

FACTUAL HISTORY

This case was previously before the Board.² In a decision dated July 24, 2014, the Board remanded appellant's case to OWCP for further development on the issues of what his date of last exposure to hazardous noise was and whether his immediate supervisor had actual knowledge of his hearing loss within 30 days of the alleged injury. The facts as set forth in the Board's prior decision are incorporated hereby by reference.

By letter dated August 6, 2014, OWCP requested that the employing establishment respond to its inquiries in further development of appellant's claim. It asked for a job title as of the date of injury, the date of his last exposure to hazardous noise, and whether he was exposed to hazardous noise after June 2004. OWCP asked whether appellant previously notified any of his supervisors of hearing loss and whether the employing establishment was made aware of the injury previously. It further requested that the employing establishment provide statements from his previous supervisors verifying whether he gave notice of injury. In particular, OWCP requested that the employing establishment provide a statement from Scott L. Hultquist, appellant's immediate supervisor. It also requested this information from appellant in a letter of the same date, and advised him that it would be contacting his former employing establishment to obtain the relevant information from his supervisor.

On August 8, 2014 appellant responded to OWCP's inquiries. He stated that, to the best of his recollection, his last date of exposure to hazardous noise was in April 2004. Appellant noted that he did not formally notify his supervisor of a hearing loss in April 2004 because he was unaware at that time that hearing loss was taking place. He stated that, by the end of 2004, the loss was noticeable. By 2005, appellant stated that he realized something had to be done to assist his hearing, so he began to look for an audiologist. In May 2006, he stated that he was tested; and, in December 2006, he purchased hearing aids. Appellant noted that his supervisors at the time were aware that he had hearing loss, but did not suggest filing a claim for workers' compensation. He further stated that, as the employing establishment did not have an annual physical examination requirement; therefore, there was no way to document his hearing decline. Appellant noted that his hearing decline probably began in 1996 when he became a member of an alteration installation team, and that he was embarked on naval vessels over 100 times between January 1996 and April 2006.

In a letter dated August 12, 2014, Mr. Hultquist stated that he only learned of appellant's hearing loss when he became his branch head in May 2012, and that at that time he was already using hearing aids to assist him in his hearing.

Appellant's employment record revealed that he was employed as an electronics engineer from February 26, 1989 through January 31, 2014, when he voluntarily retired.

Appellant submitted a reference audiogram dated February 16, 1988.

² Docket No. 14-645 (issued July 24, 2014). On September 16, 2013 appellant, then a 59-year-old electronics engineer, filed an occupational disease claim (Form CA-2) alleging that on December 20, 2004 he became aware of his bilateral hearing loss and first realized it was caused or aggravated by duties of his federal employment. The employing establishment challenged his claim on the basis that it was untimely filed.

In a record of a telephone conversation dated September 9, 2014, the employing establishment notified a claims examiner that appellant was not in a hearing conservation program and that the employing establishment would have no knowledge of a work-related hearing loss.

By decision dated September 10, 2014, OWCP denied appellant's claim for compensation in a merit decision. It found that he had not submitted his claim in a timely manner. OWCP found that appellant was last exposed to hazardous noise in 2004 and that the employing establishment did not have knowledge of his hearing loss within 30 days of his date of injury of December 20, 2004. It further found that it was not evident that he participated in an employer-sponsored hearing conservation program to alternatively meet the timely filing requirement.

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.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 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

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

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).

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 reasonably should have been aware that he 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 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 filed in a timely manner.

On September 16, 2013 appellant filed an occupational disease claim alleging hearing loss due to factors of his federal employment. He stated that he first became aware of the condition's relationship to his federal employment on December 20, 2004. The last date of exposure to hazardous noise alleged by appellant was in April 2004. The employing establishment concurs that his last exposure to hazardous noise occurred in 2004. As appellant learned of his condition and of its relationship to his employment after his last exposure to hazardous noise, the time limitation for filing the claim began to run on the date of his realization of his condition's relationship to his employment, which was December 20, 2004.¹² He thus had three years from December 20, 2004 to timely file his claim. As appellant's claim was not filed until September 16, 2013, 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

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.*

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

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

30 days of his injury, *i.e.*, within 30 days of December 20, 2004.¹³ On the previous appeal of this case under Docket No. 14-645, the Board remanded the case to OWCP for further development of these aspects of his claim. By letter dated August 6, 2014, OWCP asked the employing establishment for appellant's job title as of the date of injury, the date of his last exposure to hazardous noise, and whether he was exposed to hazardous noise after June 2004. It asked whether he previously notified any of his supervisors of hearing loss and whether the employing establishment was made aware of the injury previously. OWCP further requested that the employing establishment provide statements from appellant's previous supervisors verifying whether he gave notice of injury. In particular, it requested that the employing establishment provide a statement from Mr. Hultquist, appellant's supervisor. In a letter of the same date, OWCP also requested this information from appellant.

In a letter dated August 12, 2014, Mr. Hultquist stated that he only knew of appellant's hearing loss when he became his branch head in May 2012, and that at that time he was already using hearing aids to assist him in his hearing. On August 8, 2014 appellant noted that he did not formally notify his supervisor of a hearing loss in April 2004 because he was unaware at that time that the hearing loss was taking place. He further stated that his employing establishment was unaware of his hearing loss, as it did not have an annual physical examination requirement and that, therefore, there was no way to document his hearing decline.

While appellant has the burden to establish his claim, OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment.¹⁴ The Board finds that OWCP has adequately developed the evidence in this case. 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 December 20, 2004. Appellant specifically stated that he did not notify his supervisors and that the employing establishment was unaware of his hearing loss. Appellant's supervisor, Mr. Hultquist, specifically stated that he had no knowledge of appellant's hearing loss until May 2012, when he became appellant's branch head. The Board finds, therefore, that appellant did not establish that his immediate supervisor had actual knowledge or that he had provided written notice of his injury within 30 days of his last exposure on December 20, 2004.

Appellant contended on appeal that he did not know that he could file a claim for hearing loss with OWCP and that an exception should be made on the timeliness element of his claim. The Board has held that an employee's lack of awareness of possible entitlement, lack of access to information, or ignorance of the law or one's rights and obligations under it, does not constitute exceptional circumstances that excuse a failure to file a timely claim.¹⁵ As such, appellant did not file a timely claim for compensation.

¹³ See 5 U.S.C. § 8122(a); *Ralph L. Dill*, 57 ECAB 248, 251 (2005).

¹⁴ See *Robert C. Fay*, 39 ECAB 163 (1987).

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

CONCLUSION

The Board finds that appellant's claim is untimely pursuant to 5 U.S.C. § 8122.

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 20, 2015
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