United States Department of Labor
Employees' Compensation Appeals Board

P.S., Appellant	)	
and	)	**Docket No. 22-0640**
	)	**Issued: April 18, 2023**
DEPARTMENT OF THE INTERIOR, BUREAU OF SAFETY & ENVIRONMENTAL ENFORCEMENT, Camarillo, CA, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On March 25, 2022 appellant, through counsel, filed a timely appeal from a September 27, 2021 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.

[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.*

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 January 21, 2021 appellant, then a 64-year-old retired supervisory petroleum engineer, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment, including loud noises from compressors, engine rooms, pumps, and drilling rigs. He noted that he first became aware of his condition on October 1, 2014 and realized its relationship to his federal employment on October 26, 2020. On the reverse side of the claim form the employing establishment noted that appellant retired, effective November 8, 2012.

In support of his claim, appellant provided an undated statement. He recounted that he had worked for the employing establishment from September 1982 through October 2012 and described the frequency and nature of his noise exposure during his federal employment, including loud noise inherent to routine operations at large oil and gas facilities and helicopter travel to and from offshore platforms. Appellant noted that he was in the employing establishment's hearing conservation program, which included training, testing, and personal protective equipment (PPE). He related that he first noticed his hearing loss approximately five years prior and that he had not informed his employer because he noticed the impacts around the time of his retirement.

Appellant also submitted an audiogram dated October 26, 2020 from Christine Wilson, an audiologist. In a report of even date, Dr. Jeffrey Tseng, a Board-certified otolaryngologist, reviewed the audiogram and related that appellant had slowly developed hearing loss over the last five years. He recounted appellant's exposure to loud noises during his federal employment. Dr. Tseng noted that appellant had constant bilateral nonpulsatile tinnitus, which could interfere with sleep, and that he had difficulty with conversations in crowded rooms. He diagnosed bilateral sensorineural hearing loss, exacerbated by significant noise exposure, and bilateral eustachian tube dysfunction. Dr. Tseng opined that appellant's work duties contributed to the development of his sensorineural hearing loss and provided a pathophysiological explanation. He also noted that "because [appellant] was exposed to loud noise over a prolonged period of time, the development of the hearing loss was very gradual and did not present itself for many years after initial exposure."

In a development letter dated January 27, 2021, OWCP informed appellant of the deficiencies of his claim. It explained the type of additional evidence required and provided a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor addressing the accuracy of appellant's allegations and describing his workplace exposure to hazardous noise. It specifically requested that the employing establishment provide detailed information, including all medical examinations pertaining to hearing or ear problems, including preemployment examination and all audiograms. OWCP provided both parties 30 days to respond.

On February 3, 2021 the employing establishment responded to OWCP's development questionnaire, noting that appellant had retired nine years prior and, as his supervisor was no longer employed by the employing establishment, there was difficulty obtaining any information relating to appellant.

On February 26, 2021 appellant, through counsel, responded to OWCP's development questionnaire, noting that appellant's earlier statement had answered several of its questions. He related that he did not begin to experience the impact of his hazardous work noise exposure until after his retirement. Appellant explained that he first became aware that his hearing loss was related to his federal employment on October 26, 2020 when he was examined by Dr. Tseng, and that no physician told him that his hearing loss was work related before that time. Thus, he asserted, his claim was timely filed.

By decision dated March 4, 2021, OWCP denied appellant's occupational disease claim, finding that it was untimely filed. It determined that the evidence of record did not support that he filed his claim within three years of the date of injury or date of last exposure or that his supervisor had actual knowledge of the claimed condition within 30 days of the date of injury.

On June 29, 2021 appellant, through counsel, requested reconsideration. In support of his request, appellant argued that he was enrolled in a hearing conservation program with the employing establishment due to the routine exposure to loud noise and, thus, the employing establishment had actual notice of his hearing loss.

In a letter dated July 16, 2021, OWCP requested that the employing establishment provide additional information regarding whether appellant was enrolled in a hearing conservation program and whether he had hearing tests performed during his federal employment.

In a July 28, 2021 statement, the employing establishment responded to OWCP's letter and reiterated that, as appellant had retired in 2012, there were no supervisors who could answer its questions about hearing tests. It attached a notification of personnel action (Standard Form 50) dated September 24, 2012, indicating that he retired effective October 1, 2012.

In a letter dated September 21, 2021, OWCP again requested that the employing establishment submit copies of any audiograms in appellant's personnel/medical files.

By decision dated September 27, 2021, OWCP affirmed the March 4, 2021 decision, finding that based on the medical evidence of record it could not determine whether the employing establishment had constructive notice of appellant's hearing loss.

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] *Id*.

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 of 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 alleged that he developed hearing loss due to factors of his federal employment, including loud noises from compressors, engine rooms, pumps, and drilling rigs. He noted that he first became aware of his condition on October 1, 2014 and realized its relationship to his federal employment on October 26, 2020. Appellant retired from federal employment on October 1, 2012.

In a development letter dated January 27, 2021, OWCP requested that the employing establishment provide all medical examinations pertaining to hearing or ear problems, including preemployment examination and all audiograms. On February 3, 2021 the employing establishment responded that appellant had retired nine years prior and, as his supervisor was no longer employed by the employing establishment, there was difficulty obtaining any information relating to appellant. On June 29, 2021 appellant, through counsel, requested reconsideration and stated that he was enrolled in a hearing conservation program with the employing establishment. In a letter dated July 16, 2021, OWCP requested that the employing establishment provide additional information regarding whether appellant was enrolled in a hearing conservation program and whether he had hearing tests performed during his federal employment. In a July 28, 2021 statement, the employing establishment responded to OWCP's letter and reiterated that, as appellant had retired in 2012, there were no supervisors who could answer its questions about hearing tests. OWCP again requested that the employing establishment submit copies of any audiograms in appellant's personnel/medical files. However, the employing establishment did not provide the audiograms or medical records from its hearing conservation program.

The Board finds that OWCP must further develop the factual aspect of this record. The record reflects that appellant participated in the employing establishment's hearing conservation program. However, audiological and other medical records from that program were not provided

[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).

by the employing establishment. Accordingly, OWCP must develop this factual aspect of the case before a full and fair determination can be made regarding the timeliness of the claim.[17]

It is well established that, proceedings under FECA are not adversarial in nature, and while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[18] OWCP has an obligation to see that justice is done.[19]

On remand it shall obtain all relevant records from the employing establishment's hearing conservation program.[20] Following this and other such further development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[17] *C.f. D.O.*, Docket No. 20-0006 (issued September 9, 2020); *J.V.*, Docket No. 17-0973 (issued July 19, 2018).

[18] *See D.O.*, *id.*, *R.A.*, Docket No. 17-1030 (issued April 16, 2018); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978).

[19] *See A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

[20] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapters 2.800.4, 2.800.7, 2.800.8, and 2.800.10 (June 2011).

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 18, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board