

**United States Department of Labor
Employees' Compensation Appeals Board**

A.S., Appellant

and

**U.S. POSTAL SERVICE, MORGAN
PROCESSING & DISTRIBUTION CENTER,
New York, NY, Employer**

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**Docket No. 17-1639
Issued: November 27, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 24, 2017 appellant, through counsel, filed a timely appeal from a May 3, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant's claim is timely pursuant to 5 U.S.C. § 8122(a) of FECA.

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.*

On appeal counsel contends that the three-year period for timeliness under FECA began when appellant received his medical diagnosis and became aware of his condition and its relationship to his employment.

FACTUAL HISTORY

On December 7, 2015 appellant, then a 62-year-old retired mail handler, filed an occupational disease claim (Form CA-2) alleging that he developed noise-induced hearing loss due to noise exposure in his federal employment. He noted that he was employed by the employing establishment for almost 30 years and was exposed to very loud noise on a daily basis. Appellant indicated that he first became aware of his condition on December 1, 2015 and first attributed this condition to his employment on that date. His supervisor indicated that he had retired on August 31, 2012 but that he stopped work on July 10, 2009 due to a separate employment injury. The supervisor noted that appellant became aware of his hearing loss more than three years after he stopped work at the employing establishment.

In support of his claim, appellant submitted an audiogram dated December 1, 2015. The audiologist, Jennifer Srour, noted that appellant reported long-term noise-induced hearing loss bilaterally. She noted appellant's noise exposure at work as well as significant hearing difficulty while listening to speech, driving, and watching television. Appellant also reported tinnitus bilaterally, worse on the right. Dr. Sydney C. Butts, a Board-certified otolaryngologist, reviewed the audiogram and audiological report on January 15, 2016 and noted that appellant's tinnitus began two years earlier. He opined that appellant had a mainly high frequency sensorineural hearing loss which could certainly be due to a history of loud noise exposure. Dr. Butts also noted that it was possible that appellant's hearing loss could include a component of presbycusis as well.

Appellant provided a narrative statement dated December 7, 2015 and indicated that the start date of his hearing loss was unknown. He listed his noise exposure to loud machines at the employing establishment for almost 30 years. Appellant also provided a notification of personnel action which indicated that his last day in pay status was July 10, 2009 and that he retired effective August 31, 2012.

In a letter dated May 5, 2016, OWCP requested additional factual and medical evidence from appellant in support of his occupational disease claim. It found that the evidence submitted failed to establish that appellant's claim was timely filed. OWCP afforded appellant 30 days to provide additional evidence that his claim was filed within three years of his date of last exposure to the noise at the employing establishment on July 10, 2009. On the same date, it requested that the employing establishment provide information relating to appellant's history of occupational noise exposure.

Appellant responded on May 13, 2016 to OWCP's questions and noted that he was not diagnosed with a noise-induced hearing loss until December 1, 2015. He provided the employing establishment with his Form CA-2 on December 7, 2015. Appellant asserted that he did not know that he had a hearing loss until the December 1, 2015 audiogram. He further noted that Ms. Srour and Dr. Butts informed him that his hearing loss was due to his employment-related noise exposure.

In a June 7, 2016 letter, the employing establishment denied the presence of noise hazards. It further noted that there had not been any other claims of hearing loss due to noise in that department of the employing establishment and that appellant had not reported any noise hazards during his employment period. The employing establishment also asserted that hearing protection was not required at appellant's work site because the noise levels did not exceed 85 decibels, the allowable amount for safe operation established by the Occupational Safety & Health Administration (OSHA). The employing establishment reported that appellant had not undergone preemployment audiograms, or an employment-related medical examination, as he did not operate a motor vehicle at the employing establishment.

By decision dated June 7, 2016, OWCP denied appellant's occupational disease claim finding that it was not timely filed. It noted that appellant filed his claim on December 7, 2015 with a date of injury of December 1, 2015. However, OWCP further noted that appellant's date-of-last-exposure was July 10, 2009 and that he had three years from that date to file his claim.

On June 13, 2016 counsel requested an oral hearing from OWCP's Branch of Hearings and Review. Appellant testified at the oral hearing before an OWCP hearing representative on February 16, 2017. He reported his exposure to very loud machine noise. Appellant testified that he stopped work due to his back condition in 2009. He started noticing his hearing loss in 2015 when his wife retired and she brought to his attention the volume levels on the radio and television. His wife encouraged him to make an appointment with a hearing specialist. Appellant testified that he did not know that he had a hearing loss until 2015. Counsel contended that appellant did not know of his hearing loss until 2015 and that he therefore timely filed his claim.

By decision dated May 3, 2017, OWCP's hearing representative found that appellant's claim for hearing loss was not timely filed. She noted that appellant stopped work on July 10, 2009 and retired three years later on August 31, 2012. Appellant testified that he did not realize his hearing loss until 2015. The hearing representative noted that appellant's claim was filed on December 7, 2015 more than three years after appellant's last exposure to noise at the employing establishment. She further found that there was no evidence that appellant's supervisor had actual knowledge of his injury within 30 days.

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) of FECA provides that the time for filing in latent disability cases does not begin to run until a claimant is aware or by the exercise of reasonable diligence should have been aware, of the

³ *Charles Walker*, 55 ECAB 238 (2004); *B.V.*, Docket No. 16-1249 (issued November 10, 2016); *M.S.*, Docket No. 14-0930 (issued February 25, 2015).

⁴ 5 U.S.C. § 8122(a); 20 C.F.R. § 10.101(b); *Linda J. Reeves*, 48 ECAB 373 (1997); *L.G.*, Docket No. 16-0535 (February 6, 2017); *I.W.*, Docket No. 15-1691 (issued February 11, 2016).

causal relationship between the employment and the compensable disability.⁵ 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.⁶ 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.⁷ Where an employee continues in the same employment after he or she reasonably should have been aware that he or she 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.⁸

FECA provides that compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within three years unless 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.⁹

ANALYSIS

OWCP denied appellant's occupational disease claim as it was not timely filed. It found that the latent disability claim for hearing loss should have been filed within three years of appellant's last exposure to the implicated employment exposures on July 10, 2009. However, OWCP failed to consider when appellant first became aware of his noise-induced hearing loss. Appellant reported that he first noticed his hearing loss in 2015 when his wife informed him that the volume on the television was too high. He sought medical treatment on December 1, 2015 and underwent an audiogram which demonstrated high-frequency hearing loss. Appellant filed his claim for employment-related hearing loss on December 7, 2015. On January 15, 2016 Dr. Butts diagnosed high-frequency sensorineural hearing loss and indicated that this loss of hearing could be attributed to noise exposure. He also noted that appellant began to experience tinnitus two years earlier.

The Board finds that the record does not establish that he should have known earlier than December 1, 2015 that he had an employment-related hearing loss. The December 1, 2015 audiogram was the first notification that he may have sustained a noise-induced hearing loss due

⁵ *Id.*

⁶ *Larry E. Young*, 52 ECAB 264 (2001); *Delmont L. Thompson*, 51 ECAB 155 (1999); *I.W.*, *supra* note 4. *See A.T.*, Docket No. 13-0611 (issued March 5, 2014) (where the Board found that the claimant knew or should have known that the tingling and numbness in his wrist, hands, and arms was related to his employment at least by his last day of employment on January 3, 2008; as he did not file his claim until June 13, 2011, over three years subsequent to that date, the Board held that his claim was not timely filed).

⁷ *See G.M.*, Docket No. 16-0220 (issued March 15, 2016); *C.G.*, Docket No. 08-1634 (issued January 9, 2009).

⁸ *Duet Brinson*, 52 ECAB 168 (2000); *Reeves*, *supra* note 4; *J.Y.*, Docket No. 16-0332 (issued June 8, 2016).

⁹ *Supra* note 4.

to noise exposure as a mail handler.¹⁰ The Board finds that the evidence is insufficient to establish that appellant was aware or reasonably should have been aware of an employment-related hearing loss more than three years before December 7, 2015.¹¹ There are no other medical reports, audiograms or other evidence prior to the December 1, 2015 audiogram to establish that appellant had a noise-induced hearing loss.

The Board finds that appellant first became aware that his hearing loss was an occupational disease resulting from exposure to noise at work on or about December 1, 2015. This was the first evidence to establish that he reasonably should have been aware that his hearing loss was due to occupational exposure. The Board finds that his claim filed on December 7, 2015 was within three years of his December 1, 2015 date of awareness and was, therefore, timely. The case will be remanded for OWCP to address the merits of the claim. After any further development that it deems necessary, OWCP should issue a *de novo* decision.

CONCLUSION

The Board finds that appellant's claim for a hearing loss is timely pursuant to 5 U.S.C. § 8122(a) of FECA.

¹⁰ See *G.B.*, Docket No. 10-1873 (issued June 7, 2011) (finding that without medical evidence or a hearing conservation program, the date of the diagnosis was the date that the claimant knew or should have known of that his hearing loss was related to his employment).

¹¹ See *William C. Oakley*, 56 ECAB 519 (2005) (as appellant had no knowledge that his hearing loss was noise-related, the first diagnosis of this relationship began to run the three-year time limitation for latent disability under FECA); *G.B.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2017 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further action consistent with this decision.

Issued: November 27, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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