

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

R.M., Appellant)	
)	
and)	Docket No. 15-1730
)	Issued: December 24, 2015
DEPARTMENT OF THE NAVY, PACIFIC)	
FLEET SHIPYARDS, Bremerton, WA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 17, 2015 appellant filed a timely appeal from a June 10, 2015 nonmerit 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 lacks jurisdiction over the merits of this case.²

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence following the June 10, 2015 decision. Because the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final merit decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). However, on November 12, 2015 the Board received a pleading from the Director of OWCP noting that OWCP did receive documentation on July 24, 2015 of hearing tests conducted during appellant's federal employment. The Director indicated that upon return of the case record to OWCP the new evidence would be reviewed by OWCP.

FACTUAL HISTORY

On April 21, 2015 appellant, then a 73-year-old retired chief test engineer, filed an occupational disease claim (Form CA-2) alleging that on November 1, 1993 he first became aware of his bilateral hearing loss and first realized that it was caused or aggravated by duties of his federal employment. He stated that he had not been informed that hearing loss was an injury and that explained his delay in filing. The employing establishment noted that appellant retired on May 27, 1994.

On April 22, 2015 OWCP requested that appellant submit additional evidence to establish his claim. It noted that the evidence of record did not establish that he provided timely notification of his work injury. OWCP also requested that the employing establishment submit any factual and medical evidence related to appellant's noise exposure.

By letter dated February 9, 2015, appellant provided his employment history. He noted that from 1959 through 1979 he worked for the U.S. Navy as a nuclear engineman, where he was exposed to industrial noise for eight hours per day and was not offered safety devices. From 1980 through 1994, appellant worked as a chief test engineer in engine rooms, where he was exposed to industrial noise for four hours per day, and was provided and used hearing protection equipment. He noted hobbies of hunting and woodworking. Appellant stated that his claim was filed in a timely manner because his immediate supervisor had knowledge of his injury when hearing tests were performed in accordance with a hearing conservation program at the employing establishment. He explained that he only realized his hearing loss was a compensable injury when he was informed by the Veterans Administration.

By letter dated May 11, 2015, the employing establishment sent a letter to appellant noting that it had sent its medical records regarding hearing tests to another location, and gave appellant instructions to request medical records from this location.

On May 29, 2015 the employing establishment controverted appellant's claim. It stated, "As [appellant] is retired, there is no supervisor to comment. The [employing establishment] does not know if he was in the hearing conservation program (HCP)... He is instructed that once [his medical file is received from the National Archives and Records Administration], he can then copy and mail his audiograms to our office. We will then be able to comment on the HCP and forward the audiograms to your office...."

By decision dated June 10, 2015, OWCP denied appellant's claim for hearing loss as it was not timely filed within three years of the date of last exposure or that his immediate supervisor had actual knowledge of the hearing loss within 30 days of the date of last exposure. OWCP found that the date of appellant's last exposure was May 27, 1994, his retirement date.

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary issue that precedes any determination on the merits of the claim.³ 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

³ *Charles Walker*, 55 ECAB 238, 239 (2004); see *Charles W. Bishop*, 6 ECAB 571, 571 (1954).

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 within 30 days.⁴

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.⁵ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.⁶ 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.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, 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.⁸

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 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.⁹ 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.¹⁰ The

⁴ 5 U.S.C. § 8122(a).

⁵ *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264, 266 (2001).

⁶ *Laura L. Harrison*, 52 ECAB 515, 517 (2001).

⁷ *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

⁸ 5 U.S.C. § 8122(b); *see Luther Williams, Jr.*, 52 ECAB 360, 361 (2001).

⁹ *Larry E. Young*, *supra* note 5.

¹⁰ *Id.*

requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.¹¹

ANALYSIS

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

On April 21, 2015 appellant filed an occupational disease claim alleging that on November 1, 1993 he became aware of his bilateral hearing loss and first realized that it was caused or aggravated by duties of his federal employment. The employing establishment noted that appellant retired on May 27, 1994. As appellant continued to be exposed to alleged hazardous noise after his realization that it was caused or aggravated by duties of his federal employment, the time limitation for filing the claim began to run on the date of last exposure to hazardous noise, which was his date of retirement on May 27, 1994.¹² Appellant had three years from May 27, 1994 to timely file his claim. As his claim was not filed until April 21, 2015, 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) of FECA if his immediate supervisor had actual knowledge of the injury, or if he provided written notice, within 30 days of his injury, *i.e.*, within 30 days of May 27, 1994. The record does not reflect that appellant provided written notice of injury prior to filing the instant claim, and there is no evidence of record to indicate that a supervisor had actual knowledge within 30 days of May 27, 1994. Although appellant submitted a work history and claimed that he was enrolled in an HCP such that his immediate supervisor had notice, he did not submit any evidence to support these claims. While the Board has recognized in previous cases that evidence regarding any HCPs could be sufficient to establish timely notice of hearing loss,¹³ these documents would be in the possession of the employing establishment. The employing establishment has explained that the records in question had been sent to the National Archives and Records Administration (NARA), were no longer in the possession of the employing establishment, and advised appellant how to gain access to these records.¹⁴

Appellant did not submit further evidence indicating that he had attempted to obtain the records in question. He therefore did not meet his burden of proof to establish enrollment in an HCP indicating actual knowledge by a supervisor of his hearing loss.

Appellant noted that he did not know he could file a claim for hearing loss until he was recently informed by the Veterans Administration. The Board has held that 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 exceptional circumstances that excuse a failure to file a

¹¹ *Debra Young Bruce*, 52 ECAB 315, 317 (2001).

¹² *See Larry E. Young*, *supra* note 5.

¹³ *John J. Sullivan*, 37 ECAB 526 (1986).

¹⁴ *See T.M.*, Docket No. 14-1631 (issued December 2, 2014).

timely claim.¹⁵ As such, the Board finds that appellant did not file a timely claim for compensation.

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 failed to file a timely claim for compensation under 5 U.S.C. § 8122.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 24, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁵ See R.A., Docket No. 12-1339 (issued December 6, 2012).