United States Department of Labor
Employees' Compensation Appeals Board

M.N., Appellant	)	
and	)	**Docket No. 17-0931**
	)	**Issued: August 15, 2017**
DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, VA, Employer	)	

Appearances:
David G. Jennings, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 24, 2017 appellant, through counsel, filed a timely appeal from a March 2, 2017 decision of the Office of Workers' Compensation Programs (OWCP). 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.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that appellant submitted additional evidence following the March 2, 2017 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).

ISSUE

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

FACTUAL HISTORY

On November 17, 2016 appellant, then a 64-year-old retired training instructor, filed an occupational disease claim (Form CA-2) alleging that, following an employing establishment hearing evaluation on March 30, 2000, he first became aware of his bilateral hearing loss and first realized that it was caused or aggravated by his federal employment. He explained that his hearing worsened each year that he worked at the employing establishment. Appellant stated that he did not know that a hearing loss claim was available until he retired, and that he was not told of his hearing loss at annual physical examinations. The employing establishment noted that he retired on April 3, 2007.

In a narrative statement dated October 20, 2016, appellant related that he was currently retired, and that he did not relate his hearing loss to his federal employment until a hearing test on April 5, 2012 by his treating physician.

On November 18, 2016 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 in the course of his federal employment.

By letter dated December 15, 2016, the employing establishment responded to OWCP's requests. It noted that appellant was routinely exposed to hazardous noise in the course of his employment, but that he did not submit his claim within three years of becoming aware of his hearing loss and of its relationship to his employment. The employing establishment further noted that it provided and appellant used hearing protection.

By decision dated December 21, 2016, OWCP denied appellant's claim as it was untimely filed. It found that his claim was not timely filed within three years of the date of last exposure or that his immediate supervisor had actual knowledge within 30 days of the date of last exposure. OWCP found that the date of appellant's last exposure was his retirement date, April 3, 2007.

On January 11, 2017 appellant, through counsel, filed a request for reconsideration. With the request for reconsideration, counsel attached copies of audiograms from appellant's federal employment dating from August 14, 1978 through March 29, 2007, reflecting the existence of a hearing conservation program.

An employing establishment hearing conservation data form related the results of an April 10, 1985 reference audiogram and the audiogram results from March 29, 2007. Using the frequencies of 500, 1,000, 2000, and 3,000 cycles per second (cps) the reference audiogram revealed the following: left ear 10, 10, 5, and 10 decibels; right ear 5, 5, 10, and 20 decibels.

Using the same frequencies the March 29, 2007 audiogram revealed the following: left ear 10, 15, 25, and 45 decibels; right ear 10, 15, 30, and 50 decibels. Counsel contended that the audiograms were reflective of the existence of a hearing conservation program and demonstrate that the employing establishment had actual knowledge of an employment-related hearing loss.

By decision dated March 2, 2017, OWCP reviewed the merits of appellant's claim and denied modification of its prior decision, finding that because appellant stated that he had not related his hearing loss to his work until April 5, 2012, his claim remained untimely filed.

LEGAL PRECEDENT

Under section 8122(a) of FECA[4] a claimant has three years to file a claim for compensation.[5] 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 condition and his employment. Such awareness is competent to start the limitation period even if the employee does not know the nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[6] Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of his last exposure to the implicated factors.[7] 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 employment and the compensable disability or should have been aware of this relationship by exercising reasonable diligence.[8]

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 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.[9] In interpreting section 8122(a)(1) of FECA, OWCP procedures provide 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.[10]

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

[4] 5 U.S.C. § 8122(a).

[5] *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); *see* 20 C.F.R. § 10.101(b).

[6] *Duet Brinson*, *id.*

[7] *Larry E. Young*, 52 ECAB 264 (2001).

[8] 5 U.S.C. § 8122(b); *Bennie L. McDonald*, 49 ECAB 509, 514 (1998).

[9] *Id.* at § 8122(a)(1).

[10] 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).

exposure is sufficient to constructively establish actual knowledge of a hearing loss, such as to put the immediate supervisor on notice of an on-the-job injury.[11] A hearing loss identified on such a test would constitute actual knowledge on the part of the employing establishment of a possible work injury.[12]

ANALYSIS

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

Appellant clearly indicated that he was aware of a relationship between his claimed hearing loss and his federal employment as of March 30, 2000. He explained that he underwent an employing establishment evaluation on that date which revealed a hearing loss. Under section 8122(b), the time limitation begins to run when appellant 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 April 3, 2007. Therefore the three-year time limitation began to run no later than April 3, 2007. 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(a).

Appellant's claim would still be regarded as timely filed under 5 U.S.C. § 8122 if his immediate superior had actual knowledge of the injury within 30 days or under section 8122(a) if written notice of injury was given to his immediate superior within 30 days. However, participation in an employing establishment hearing conservation program can also establish constructive notice of injury.[13] A positive test result from an employing establishment program of regular audiometric examination as part of a hearing conservation program is sufficient to establish knowledge of hearing loss so as to put the immediate superior on notice of an on-the-job injury.[14]

Of note, the April 10, 1985 audiometric test at the frequency levels of 500, 1,000, 2,000, and 3,000 cps revealed decibel losses of 5, 5, 10, and 20 decibels on the right. Subsequently, a March 29, 2007 audiometric test at the frequency levels of 500, 1,000, 2,000, and 3,000 cps revealed decibel losses of 10, 15, 30, and 50 decibels on the right. This demonstrates a hearing loss which 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 April 3, 2007.[15] Therefore, appellant's hearing loss claim is considered timely.[16]

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

[12] *L.E.*, Docket No. 14-1551 (issued October 28, 2014).

[13] *See J.C.*, Docket No. 15-1517 (issued February 25, 2016); *see also M.W.*, Docket No. 16-0394 (issued April 8, 2016).

[14] *See W.P.*, Docket No. 15-0597 (issued January 27, 2016).

[15] *See supra* note 12.

[16] *Id.*

The case must be remanded for OWCP to address the merits of the claim. After carrying out this development, OWCP shall issue a *de novo* decision.[17]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further development consistent with this decision.

Issued: August 15, 2017
Washington, DC

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

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

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

[17] *Id.*