United States Department of Labor
Employees' Compensation Appeals Board

G.M., Appellant	)	
and	)	**Docket No. 16-0220**
	)	**Issued: March 15, 2016**
DEPARTMENT OF THE AIR FORCE, AIR FORCE NATIONAL GUARD TITLE 32, Tacoma, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 17, 2015 appellant filed a timely appeal from a July 10, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (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 claim for compensation was filed within the applicable time limitation provisions of FECA.

[1] The Board notes that appellant submitted additional evidence after the July 10, 2015 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision and therefore, this additional evidence cannot be considered on appeal. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 14, 2014 appellant, then a 71-year-old retired aircraft mechanic, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 1984, while he was working, he hit his head on the KC-135 wheel well while all four engines were running. He stated that his hearing protection was knocked off his head and the collision caused him to cut his left eyelid, the bridge of his nose, and his forehead requiring him to get stitches at the hospital. On the reverse side of the form, appellant's supervisor indicated that he was first notified of the incident on August 9, 1984 and appellant sought emergency medical treatment that same date. He checked the box marked "yes" when asked if his knowledge about the facts of injury agreed with appellant's statements. Appellant's supervisor also checked the box marked "yes" when asked was appellant "in the performance of duty?"

By letter dated June 9, 2015, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It informed him of the medical and factual evidence needed and also advised him that the evidence was not sufficient to show that he timely filed his claim. OWCP requested that appellant submit such evidence within 30 days.

By letter dated February 1, 2015, appellant reported that he had retired from the employing establishment in 1995 as a general aircraft mechanic. He stated that working in the field caused him to progressively lose his hearing ability. Appellant discussed the 1984 accident when he hit his head on the KC-135 wheel well while all four engines were running. This knocked his hearing protection off his head and he was lying on the ground with no hearing protection for 5 to 10 minutes. Appellant was transported to the emergency room where he received stitches for his eyelid, nose, and forehead. Directly after the incident, he experienced high pitch sounds in his ears, difficulty hearing, and difficulty understanding the spoken word. Appellant thought the problem would go away but it continued to worsen. He requested hearing aids as a result of his hearing loss.

By decision dated July 10, 2015, OWCP denied appellant's claim on the grounds that it was not timely filed. It found no evidence that the claim had been filed within three years of the injury date or that his immediate supervisor had actual knowledge of his injury within 30 days of the injury date.

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.[4] Compensation

[3] *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002).

[4] *W.L.*, 59 ECAB 362 (2008); *Gerald A. Preston*, 57 ECAB 270 (2005); *Laura L. Harrison*, 52 ECAB 515 (2001).

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.[5]

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 supervisor or 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 person giving the notice.[6] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[7] 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.[8]

When a traumatic injury definite in time, place, and circumstances is involved, the time for giving notice of injury and filing for compensation begins to run at the time of the incident, even though the employee may not have been aware of the seriousness or ultimate consequences of his injury.[9] 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.[10] 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.[11]

[5] 5 U.S.C. § 8122(a). *See J.M.*, Docket No. 09-1563 (issued February 26, 2010); *J.P.*, 59 ECAB 178 (2007); *Cory W. Davis*, 57 ECAB 674 (2006).

[6] 5 U.S.C. § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

[7] *Laura L. Harrison*, *supra* note 4.

[8] *Delmont L. Thompson*, 51 ECAB 155 (1999).

[9] *Emma L. Brooks*, 37 ECAB 407 (1986).

[10] *Supra* note 8.

[11] 5 U.S.C. § 8122(b).

ANALYSIS

Appellant did not file his traumatic injury claim until December 22, 2014, almost 30 years after the August 9, 1984 incident. Therefore, his claim was filed outside the three-year time limitation period which ended August 9, 1987.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate superior or another employing establishment official had actual knowledge of the injury within 30 days of the date of injury.[12] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.[13] There is no supporting evidence that appellant's immediate superior or another employing establishment official had actual or written knowledge of the August 9, 1984 hearing loss injury within 30 days of the date of injury. On the reverse side of appellant's Form CA-1, his supervisor indicated that he was notified of the employment incident on August 9, 1984 and appellant received emergency medical attention. On his Form CA-1, appellant noted that he sustained an injury to his left eyelid, bridge of his nose, and forehead which required him to get stitches. However, his February 1, 2015 narrative report indicates that his hearing loss did not occur until after the employment incident and progressively worsened over time. Thus, the evidence submitted does not substantiate an immediate supervisor's knowledge that appellant sustained work-related hearing loss injury within 30 days of the injury.[14] Knowledge merely of an employee's illness is not sufficient to establish actual knowledge and timeliness; it must be shown that the circumstances were such as to put the supervisor on notice that the alleged injury was actually related to the employment or that the employee attributed it thereto.[15]

The Board finds that appellant has not established actual knowledge by his supervisors of a work-related hearing loss within 30 days of the incident and, therefore, has not established a timely claim.[16] The record is void of any indication that his immediate supervisor had written notice of his work-related hearing loss injury within 30 days. This exception to the statute has not been met and, thus, appellant has failed to establish that he filed a timely claim.

[12] *Larry E. Young*, *supra* note 6. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

[13] *Kathryn A. Bernal*, 38 ECAB 479 (1987).

[14] *See Linda J. Reeves*, 48 ECAB 373 (1997) (where the Board held that while appellant submitted a statement from a former supervisor that established that he had some knowledge of appellant's complaints, this statement was not sufficient to establish that her immediate supervisor had actual knowledge of a work-related injury as the statement only made a vague reference to appellant's health and did not indicate that she sustained any specific employment-related injury such that the knowledge would put the immediate supervisor reasonably on notice of an on-the-job injury or death).

[15] *See id*.; *Roseanne S. Allexenberg*, 47 ECAB 498 (1996) (where the Board held that knowledge of an employee's illness is not sufficient to establish actual knowledge and timeliness of a claim. It must be shown that the circumstances were such as to put the supervisor on notice that the alleged injury was actually related to the employment or that the employee attributed it thereto.

[16] *D.J.*, Docket No. 14-1397 (issued November 14, 2014).

While appellant's statement suggests that he first became aware of his hearing loss at some point after the August 9, 1984 injury, he has not provided sufficient evidence to establish that this is a latent injury claim. When an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his employment, such awareness is competent to start the limitation period even though he does not know the nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[17] Appellant has not identified the date that he became aware of his hearing loss, and has not submitted supporting medical evidence to establish a latent condition. For example, in prior cases the Board has noted that appellant should have been aware of a latent hearing loss as of the date of an audiogram.[18]

Consequently, appellant has not met his burden of proof as he has not established that he filed a timely notice of traumatic injury and claim for compensation under the applicable time limitation provisions of FECA.[19]

To the extent that the February 1, 2015 letter to OWCP could suggest that he continued to be exposed to hazardous noise due to his federal employment until his retirement in 1995, the Board has held, if the employee continues in the same employment, the time limitation begins to run on the date of his last exposure to the implicated factors. Appellant's last date of exposure to any work factors would have been his retirement date of 1995. This also was not within three years of the December 14, 2014 claim.[20] Appellant has therefore not filed 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 claim for compensation within the applicable time limitation provisions of FECA.

[17] *Larry E. Young*, *supra* note 6; *see also W.A.*, Docket No. 14-1199 (issued December 19, 2014); 5 U.S.C. § 8122(b).

[18] *See C.G.*, Docket No 08-1634 (issued January 9, 2009).

[19] *L.S.*, Docket No. 15-132 (issued April 3, 2015).

[20] *See Larry E. Young*, *supra* note 6; *W.A.*, *supra* note 17.

ORDER

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

Issued: March 15, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board