

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

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<b>J.C., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 18-1178</b>
	)	<b>Issued: February 11, 2019</b>
<b>DEPARTMENT OF THE NAVY, PUGET</b>	)	
<b>SOUND NAVAL SHIPYARD, Bremerton, WA,</b>	)	
<b>Employer</b>	)	
_____	)	

*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 May 17, 2018 appellant filed a timely appeal from a January 31, 2018 merit decision and an April 19, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant filed a timely claim for compensation pursuant to 5 U.S.C. § 8122; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On August 1, 2017 appellant, then a 63-year-old retired sheet metal mechanic, filed an occupational disease claim (Form CA-2) alleging bilateral hearing loss due to his exposure to occupational noise while in the performance of duty. He indicated that he first became aware of his bilateral hearing loss and that it was caused or aggravated by his federal employment following an April 5, 2011 hearing evaluation. Appellant explained that the hearing evaluation revealed that his baseline hearing changed due to hearing loss caused by exposure to occupational noise. The employing establishment noted that he had retired on June 30, 2012.

In an August 9, 2017 developmental letter, OWCP requested that appellant submit additional evidence to establish his claim. It noted that the evidence of record was insufficient to establish that he had provided timely notification of his work injury. OWCP afforded appellant 30 days to submit the necessary evidence. It also requested that the employing establishment submit factual and medical evidence related to his noise exposure in the course of his federal employment.

Appellant subsequently submitted a position description and a notification of personnel action (SF-50) confirming that he had retired on June 30, 2012.

The employing establishment submitted hearing conservation data, including reference audiograms dated February 9, 2005 and February 29, 2012. Using the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second (cps) the reference audiogram dated February 9, 2005 documented appellant's hearing as follows: -5, 0, 10, and 5 decibels in the left ear and 0, 0, 15, and 15 decibels in the right ear. Using the same frequencies the February 29, 2012 reference audiogram revealed appellant's hearing measured as: 0, 5, 10, and 10 decibels in the left ear and 0, 10, 15, and 20 decibels in the right ear.

In a September 7, 2017 narrative statement, appellant contended that his claim was filed in a timely manner because both his supervisor and the technician at the dispensary were aware of the injury and argued that the audiograms taken at the employing establishment were evidence of the injury.

By decision dated January 31, 2018, OWCP denied appellant's claim, finding that it was untimely filed. It found that the date of appellant's injury was April 5, 2011, as indicated on his claim form, and it noted that his claim was not filed within three years of the date of last exposure. OWCP further noted that appellant's immediate supervisor did not have actual knowledge of the injury within 30 days of the date of last exposure.

On March 27, 2018 appellant requested reconsideration. He submitted a narrative statement dated March 5, 2018 and enclosed a hearing conservation disposition dated February 9, 2005 from the employing establishment which reported a provisional diagnosis of noise-induced sensorineural hearing loss. Appellant further indicated that he was sent by his supervisor back to the dispensary to reestablish the reference audiogram and subsequently his baseline thresholds were adjusted and he returned to work. He contended that this was evidence that both the dispensary and his immediate supervisor had knowledge of the injury.

By decision dated April 19, 2018, OWCP denied appellant's request for reconsideration without conducting a merit review because he failed to advance a relevant legal argument or submit any relevant and pertinent new evidence. It found that the evidence appellant submitted on reconsideration was irrelevant to the issue of whether he had filed a timely claim for compensation pursuant to 5 U.S.C. § 8122.

### **LEGAL PRECEDENT -- ISSUE 1**

Under section 8122(a) of FECA<sup>2</sup> a claimant has three years to file a claim for compensation.<sup>3</sup> 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 or her condition and his or her 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.<sup>4</sup> Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of his or her last exposure to the implicated factors.<sup>5</sup> 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 or her employment and the compensable disability or should have been aware of this relationship by exercising reasonable diligence.<sup>6</sup>

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 or her 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.<sup>7</sup> 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.<sup>8</sup>

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

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<sup>2</sup> 5 U.S.C. § 8122(a).

<sup>3</sup> *M.G.*, Docket No. 17-1334 (issued December 18, 2017); *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); see 20 C.F.R. § 10.101(b).

<sup>4</sup> *M.G.*, *id.*

<sup>5</sup> *M.N.*, Docket No. 17-0931 (issued August 15, 2017); *Larry E. Young*, 52 ECAB 264 (2001).

<sup>6</sup> 5 U.S.C. § 8122(b); *I.W.*, Docket No. 15-1691 (issued February 11, 2016); *Bennie L. McDonald*, 49 ECAB 509, 514 (1998).

<sup>7</sup> *Id.* at § 8122(a)(1).

<sup>8</sup> 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).

the immediate supervisor on notice of an on-the-job injury.<sup>9</sup> A hearing loss identified on such a test would constitute actual knowledge on the part of the employing establishment of a possible work injury.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

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

Appellant stated on his CA-2 claim form that he was aware of a relationship between the claimed condition and his federal employment as of April 5, 2011. Under section 8122(b), the time limitation begins to run when he 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 June 30, 2012. Therefore, the three-year time limitation began to run on June 30, 2012. As appellant did not file his occupational disease claim until August 1, 2017, the Board finds that it was untimely filed under section 8122(b).<sup>11</sup>

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 had been given to his immediate superior within 30 days. The Board has previously held, however, that participation in an employing establishment hearing conservation program can also establish constructive notice of injury.<sup>12</sup> 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.<sup>13</sup>

Herein, the results of a February 9, 2005 reference audiogram at the frequency levels of 500, 1,000, 2,000, and 3,000 cps revealed decibel losses of -5, 0, 10, and 5 decibels in the left ear and 0, 0, 15, and 15 decibels in the right ear. Subsequently, a February 29, 2012 reference audiogram at the same frequency levels revealed decibel losses of 0, 5, 10, and 10 decibels in the left ear and 0, 10, 15, and 20 decibels in the right ear. 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 June 30, 2012, the date of his retirement.<sup>14</sup> Therefore, based on this positive test result from the employing

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<sup>9</sup> *L.B.*, Docket No. 12-1548 (issued January 10, 2013); *James W. Beavers*, 57 ECAB 254 (2005).

<sup>10</sup> *L.E.*, Docket No. 14-1551 (issued October 28, 2014).

<sup>11</sup> *See supra* note 6.

<sup>12</sup> *See J.C.*, Docket No. 15-1517 (issued February 25, 2016); *see also M.W.*, Docket No. 16-0394 (issued April 8, 2016).

<sup>13</sup> *See M.N.*, Docket No. 17-0931 (issued August 15, 2017); *W.P.*, Docket No. 15-0597 (issued January 27, 2016).

<sup>14</sup> *See supra* notes 9, 10, 12, and 13.

establishment's hearing conservation program, appellant's hearing loss claim is considered timely.<sup>15</sup>

The case must therefore be remanded for OWCP to address the merits of the claim. After carrying out this development, OWCP shall issue a *de novo* decision.<sup>16</sup>

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 31, 2018 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 11, 2019  
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

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<sup>15</sup> *M.N.*, *supra* note 13.

<sup>16</sup> In light of the Board's disposition of the timeliness issue, the second issue of whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) is moot.