

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

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| W.P., Appellant |) | |
| |) | |
| and |) | Docket No. 21-0107 |
| |) | Issued: May 4, 2021 |
| DEPARTMENT OF JUSTICE, U.S. |) | |
| ATTORNEYS OFFICE, Newport News, VA, |) | |
| Employer |) | |
| _____ |) | |

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On November 2, 2020 appellant filed a timely appeal from a May 12, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of his oral argument request, appellant asserted that oral argument should be granted because it would aid in explaining how OWCP's decision was erroneous and contrary to law. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish that he filed a timely claim for compensation pursuant to 5 U.S.C. § 8122(a).

FACTUAL HISTORY

On July 28, 2019 appellant, then a 61-year-old Assistant United States Attorney, filed an occupational disease claim (Form CA-2) alleging that he developed Meniere's disease due to factors of his federal employment. He explained that Meniere's disease was an inner ear disorder, which was caused by stress and other factors, and that his work was stressful. Appellant indicated that he first became aware of his condition and its relation to his federal employment on November 16, 2007. On the reverse side of the claim form, appellant's supervisor, H.Z., asserted that appellant first reported his condition on November 16, 2007, but was unaware that appellant's condition was caused by his federal employment. It was also noted that appellant had retired effective November 30, 2013.

In support of his claim, appellant attached a statement alleging that he experienced sudden vertigo and hearing loss, primarily in his left ear, beginning in November 2007. He was diagnosed with Meniere's disease, an inner ear disorder substantially caused by stress and other factors. Appellant also stated that, in November 2007, he was assigned violent crimes and narcotics cases at work; however, due to his medical condition, his supervisor assigned another attorney to assist him and later assigned him to work on less stressful cases. In November 2010, he underwent surgery, which eliminated his vertigo, but did not restore his hearing loss. Appellant assumed a new position handling forfeiture cases in November 2010 in order to further reduce his stress. In November 2013, he accepted early retirement. Appellant alleged that his supervisor, H.Z., had actual, contemporaneous knowledge of his disease and took steps to accommodate him.

Appellant submitted an audiogram dated December 28, 2018, which revealed a slight drop in hearing at 250 Hertz (Hz) in the left ear.

In a development letter dated August 19, 2019, OWCP advised appellant that additional factual and medical evidence was necessary to establish his claim. It requested that he submit a narrative medical report from his attending physician, which explained how a diagnosed medical condition was causally related to the alleged employment incident. OWCP also noted that the evidence of record was insufficient to establish that he provided timely notice of his employment injury. It provided a questionnaire for his completion and afforded him 30 days to respond. In a separate development letter of even date to the employing establishment, OWCP requested a supervisory statement and additional information regarding the accuracy of appellant's alleged federal employment factors. It also afforded the employing establishment 30 days to respond.

In response, appellant submitted a report dated November 16, 2007 from Dr. Michael J. Jacobson, a Board-certified otolaryngologist. Dr. Jacobson noted appellant's complaints of diminished hearing with pressure and static noise in his left ear. Appellant indicated that his hearing problem started in both ears with a buzzing noise that was intermittent at first, but then became constant. There was no lightheadedness or vertigo. Dr. Jacobson's impression was sudden

hearing loss, which he indicated was “all sensorineural with unclear etiology,” tinnitus, and allergic rhinitis.

OWCP received a report from Dr. Jacobson dated March 16, 2011, which was a six-month follow-up appointment for appellant’s Meniere’s disease. Appellant reported no complaints. Dr. Jacobson noted that appellant’s hearing was affected in the high pitches, and that appellant’s endolymphatic shunt helped his vertigo to the extent that he had no attacks for approximately a year. Dr. Jacobson indicated that appellant was to continue with maintenance allergy shots and return for follow up in six months.

Appellant responded to OWCP’s questionnaire by an undated letter received September 19, 2019, explaining that he was diagnosed with Meniere’s disease, an inner ear disorder substantially caused by stress and other factors. He again reiterated that his Meniere’s disease was triggered by stress related to his federal employment. Appellant alleged that his supervisor had actual, contemporaneous knowledge of his Meniere’s disease and took steps to accommodate him.

By decision dated October 21, 2019, OWCP denied appellant’s claim, finding that it was untimely filed.

On October 26, 2019 appellant requested a hearing before a representative of OWCP’s Branch of Hearings and Review. The hearing was held on March 11, 2020. During the hearing, appellant testified that, while his supervisor, H.Z., had admitted that he knew of appellant’s Meniere disease diagnosis, H.Z. had denied knowing of the cause of appellant’s condition.

OWCP subsequently received a letter dated April 9, 2020, the employing establishment controverted appellant’s claim. It did not contest that appellant’s supervisor became aware that he had a medical condition; however, the employing establishment stated that his supervisor was not aware that this was a direct result of his federal employment.

In a letter dated May 5, 2020, appellant responded that the employing establishment’s representative did not know him, nor did she have any personal knowledge of the facts. He also asserted that his supervisor admitted that his claim was timely. Appellant explained that he accepted early retirement only because it was an opportunity to reduce his stress level and manage his Meniere’s disease.

By decision dated May 12, 2020, the hearing representative affirmed the October 12, 2019 decision, finding that appellant had not established that he filed a timely claim for compensation.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable

³ *Supra* note 2.

time limitation period of FECA,⁴ that an injury was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁵ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

The issue is whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.⁷ 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.⁸

In an occupational disease claim, 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 federal employment. Such awareness is competent to start the limitation period even though the employee does not know the precise nature or the impairment or whether the ultimate result of such affect would be temporary or permanent.⁹ Where the 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.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 It is the employee's burden of proof to establish that a claim is timely filed.¹²

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

⁴ *M.O.*, Docket No. 19-1398 (issued August 13, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *J.R.*, Docket No. 20-0496 (issued August 13, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *B.M.*, Docket No. 19-1341 (issued August 12, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *M.B.*, Docket No. 20-0066 (issued July 2, 2020); *Charles W. Bishop*, 6 ECAB 571 (1954).

⁸ 5 U.S.C. § 8122(a); *F.F.*, Docket No. 19-1594 (issued March 12, 2020); *W.L.*, 59 ECAB 362 (2008).

⁹ *See A.M.*, Docket No. 19-1345 (issued January 28, 2020); *Larry E. Young*, 52 ECAB 264 (2001).

¹⁰ *S.O.*, Docket No. 19-0917 (issued December 19, 2019); *Larry E. Young, id.*

¹¹ 5 U.S.C. § 8122(b).

¹² *D.D.*, Docket No. 19-0548 (issued December 16, 2019); *Gerald A. Preston*, 57 ECAB 270 (2005).

provided within 30 days pursuant to section 8119.¹³ The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.¹⁴

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that he filed a timely claim for compensation pursuant to 5 U.S.C. § 8122(a).

Appellant submitted an occupational disease claim on July 28, 2019 alleging that he developed Meniere's disease, which he realized was caused or aggravated by his employment on November 16, 2007. The claim was, therefore, not filed within three years of appellant's awareness of the possible relationship between the condition and his federal employment.¹⁵ 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 his federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.¹⁶ The date of last exposure in the present case was November 30, 2013, the date appellant retired from federal employment. As such, the Board finds that appellant's July 28, 2019 claim was untimely filed under the three-year requirement of 5 U.S.C. § 8122(a).

Appellant's claim would still be regarded as timely under FECA if his immediate supervisor had actual knowledge of his injury and any possible relation to his federal employment within 30 days, or if written notice of injury was given to his immediate supervisor within 30 days of injury.¹⁷ In the present case, the Board finds that there is no evidence of record that appellant's immediate supervisor had actual knowledge, of the injury and its possible relation to his federal employment within 30 days of the alleged injury, or that appellant provided written notice of injury within 30 days of the injury. On the reverse side of the claim form, appellant's supervisor, H.Z., asserted that appellant first reported his condition on November 16, 2007, but was unaware that appellant's condition was caused by his federal employment. In his statements, appellant asserted that his supervisor assigned another attorney to help him, assigned him cases that were less stressful, and transferred him to a new division in order to accommodate his occupational disease. However, the case record does not contain any evidence documenting that an immediate superior either had actual knowledge of or received written or verbal notification about his conditions and the possible relation to his employment within 30 days of its occurrence. The Board has previously explained that knowledge merely of an employee's illness is insufficient to establish actual knowledge for the purpose of establishing timeliness. It must be shown that the circumstances

¹³ 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); *see also* Larry E. Young, *supra* note 9.

¹⁴ *S.O.*, *supra* note 10; *B.H.*, Docket No. 15-0970 (issued August 17, 2015); *Willis E. Bailey*, 49 ECAB 511 (1998).

¹⁵ *Supra*, note 8.

¹⁶ *M.B.*, Docket No. 20-0066 (issued July 2, 2020); *S.O.*, *supra* note 14.

¹⁷ *L.H.*, Docket No. 19-0818 (issued December 9, 2019); *C.S.*, Docket No. 18-0009 (issued March 22, 2018).

were such as to put the supervisor on notice that the alleged injury was related to the employment or that the employee attributed it thereto within 30 days of its occurrence.¹⁸

As evidence of record is insufficient to establish actual knowledge by appellant's supervisor of a work-related injury within 30 days the Board finds that he has not established a timely claim.

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 has not met his burden of proof to establish that he filed a timely claim for compensation pursuant to 5 U.S.C. § 8122(a).

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 4, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ C.S., Docket No. 18-0009 (issued March 22, 2018).