United States Department of Labor
Employees' Compensation Appeals Board

T.R., Appellant	)	
and	)	**Docket No. 21-1167**
	)	**Issued: April 4, 2022**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, 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 July 26, 2021 appellant filed a timely appeal from a June 9, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 appellant filed a timely claim for compensation pursuant to 5 U.S.C. § 8122.

FACTUAL HISTORY

On March 16, 2020 appellant, then a 68-year-old retired benchmarking specialist (nuclear), filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to

[1] 5 U.S.C. § 8101 *et seq*.

exposure to hazardous noise while in the performance of duty. He noted that he first became aware of his hearing loss and realized its relation to his federal employment on January 1, 1993. Appellant retired effective January 3, 2008.

Appellant submitted a statement dated March 16, 2020, wherein he recounted that he had worked for the U.S. Air Force from 1972 to 1976 in AFT control and warning. He stated that he was exposed to two hours of noise per day from a radar magnetron and a thyratron, and that he used provided safety devices to protect against noise exposure. From 1976 to 1993, appellant worked at the employing establishment as a shopfitter during which time he was exposed to eight hours of noise per day from chipping guns, grinders, sanders, roto hammers, descalers, motors, pumps, generators, cranes, and forklifts. He did not indicate whether safety devices were provided or used to protect against noise exposure. From 1993 to 2001, appellant worked at the employing establishment as a planner and estimator. He indicated that he was exposed to noise from occasional oversight of operations onboard ship. Appellant did not indicate the number of hours of exposure per day in this position, but noted that safety devices were provided and used to protect against noise exposure. From 2001 to 2008, he worked at the employing establishment as a benchmark specialist, where he experienced no significant exposure to noise. From 2018 to 2019, appellant worked at CDI as a planner and estimator, where he experienced no noise exposure except when in Japan during ship checks. He indicated that safety devices were provided and used to protect against noise exposure. Appellant further noted that he engaged in hunting as a hobby. He stated that he was last exposed to hazardous noise at work in 2008.

Hearing conservation data received on April 1, 2020 recorded audiometric findings obtained on July 10, 2006 at the frequency levels of 500, 1,000, 2,000, and 3,000 hertz (Hz) of losses for the right ear of 0, 0, 5, and 5 decibels (dBs) and for the left ear of 5, 0, 5, and 10 dBs. Testing on July 25, 2006 at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 5, 0, 5, and 5 dBs and for the left ear of 0, -5, 0, and 10 dBs. A reference audiogram from June 27, 1984 demonstrated losses for the right ear of 5, 0, 0, and 0 dBs and for the left ear of 5, 0, 0, and 0 dBs. An audiometric evaluation dated February 3, 2020 was attached in which testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 5, 5, 5, and 20 dBs and for the left side of 10, 5, 10, and 25 dBs.

On October 7, 2020 OWCP referred appellant for a second opinion evaluation with Dr. Edward Treyve, a Board-certified otolaryngologist, in order to determine whether his work-related noise exposure was sufficient to have caused hearing loss, and if so, the extent and degree of appellant's hearing loss. In a report dated December 3, 2020, Dr. Treyve reviewed the case record and a statement of accepted facts (SOAF), and opined that appellant's sensorineural hearing loss was not due to noise exposure encountered in appellant's civilian employment. Testing obtained on that date at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 5, 0, 10, and 10 dBs and for the left ear of 5, 0, 10, and 20 dBs. In a supplemental report dated January 7, 2021, Dr. Treyve noted that industrial audiometry was made available from 1984, eight years after appellant began working at the employing establishment, and that at that time it was entirely normal. He explained that appellant's hearing levels in 2006, two years prior to retirement and 30 days after the start of employment, was normal. Dr. Treyve noted that appellant's audiometry obtained on December 3, 2020 was consistent with the effects of presbycusis and possible recreational noise exposure, but not occupational noise exposure. He indicated that there was no audiometric evidence that appellant sustained noise-induced hearing

loss as a result of workplace exposure and noted that appellant was diligent about ear protection. Dr. Treyve noted that appellant's recreational shooting had contributed to his current hearing levels and that the asymmetry between the two ears would be consistent with right-handed shooting. He opined that appellant's sensorineural hearing loss was not due to noise exposure encountered in appellant's civilian employment. Dr. Treyve explained that appellant had bilateral sensorineural hearing loss at that time, which he believed was related to the combination of presbycusis and possible recreational noise exposure. Appellant had a history of approximately 2,000 rounds of gunfire with recreational shooting, with hearing levels worse on the left than the right, which one would expect from a right-handed shooter. He noted that industrial audiometry in 2006, 30 years after he began working for the employing establishment and 2 years before his retirement, was entirely normal without evidence of noise-induced hearing loss at that time. Referring to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[2] Dr. Treyve calculated zero percent binaural hearing loss. He recommended against usage of hearing amplification.

OWCP forwarded Dr. Treyve's report to Dr. Jeffrey Israel, a Board-certified otolaryngologist serving as OWCP's district medical adviser (DMA), for review on January 8, 2021. In a report dated January 12, 2021, Dr. Israel reviewed the SOAF and case record, including Dr. Treyve's December 3, 2020 report. The DMA noted that appellant's earliest audiogram was dated June 27, 1984, which demonstrated normal hearing, and that serial audiograms over the years have demonstrated a progressive sensorineural hearing loss in the four to eight kilohertz (KHz) frequencies. He noted that the latest audiogram of record, dated December 3, 2020, demonstrated normal hearing through 3 KHz, after which the left ear sharply dropped to a 4 KHz acoustic notch at 50 dB with record to 40 dB at 8KHz. The DMA opined that these patterns were suggestive of sensorineural hearing loss due at least in part to noise-induced work-related acoustic trauma. He noted that the date of maximum medical improvement was December 3, 2020. The DMA concurred with Dr. Treyve's calculation of zero percent binaural hearing impairment, as a result of right-sided monaural loss of zero percent and left-sided monaural loss of zero percent. He recommended authorization for hearing aids.

In a supplemental report dated January 22, 2021, Dr. Treyve explained that it was not reasonable that appellant's hearing loss at the present time represented occupational noise-induced hearing loss, given that he had normal hearing according to industrial audiometry two years before retirement and had spent the last seven years working as a benchmark specialist without noise exposure. He noted that recreational noise exposure in the form of gunfire was well recognized to cause noise-induced hearing loss, and right-sided long arm shooting classically resulted in more hearing loss in the left ear, because his left ear would be closest to the source of the noise at the muzzle. Dr. Treyve stated that firing more than 1,000 rounds in a lifetime retained a statistically significant association with hearing loss for each thousand rounds, approximately equivalent to three years of occupational noise exposure. He opined that appellant's high-frequency hearing loss was more probably than not related to the effects of presbycusis and recreational noise exposure.

[2] A.M.A., *Guides* (6th ed. 2009).

OWCP forwarded Dr. Treyve's reports to Dr. Israel, serving as the DMA, on January 25, 2021. In a report dated February 1, 2021, Dr. Israel noted that, in his prior report, he had stated that appellant's hearing loss patterns were suggestive of sensorineural hearing loss due at least in part to noise-induced work-related acoustic trauma. He explained that it was impossible to determine the percentage of hearing loss that could be attributed to presbycusis, work-related acoustic trauma, and "hobby or life activity" noise. Dr. Israel stated that it had to be assumed that at least some of the noise exposure and subsequent hearing loss was due to work-related noise hazards. He further noted that it had been established that hearing loss related to hazardous noise exposure may continue after exposure stops. Dr. Israel noted that Dr. Trevye had mentioned that there was a normal audiogram in 2006, two years prior to retirement. He stated that it was possible there was work-related noise exposure in his last two years of work, causing the beginnings of hearing loss, but it was unknown as there were no confirming audiograms. Dr. Israel stated that it was also possible that the hearing loss exclusively occurred after retirement, but that it was unknown for certain. He noted his belief that claimants should be given the benefit of the doubt and stated that if there was any chance that the hearing loss seen at present had been contributed to by his prior work, then it should be considered. Dr. Israel noted that, if there was a retirement audiogram from 2008, then he could perhaps agree with Dr. Treyve's discussion. Lastly, he stated that, while he may disagree with Dr. Treyve as to the nuances of how and when a hearing loss might or might not happen, he concurred that appellant's percentage of binaural hearing impairment was zero percent.

By decision dated February 8, 2021, OWCP denied appellant's claim, finding that it was untimely filed. It found that the date of his injury was January 1, 1993, as indicated on his claim form, and it noted that his claim was not filed within three years of the date of last exposure on January 3, 2008. OWCP further stated that appellant's "date of injury [was] January 1, 1993 represents reasonably aware."

On March 1, 2021 appellant requested a review of the written record by OWCP's Branch of Hearings and Review. In an attached letter, he argued that his claim should not have been denied as untimely, because his supervisor and the dispensary where his hearing was tested yearly both were aware of his hearing loss at the time it occurred. Appellant asserted that the timely filing element had been met with the evidence from the hearing conservation program that he was enrolled in throughout his employment at the employing establishment.

By decision dated June 9, 2021, OWCP's Branch of Hearings and Review affirmed the February 8, 2021 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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 1.

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] *W.P.*, Docket No. 21-0107 (issued May 4, 2021); *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]

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 supervisor on notice of an on-the-job injury.[15] A hearing loss identified on such a test would constitute actual knowledge on the part of the employing establishment of a possible work injury.[16]

ANALYSIS

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 January 1, 1993. 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 January 3, 2008. Therefore, the latest date appellant could have been exposed to any hazardous noise at work was the date of his retirement, and the three-year time limitation began to run on January 3, 2008.

Appellant's claim would still be regarded as timely filed under 5 U.S.C. § 8122; however, 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.[17] 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.[18]

Herein, the results of a reference audiogram from June 27, 1984 at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 5, 0, 0, and 0 dBs and for the left ear of 5, 0, 0, and 0 dBs. Subsequently, hearing conservation data indicated audiometric findings obtained on July 10, 2006 at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz of

[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] *J.C.*, Docket No. 18-1178 (issued February 11, 2019); *L.B.*, Docket No. 12-1548 (issued January 10, 2013); *James W. Beavers*, 57 ECAB 254 (2005).

[16] *J.C.*, *id.*; *L.E.*, Docket No. 14-1551 (issued October 28, 2014).

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

[18] *See M.N.*, Docket No. 17-0931 (issued August 15, 2017); *W.P.*, Docket No. 15-0597 (issued January 27, 2016).

losses for the right ear of 0, 0, 5, and 5 dBs and for the left ear of 5, 0, 5, and 10 dBs. Testing on July 25, 2006 at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 5, 0, 5, and 5 dBs and for the left ear of 0, -5, 0, and 10 dBs. 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 January 3, 2008, the date of his retirement.[19] Therefore, based on the audiometric test results from the employing establishment's hearing conservation program, 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 carrying out this development, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[19] *See supra* notes 15, 16, 18, and 19.

[20] *See J.C., supra* note 15; *M.N., supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2021 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: April 4, 2022
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