

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

L.E., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
FACILITIES ENGINEERING COMMAND,
San Diego, CA, Employer**

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**Docket No. 14-1551
Issued: October 28, 2014**

Appearances:
David G. Jennings, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 1, 2014 appellant, through counsel, filed a timely appeal from the June 12, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 OWCP properly denied appellant's hearing loss claim on the grounds that it was untimely filed.

FACTUAL HISTORY

On March 28, 2014 appellant, then a 68-year-old former contract surveillance representative, filed an occupational disease claim (Form CA-2) alleging that he sustained a

¹ 5 U.S.C. §§ 8101-8193.

bilateral hearing loss due to exposure to hazardous noise at work. He noted that he first became aware of his claimed hearing loss and its relationship to his federal employment on January 1, 1990. Appellant stated that he related the hearing loss to occupational noise exposure because it “couldn’t be anything else.” He delayed filing his claim for more than 30 days after January 1, 1990 because it only recently came to his attention that he could file a claim.²

In an April 1, 2014 letter, OWCP requested that appellant submit a detailed history of his occupational noise exposure, describe any nonoccupational exposure to hazardous noise and submit medical reports and audiograms from any treatment for hearing loss. It advised him that he must also submit evidence to establish that his claim was filed within three years of the date he first related his condition to his employment. OWCP afforded appellant 30 days to submit the requested evidence.

In response, appellant stated that he was exposed to hazardous noise during his federal employment from 1965 to 1967 and 1972 to 1999 when he worked in various positions as a shipfitter and shipbuilding specialist. In all of these positions, he was exposed to hazardous noise from heavy machines and pneumatic tools, including those used for hammering, grinding, gouging, chipping and sandblasting. Appellant indicated that he was provided with safety devices while he worked in these positions. He stated that he was last exposed to noise in his federal employment when he stopped work as a shipbuilding specialist in December 1999.³ Appellant indicated that he had federal employment as a contract surveillance representative from February 2000 until his retirement on October 31, 2008, but that he had no exposure to hazardous noise in this position.

Appellant submitted employing establishment audiograms performed as part of a hearing conservation program which showed ratable monaural hearing loss in his right ear.⁴ An October 29, 1996 audiometric test at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 5, 10, 35 and 60 decibels on the right. A September 30, 1999 audiometric test at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 5, 15, 40 and 65 decibels on the right.⁵ The audiograms from the hearing conservation program showed a progression in appellant’s right-sided hearing loss from a nonratable loss to a ratable loss as a December 21, 1981 audiogram had shown a nonratable loss in the right ear.⁶

² On May 13, 2014 appellant filed a claim for a schedule award due to his claimed hearing loss. The record contains documents showing that he had retired from federal employment effective October 31, 2008.

³ The record contains documents from the employing establishment confirming that he was exposed to hazardous noise in the workplace.

⁴ Under FECA, hearing loss impairments are determined by the average of the hearing levels at 500, 1,000, 2,000 and 3,000 cycles per second. If the average is less than 25 decibels, the hearing impairment is not ratable. See American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) at 250-51.

⁵ All of the audiograms submitted by appellant showed a nonratable hearing loss in his left ear.

⁶ The December 21, 1981 audiometric test at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 15, 15, 25 and 25 decibels on the right.

In a June 12, 2014 decision, OWCP denied appellant's claim finding 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 28, 2014, more than three years after his last exposure to hazardous noise in October 2008. 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.

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 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 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 For latent disability cases, section 8122(b) of FECA provides that the time limitation does not begin to run until the claimant is aware of the causal relationship between his or her employment and the compensable disability or should have been aware of this relationship by exercising reasonable diligence.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 or her alleged employment-related injury within 30 days such that the immediate superior was put reasonably on notice of an on-the-job injury or death.¹² In interpreting section 8122(a)(1) of FECA, OWCP procedure provides that, if the employing establishment provides 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 periodic 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

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 *Duet Brinson*, *supra* note 8.

¹⁰ *Larry E. Young*, 52 ECAB 264 (2001).

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

¹² *Id.* at § 8122(a)(1).

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).

loss, such as to put the immediate supervisor on notice of an on-the-job-injury.¹⁴ A hearing loss identified on such a test would constitute actual knowledge on the part of the employing establishment of a possible work injury.¹⁵

ANALYSIS

Appellant clearly indicated that he was aware of a relationship between his claimed hearing loss and his federal employment as of January 1, 1990. Under section 8122(b), the time limitation begins to run when he became aware of causal relationship, or, if he continued to be exposed to noise after awareness, the date he was no longer exposed to noise. Appellant was last exposed to hazardous noise from his federal employment on December 31, 1999.¹⁶ Therefore, the three-year time limitation began to run no later than December 31, 1999. As appellant did not file his occupational disease claim until March 28, 2014, the Board finds that it was not filed within the three-year time period under section 8122(b).

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 within 30 days of his last exposure to hazardous noise in federal employment, *i.e.*, within 30 days of his last exposure no later than December 31, 1999.¹⁷ The Board finds that the employing establishment conducted a program of audiometric testing for which appellant submitted a series of audiograms obtained prior to his retirement. These audiograms obtained as part of a hearing conservation program, are sufficient to establish actual knowledge of the claimed hearing loss within 30 days of his last noise exposure which occurred no later than December 31, 1999. Of note, an October 29, 1996 audiometric test at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 5, 10, 35 and 60 decibels on the right. In addition, a September 30, 1999 audiometric test at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 5, 15, 40 and 65 decibels on the right. This ratable hearing loss¹⁸ constitutes actual knowledge by the employing establishment of a possible work-related hearing loss within 30 days of his last noise exposure which occurred no later than December 31, 1999.¹⁹ Therefore, appellant's hearing loss claim is considered timely.

The case must be remanded for OWCP to address the merits of the claim. After carrying out this development, OWCP shall issue an appropriate decision.

¹⁴ *L.B.*, Docket No. 12-1548 (issued January 10, 2013); *James W. Beavers*, 57 ECAB 254 (2005).

¹⁵ See 5 U.S.C. § 8122(a)(1); Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 2.801.3; *G.C.*, Docket No. 12-1783 (issued January 29, 2013); *Ralph L. Dill*, *supra* note 13.

¹⁶ Appellant indicated that he was not exposed to hazardous noise in his federal employment after the date in December 1999 that he stopped working as shipbuilding specialist. The precise date that appellant stopped working as a shipbuilding specialist in December 1999 remains unclear from the record.

¹⁷ See *supra* note 12.

¹⁸ See A.M.A., *Guides* 250-51.

¹⁹ See *supra* notes 14 and 15.

CONCLUSION

The Board finds that appellant's claim for hearing loss was timely filed. The case is remanded to OWCP for further development.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 12, 2014 is set aside and the case remanded to OWCP for further development in accordance with this decision of the Board.

Issued: October 28, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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