with the employing establishment indicated that an audiogram obtained that date showed normal findings on the left and moderate-to-severe hearing loss on the right with a large conductive loss that would not be occupational. He recommended that appellant be evaluated by a private physician.

In a statement dated February 10, 2013, appellant related that the audiology department at the employing establishment issued him earplugs. He noticed his hearing loss two years after he began work.

In a statement dated April 26, 2013, an audiologist with the employing establishment reviewed appellant's history of noise exposure and medical records. He related that hearing conservation forms indicated that appellant was issued hearing protection in 1961 and was

"provide[d] with hearing conservation training." The audiologist noted that appellant initially filed a claim for hearing loss in 1978 and that at the time of his preemployment physical he had right-sided hearing loss. He recommended an evaluation by a Board-certified otolaryngologist, noting that the hearing loss on the left was below the compensable range and on the right did not appear occupational in nature. On April 30, 2013 Dr. Ernest L. Fair, who specializes in occupational medicine, concurred with the recommendation of the audiologist.

By decision dated October 23, 2013, OWCP denied modification of its July 3, 2013 decision. It found that, while appellant participated in a hearing conservation program, he did not show that the employing establishment had actual knowledge of his claimed injury. OWCP further determined that he did not file his claim within three years from April 3, 1997, the date of last exposure.[2]

On appeal appellant's attorney argues that his participation in the hearing conservation program at the employing establishment establishes actual knowledge of his injury. He asserts that a claim does not need to be filed within three years if the employing establishment had actual knowledge of the injury.

LEGAL PRECEDENT

Section 8122(a) of FECA[3] provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.[4] 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 the employment and the compensable disability.[5] The Board has held that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.[6] Even if a claim is not timely filed within the three-year period of limitation, it would still be regarded as timely under section 8122(a)(1) if the immediate superior had actual knowledge of his alleged employment-related injury within 30 days or written notice of the injury was provided within 30 days pursuant to section 8119.[7] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.[8] The Board has indicated that an employee need only be aware of a possible relationship between his "condition" and his employment to commence the

[2] OWCP indicated that appellant retired on April 3, 1993 rather than April 3, 1997; however, this appears to be a typographical error.

[3] 5 U.S.C. § 8101 *et seq*.

[4] *Id*. at § 8122(a).

[5] *Id*. at § 8122(b).

[6] *See Linda J. Reeves*, 48 ECAB 373 (1997).

[7] 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); *see also Larry E. Young*, 52 ECAB 264 (2001).

[8] *Willis E. Bailey*, 49 ECAB 509 (1998).

running of the applicable statute of limitations.[9] The Board has also 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.[10]

In interpreting section 8122(a)(1) of FECA, OWCP procedures provide 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.[11]

ANALYSIS

The Board finds that appellant's claim was timely filed. As noted above, if an employee continues to be exposed to injurious working conditions, the time limitation begins to run on the date of last exposure.[12] Appellant ceased to be exposed to work-related noise when he retired on April 3, 1997. Therefore, the time limitation provisions began to run on that date. As appellant did not file a claim for hearing loss until February 2013, his claim was filed outside the three-year time limitation period.[13] However, his claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate supervisor had actual knowledge of the injury within 30 days of his last exposure to the implicated employment factors. To have actual knowledge, the supervisor must be aware that appellant attributed his hearing loss to an injury sustained in the performance of duty or to some other factor of employment.[14]

On appeal appellant's attorney contends that his supervisor had actual knowledge of his hearing as he was part of a hearing conservation program. The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with employee testing programs 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.[15] OWCP's procedure manual, interpreting section 8122(a)(1) of FECA 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

[9] *Edward C. Horner*, 43 ECAB 834, 840 (1992).

[10] *See J.B.*, Docket No. 10-2025 (issued June 17, 2011); *Jose Salaz*, 41 ECAB 743 (1990).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(c) and 6(c) (March 1993); *see also James A. Sheppard*, 55 ECAB 515 (2004).

[12] *See Larry E. Young*, 52 ECAB 264 (2001).

[13] 5 U.S.C. § 8122(b).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3a(3)(b) (March 1993).

[15] *See Joseph J. Sullivan*, 37 ECAB 526 (1986); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(c) (March 1993).

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."[16]

The record supports that appellant participated in an annual hearing conservation program as early as 1986 and that the results indicated various levels of hearing loss. As noted, OWCP procedures provide 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.[17] On April 30, 2013 an audiologist with the employing establishment related that appellant had hearing loss on the right side at the time of his preemployment physical and had initially claimed hearing loss in 1978. He recommended an evaluation by a private physician. In a report dated July 19, 1978, a physician found that appellant's audiogram revealed moderate-to-severe right-sided hearing loss with a large conductive component that would not be occupational. The physician also recommended a consultation with a private physician.

The Board finds that the evidence of record is sufficient to establish that the employing establishment had actual knowledge within 30 days of the date of last exposure that appellant believed that he had hearing loss as a result of his employment duties. While it is not clear whether appellant's hearing loss resulted totally from his federal employment, audiograms from the employing establishment document hearing loss and it appears that the employing establishment was aware in 1978 that he attributed some of his hearing loss at least in part to federal employment. Consequently, his claim for compensation for hearing loss was timely filed.[18] The case will be remanded to OWCP for further development to determine if appellant sustained hearing loss causally related to factors of his federal employment. Following such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant's claim was timely filed.

[16] Federal (FECA) Procedure Manual, *id*.

[17] *Id*. at Chapter 2.801.3(c) and 6(c) (March 1993); *see also James A. Sheppard*, *supra* note 11.

[18] *See Gerald A. Preston*, 57 ECAB 270 (2005); *James A. Sheppard*, *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the October 23 and July 3, 2013 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 2, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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