United States Department of Labor
Employees' Compensation Appeals Board

V.J., Appellant	)	
and	)	**Docket No. 23-0787**
	)	**Issued: December 20, 2023**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD & INTERMEDIATE MAINTENANCE FACILITY, 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
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On May 2, 2023 appellant filed a timely appeal from a March 30, 2023 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 has met his burden of proof to establish that he filed a timely claim for compensation pursuant to 5 U.S.C. § 8122(a).

[1] 5 U.S.C. § 8101 *et. seq.*

FACTUAL HISTORY

On August 4, 2022 appellant, then a 71-year-old retired electrician, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment, specifically his exposure to loud noise in the workplace. He further indicated that he first became aware of the condition and its relationship to his employment on August 15, 1994. On the reverse side of the claim form, the employing establishment indicated that appellant first reported his condition on August 4, 2022 and his last date of exposure was August 15, 1994.

OWCP received a position description form on August 15, 2022 describing appellant's duties as an electrical worker. The form indicated the work areas as "noisy" aboard ships and submarines.

Appellant submitted audiometric testing reports taken on an annual basis as part of the employing establishment's hearing conservation program. A reference audiogram dated February 29, 1984 noted testing at the frequencies of 500, 1,000, 2,000, and 3,000, Hertz (Hz) revealed varying losses in each report. On February 29, 1984 testing at 500, 1,000, 2,000, and 3,000, Hz demonstrated losses for the right ear of 0, 10, 5, and 0, decibels (dBs) and losses for the left ear of 0, 15, 5, and 5 dBs. On August 15, 1994 testing at 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 25, 35, 20, and 15 dBs and losses for the left ear of 10, 35, 10, and 5 dBs.

In a development letter dated August 16, 2022, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond. In separate development letter of even date, it requested that the employing establishment provide additional information regarding the claim.

In a completed questionnaire dated September 14, 2022, appellant indicated that he was exposed to noise as part of this job from 1979 until he retired on August 15, 1994 which was the same date he first noticed the hearing loss after an audiogram and realized that it was related to his employment. He further indicated that he notified his supervisor of the hearing loss.

By decision dated October 11, 2022, OWCP denied appellant's claim, finding that he did not file a timely claim for compensation within the requisite three-year time limit provided under 5 U.S.C. § 8122. It found that the date he became aware of the condition was August 15, 1994 and that he had not filed a claim until August 4, 2022. OWCP further found that there was no evidence that appellant's immediate supervisor had actual knowledge within 30 days of the date of injury.

On November 7, 2022 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated March 30, 2023, an OWCP hearing representative affirmed the October 11, 2022 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA, 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.[3] 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.[4]

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes a determination on the merits of the claim.[5] 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.[6]

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.[7] 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.[8] 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.[9] It is the employee's burden of proof to establish that a claim is timely filed.[10]

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[2] *Id*.

[3] *J.M*., Docket No. 17-0284 (issued February 7, 2018); *R.C*., 59 ECAB 427 (2008); *James E. Chadden, Sr*., 40 ECAB 312 (1988).

[4] *B.H.*, Docket No. 20-0777 (issued October 21, 2020); *K.M*., Docket No. 15-1660 (issued September 16, 2016); *L.M*., Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[5] *J.S.*, Docket No. 22-0347 (issued September 16, 2022); *F.F*., Docket No. 19-1594 (issued March 12, 2020); *R.T.*, Docket No. 18-1590 (issued February 15, 2019); *Charles Walker*, 55 ECAB 238 (2004); *see Charles W. Bishop*, 6 ECAB 571 (1954).

[6] *Id*.

[7] *T.R.*, Docket No. 21-1167 (issued April 4, 2022); *see A.M*., Docket No. 19-1345 (issued January 28, 2020); *Larry E. Young*, 52 ECAB 264 (2001).

[8] *T.R. id*.; *S.O.*, Docket No. 19-0917 (issued December 19, 2019); *Larry E. Young*, *id*.

[9] 5 U.S.C. § 8122(b).

[10] *T.R., supra* note 7; *D.D.*, Docket No. 19-0548 (issued December 16, 2019); *Gerald A. Preston*, 57 ECAB 270 (2005).

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 provided within 30 days pursuant to Section 8119.[11] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.[12]

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 August 15, 1994. 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 August 15, 1994. Therefore, the latest date he could have been exposed to any hazardous noise at work was the date of his retirement, and the three-year time limitation thus began to run on August 15, 1994.

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.[13] 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.[14]

Herein, the results of a reference audiogram dated February 29, 1984, testing at 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 0, 10, 5, and 0 dBs and losses for the left ear of 0, 15, 5, and 5, dBs. On August 15, 1994 testing at 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 25, 35, 20, and 15 dBs and losses for the left ear of 10, 35, 10, and 5 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 appellant's last noise exposure, which occurred no later than August 15, 1994, the date of

[11] 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); *J.S.*, *supra* note 5; *see also Larry E. Young*, *supra* note 7.

[12] *J.S.*, *id*.; *B.H.*, Docket No. 15-0970 (issued August 17, 2015); *Willis E. Bailey*, 49 ECAB 511 (1998).

[13] *T.R. supra* note 7; *see J.C.*, Docket No. 15-1517 (issued February 25, 2016); *see also M.W.*, Docket No. 16-0394 (issued April 8, 2016).

[14] *T.R. id*.; *see M.N.*, Docket No. 17-0931 (issued August 15, 2017); *W.P.*, Docket No. 15-0597 (issued January 27, 2016).

his retirement.[15] Therefore, based on the audiometric test results from the employing establishment's hearing conservation program, his hearing loss claim is considered timely.[16]

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.

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2023 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further development consistent with this decision of the Board.

Issued: December 20, 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

[15] *T.R. id.*; *see 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); *see also L.E.*, Docket No. 14-1551 (issued October 28, 2014); *see also supra* note 13.

[16] *T.R. id.*; *see J.C., id.*; *M.N., supra* note 14.