United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 15-1517**
	)	**Issued: February 25, 2016**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 2, 2015 appellant filed a timely appeal from a June 11, 2015 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 filed a timely claim for compensation under 5 U.S.C. § 8122.

FACTUAL HISTORY

On April 3, 2015 appellant, then an 88-year-old retired rigger, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral hearing loss and tinnitus due to noise exposure during the course of his federal employment. He alleged that his conditions of bilateral hearing loss and tinnitus were documented by the employing establishment's

[1] 5 U.S.C. § 8101 *et seq.*

audiologist. Appellant stated that he first became aware of his hearing loss and tinnitus on February 17, 1982 and first related his condition to his employment on that date, but he asserted that he was not informed that a claim for hearing loss compensation could be filed resulting in his delay in filing his claim. He retired on February 16, 1982.

In a letter dated April 6, 2015, the employing establishment notified appellant that it had received his hearing loss claim. It stated that, after his retirement, its medical facility forwarded all official personnel and medical folders to the National Archives in St. Louis, Missouri and, therefore, it no longer had a copy of any medical examinations pertaining to appellant's hearing or ear problems, audiograms, or preemployment examination. The employing establishment enclosed instructions for appellant to request the medical information that was required by OWCP for his hearing loss claim and requested that he provide a copy of all the documents obtained.

In an April 9, 2015 letter, OWCP advised appellant of the deficiencies in his claim and requested additional evidence because the evidence submitted did not show that his claim was timely filed or that the noise exposure he experienced caused injury. It afforded him 30 days to submit additional evidence and respond to its inquiries. In a letter of April 9, 2015, OWCP advised the employing establishment that it must provide factual information, including medical and employment records, for consideration of appellant's claim. It further advised the employing establishment that federal regulations provide that, in the absence of a full reply from the agency, OWCP may accept claimant's allegations as factual.

Appellant submitted a job application, a notification of personnel action (SF-50) dated February 7, 1966, a position description, pay rate information, and his employment history. He also submitted an audiogram dated March 17, 2015 and a checklist for filing a federal occupational hearing loss claim indicating that he had no history of any previous ear or hearing problems, used to hunt as a hobby many years ago, and first noticed his hearing loss in February 1982 after he retired.

In a letter also dated April 9, 2015, OWCP informed the employing establishment of appellant's hearing loss claim and requested additional information, including copies of all medical examinations pertaining to hearing or ear problems, preemployment examination, and all audiograms, and a statement indicating if he was in a hearing conservation program while employed.

In an April 21, 2015 letter, the employing establishment stated that as appellant was retired, there was no supervisor to comment on the hearing loss claim. It reiterated that it no longer had appellant's medical file and therefore could not say if he was in a hearing conservation program. The employing establishment further indicated that it had instructed appellant on how to obtain his medical records and stated that it would comment on the issue once in receipt of his records. It failed to provide any response to OWCP's inquiry as to whether it maintained a hearing conservation program during appellant's period of employment.

On May 4, 2015 the employing establishment conducted an investigation of appellant's occupational exposure to noise. It found that for the period November 20, 1970 to February 7, 1996 he was exposed to 79 to 89 decibels of continuous lower frequency background noise while employed as a shipfitter. The employing establishment further found that for the period November 20, 1970 to February 16, 1982 appellant was exposed to 100 to 110 decibels of

intermittent upper frequency tool use noise and 79 to 89 decibels of continuous lower frequency background noise while employed as a rigger.

By decision dated June 11, 2015, OWCP denied appellant's claim for employment-related hearing loss and tinnitus finding it was untimely filed. Appellant's claim was denied because the evidence did not support a finding that his 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 decision found that there was no evidence that he was part of a hearing conservation program.

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 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) [T]he 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) [W]ritten notice of injury or death as specified in section 8119 was given within 30 days."[3]

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.[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 an 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 the 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

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

[3] 5 U.S.C. § 8122(a).

[4] *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

[5] *See Laura L. Harrison*, 52 ECAB 515 (2001).

the ultimate result of such affect would be temporary or permanent.[6] 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.[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]

ANALYSIS

The Board finds that this case is not in posture for decision.

On April 3, 2015 appellant filed an occupational disease claim alleging that he sustained bilateral hearing loss and tinnitus due to factors of his federal employment. Regarding the relationship of the claimed condition to his work, he stated that he first became aware of his claimed condition and that it was caused or aggravated by his employment on February 17, 1982. Appellant indicated on his Form CA-2 that an audiologist for the employing establishment documented his bilateral hearing loss and tinnitus prior to his retirement from the Puget Sound Naval Shipyard. He has not alleged that his hearing loss was a latent condition. Appellant retired from the employing establishment on February 16, 1982.

Although the date of appellant's injury was listed as February 17, 1982, the date of his last exposure to noise in his federal employment position was presumably his date of retirement on February 16, 1982. However, his claim for compensation was not filed until April 3, 2015, more than 30 years after he was last exposed to the claimed employment factors as a rigger for the employing establishment.

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) if written notice of injury was given to his immediate superior within 30 days as specified in section 8119. As noted on his claim form (Form CA-2), he noted that his hearing loss and tinnitus was documented by the employing establishment's audiologist. OWCP denied the claim based upon a finding that appellant had not established that he was as part of a hearing conservation program. While participation in a hearing conservation program can establish constructive notice of injury, there is no evidence in the record, other than appellant's assertion on his claim form, demonstrating that such a program was in place at this employing establishment.

The Board notes, however, that OWCP requested employment and medical records from the employing establishment by letter dated April 9, 2015, specifically asking whether appellant

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

[7] *Id.*

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

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

participated in an employing establishment hearing conservation program. In a letter dated April 6, 2015, the employing establishment stated that after retirement, the agency medical facility sent all official personnel and medical folders to the National Archives in St. Louis, Missouri and, therefore, it no longer had a copy of any medical examinations pertaining to appellant's hearing or ear problems, audiograms, or preemployment examination. The employing establishment neither confirmed nor denied that it had a hearing conservation program during appellant's period of employment. Appellant's claim would be timely if such a program were in place at the employing establishment.[10] OWCP regulations and the FECA procedure manual provide that, in the absence of a reply from the employing establishment, OWCP may accept the allegation of appellant as factual -- if claimant's statement is sufficiently clear and detailed as to matters of which he is knowledgeable.[11]

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. It has the obligation to see that justice is done.[12] While an employee has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence,[13] especially when such evidence is of the character normally obtained from the employing establishment or other government source.[14] The evidence regarding the existence of any hearing conservation program would be in the possession of the employer.[15] Once OWCP has begun investigation of a claim, it must pursue the evidence as far as reasonably possible, particularly when such evidence is in the possession of the employing establishment and is, therefore, more readily accessible to OWCP.[16] Appellant has alleged that

[10] *See T.M.*, Docket No. 14-1631 (issued December 2, 2014); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3a(3)(c) (March 2011) which states that if the employing establishment, 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, the employing establishment 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.

[11] 20 C.F.R. § 10.117(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.10(a) (June 2011).

[12] *See R.L.*, Docket No. 12-0086 (issued August 29, 2012) (where the Board remanded the case to OWCP to request the records pertaining to the employee's 1998 letter of resignation and retirement in 2001, as well as any employing establishment records of audiometric testing, and requested that the supervisor address the issue of knowledge of the claimant's hearing loss, as far as possible).

[13] *See T.M.*, *supra* note 10 (where OWCP requested employment and medical records from the employing establishment, specifically asking whether appellant participated in an employer hearing conservation program and the employing establishment did not respond, the Board found that the evidence regarding any hearing conservation programs would be in the possession of the employer and remanded the case for further development noting no response from the employing establishment as to the existence of a hearing conservation program would cause the claim to be accepted).

[14] *Id.*

[15] *Id.*

[16] *See S.A.*, Docket No. 09-1551 (issued January 21, 2010) (where OWCP requested that the employing establishment submit the employee's medical records within a week and the employer informed OWCP that it would submit the records as soon as possible. Nonetheless, OWCP denied the claim two days later. As such, the Board found that it did not pursue the evidence as far as reasonably possible and remanded the case for further development of the hearing loss claim).

his bilateral hearing loss and tinnitus conditions were documented by an employing establish audiologist. By the employing establishment's own admission, appellant's employment and medical records are at the National Archives in St. Louis, Missouri and should be obtained for the record.

For these reasons, the Board finds that the case must be remanded to OWCP for further development. OWCP shall request that the employing establishment respond to the inquiry of whether a hearing conservation program existed at the time of appellant's employment and to submit any and all employment and medical records pertaining to appellant's claim in its possession relating to the hearing loss claim, or alternatively, determine whether the claim should be accepted on the basis of appellant's statements and the available evidence. After conducting such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the June 11, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: February 25, 2016
Washington, DC

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

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

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