United States Department of Labor
Employees' Compensation Appeals Board

C.R., Appellant	)	
and	)	**Docket No. 17-0975**
	)	**Issued: August 9, 2017**
DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD FLEET FORCES COMMAND, 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:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 3, 2017 appellant, through counsel, filed a timely appeal from a March 10, 2017 merit 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.

ISSUE

The issue is whether OWCP properly denied appellant's hearing loss claim because it was untimely filed pursuant to 5 U.S.C. § 8122.

[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.*

FACTUAL HISTORY

On February 1, 2017 appellant, then a 63-year-old retired rigger leader, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hearing loss as a result of employment-related noise exposure. He first became aware of his condition and of its relationship to his federal employment on August 10, 2008. Appellant explained that he delayed filing the Form CA-2 for more than 30 days after August 10, 2008 because it only recently came to his attention that he could file a claim. On the reverse side of the form, appellant's supervisor reported that appellant had retired on December 2, 2011, that appellant had not reported his condition until February 1, 2017, and that the claim was untimely filed.

By letter dated February 1, 2017, OWCP requested additional factual information from both appellant and the employing establishment. Appellant was requested to provide information regarding whether he continued to be exposed to hazardous noise at work and, if not, his date of last exposure. OWCP noted that it did not appear the claim had been filed in a timely manner and requested evidence to establish that his claim was filed within three years of the date he became aware of a relationship between his condition and his employment. It also requested that the employing establishment provide noise survey reports for each site where appellant worked, the sources and period of noise exposure for each location, and copies of all medical examinations pertaining to hearing or ear problems. Both appellant and the employing establishment were afforded 30 days in which to respond.

On February 8, 2017 appellant responded to OWCP's questionnaire explaining that he worked for the employing establishment from 1979 to December 2011 in various positions as a rigger. In all of these positions, he was exposed to hazardous noise from various pneumatic tools, grinding, needle guns, chipping hammers, chain falls, diesel engines, valves, generators, pumps, and shipboard alarms for six to eight hours per day. Appellant noted that earplugs were provided. His hobbies included auto repair for three to five hours per week over the past five years for which he used hearing protection. Appellant further reported that he was last exposed to work-related hazardous noise in December 2011 and had no prior hearing problems. He stated that he first noticed his hearing loss in 2008 when he related it to his employment because it could not have been caused by anything other than work.

Appellant submitted employing establishment audiograms performed as part of a hearing conservation program dated November 7, 2003 through November 30, 2011. The audiograms referenced his October 6, 1991 baseline audiogram which revealed the following decibel (dB) losses at 500, 1,000, 2,000, and 3,000 hertz (Hz): 15, 5, 5, and 15 for the right ear and 25, 25, 15, and 15 for the left ear. The baseline audiogram indicated normal hearing and showed nonratable loss in both ears. The most recent November 30, 2011 audiogram revealed the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 20, 15, 10, and 20 for the right ear and 40, 35, 30, and 20 for the left ear.

No further response was received from the employing establishment.

By letter dated February 13, 2017, counsel for appellant argued that appellant's narrative statement and audiograms from his employment at the employing establishment documented the existence of a hearing conservation program and showed that the employing establishment had actual knowledge of a work-related hearing loss.

By decision dated March 10, 2017, OWCP denied appellant's claim as it was untimely filed. It found that the evidence did not establish that the claim had been filed within three years of the August 10, 2008 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] Section 8122(b) provides that, in latent disability cases, the time limitation 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.[5] The Board has held that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.[6]

Even if a claim is not filed within the three-year period of limitation, it would still be regarded as timely under section 8122(a)(1) if the immediate superior had actual knowledge of his or her alleged employment-related injury within 30 days or written notice of the injury was provided within 30 days pursuant to section 8119.[7] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.[8] The Board has indicated that an employee need only be aware of a possible relationship between his or her condition and his or her employment to commence the running of the applicable statute of limitations.[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 exposure is sufficient to constructively establish actual knowledge of a hearing loss, such as to put the immediate

[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).

[5] *Id.* at § 8122(b).

[6] *See Linda J. Reeves*, 48 ECAB 373 (1997).

[7] 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); *see also Larry E. Young*, 52 ECAB 264 (2001).

[8] *Willis E. Bailey*, 49 ECAB 511 (1998); *B.H.*, Docket No. 15-0970 (issued August 17, 2015).

[9] *Edward C. Hornor*, 43 ECAB 834, 840 (1992).

[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).

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

Appellant stated on his claim form that he was aware of a relationship between the claimed condition and his federal employment as of August 10, 2008. 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 is no longer exposed to noise. Appellant retired from federal employment on December 2, 2011. Therefore, the three-year time limitation began to run on December 2, 2011. As appellant did not file his occupational disease claim until February 1, 2017, the Board finds that it was not filed within the three-year time period under section 8122(b).[13]

Appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate supervisor had actual knowledge of the injury within 30 days of his last exposure to hazardous noise in federal employment, *i.e.*, within 30 days of his last exposure no later than December 2, 2011.[14] The Board finds that the employing establishment conducted a program of audiometric testing for which appellant submitted a series of audiograms obtained prior to his retirement.[15] These audiograms obtained as part of a hearing conservation program, are sufficient to establish actual knowledge of the claimed hearing loss within 30 days of his last noise exposure which occurred no later than December 2, 2011.[16] Of note, an October 6, 1991 baseline audiogram revealing the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 15, 5, 5, and 15 for the right ear and 25, 25, 15, and 15 for the left ear. In addition, the most recent November 30, 2011 audiometric test revealed the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 20, 15, 10, and 20 for the right ear and 40, 35, 30, and 20 for the left ear.

The audiograms from the hearing conservation program showed a progression in appellant's left-sided hearing loss from a nonratable loss on October 6, 1991 to a ratable loss as of November 30, 2011.[17] As such, the Board finds that the hearing conservation audiograms from October 6, 1991 through November 30, 2011 demonstrate a progressive worsening of

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

[12] *See* 5 U.S.C. § 8122(a)(1); Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.801.3; *G.C.*, Docket No. 12-1783 (issued January 29, 2013); *Ralph L. Dill*, *supra* note 10.

[13] *G.C.*, *id*.

[14] *Supra* note 7.

[15] *Supra* note 13.

[16] *Id.*

[17] Under FECA, hearing loss impairments are determined by the average of the hearing levels at 500, 1,000, 2,000, and 3,000 cycles per second. *See* American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009) at section 11.2d, page 250. If the average is less than 25, the hearing impairment is not ratable.

appellant's hearing loss. This ratable hearing loss[18] 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 December 2, 2011.[19] Therefore, appellant's hearing loss claim is considered timely.[20]

The case must, therefore, be remanded for OWCP to address the merits of the claim. After any further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant's claim for hearing loss was timely filed. The employing establishment had actual knowledge of a possible work-related hearing loss within 30 days of December 2, 2011, the date appellant was last exposed to hazardous noise at work.

ORDER

IT IS HEREBY ORDERED THAT the March 10, 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 9, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[18] *See* A.M.A., *Guides* 250-51.

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

[20] *Id.*