United States Department of Labor
Employees' Compensation Appeals Board

T.C., Appellant	)	
and	)	**Docket No. 23-0705**
	)	**Issued: November 1, 2023**
DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Newport News, VA, Employer	)	

Appearances:
Margaret Marshall, 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 April 20, 2023 appellant, through counsel, filed a timely appeal from an April 12, 2023 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 timely filed an occupational disease claim for compensation, pursuant to 5 U.S.C. § 8122(a).

FACTUAL HISTORY

On February 2, 2023 appellant, then a 66-year-old retired industrial specialist, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to noise at his place of federal employment. He noted that he first became aware of his hearing loss and realized its relation to his federal employment on January 1, 1995. Appellant retired effective December 31, 2011. On the reverse side of the form, the employing establishment controverted the claim arguing that it was not timely filed.

In a February 6, 2023 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him as to the type of factual and medical evidence required and provided a questionnaire for completion. OWCP afforded appellant 30 days to submit the requested evidence.

In a February 9, 2023 development letter, OWCP requested additional information from the employing establishment, including comments from a knowledgeable supervisor on the accuracy of the employees statements and factual and medical evidence related to appellant's employment-related noise exposure in the course of his federal employment. It afforded the employing establishment 30 days to submit the requested evidence.

On February 10, 2023 appellant responded to OWCP's questionnaire explaining that he worked for the employing establishment from October 1973 through January 3, 2012 in various positions. He described his exposure to hazardous noise at work, including grinding, banging, and arcing, produced by pneumatic tools, ventilation systems, shears, presses, punches, and ship equipment for eight hours per day. Appellant noted that earplugs were provided by the employing establishment. He reported later working as a systems analyst in nonfederal employment and asserted that he had no hobbies that exposed him to loud noises. Appellant stated that he was last exposed to work-related hazardous noise in December 2011 and had no prior hearing problems. He explained that he first noticed his hearing loss in 1995 when he related it to his employment because it could not be caused by anything other than work.

In support of his claim, appellant submitted employing establishment audiograms performed as part of a hearing conservation program dated May 19, 1976 through May 25, 2011. A reference audiogram from May 19, 1976, revealed the following decibel (dB) losses at 500, 1000, 2000, and 3000 hertz (Hz): 10, 15, 20, and 10 for the right ear and 15, 10, 10, and 0 for the left ear. The baseline audiogram indicated normal hearing and showed non ratable loss in both ears. Prior to appellant's retirement, the most recent May 25, 2011, audiogram revealed the following dB losses at 500, 1000, 2000, and 3000 Hz: 25, 25, 30, and 55 for the right ear and 25, 15, 20, and 40 for the left ear. The audiograms from the hearing conservation program showed a progression in his hearing loss. The May 25, 2011 audiogram also contained remarks from the audiologist at that time who noted that appellant's evaluation revealed early warning for a decrease in hearing and he was no longer fit to work in noise unless cleared by an occupational medicine

provider or audiologist. Appellant also submitted an August 19, 2020 audiometric evaluation reflecting bilateral hearing loss.

In a letter dated February 14, 2023, counsel argued that appellant's narrative statement and audiograms taken during appellant's federal employment established the existence of a hearing conservation program, and that the employing establishment had actual knowledge of a work-related hearing loss rendering the claim timely filed.

On February 24, 2023 OWCP referred appellant, along with the medical record, a statement of accepted facts and a series of questions, to Dr. Charles Beasley, a Board-certified otolaryngologist, for an audiogram and second opinion examination.

On February 28, 2023 the employing establishment responded and noted submission of a December 31, 2011 SF-50, an audiogram dated May 19, 1976, hearing conservation data dated July 22, 1994 and May 25, 2011, and an audiology diagnostic report dated August 19, 2020. It reported that appellant retired from federal service on December 31, 2011 and that there were no additional comments that could be obtained from a knowledgeable supervisor regarding sources of exposure, decibels, frequency levels, types of ear protection provided, or periods of exposure. The employing establishment explained that between the January 1, 1995 date of injury and his retirement on December 31, 2011 he held four separate positions. It challenged the claim based upon lack of timely filing as appellant was no longer exposed to hazardous noise, having last been exposed 12 years prior when he retired on December 31, 2011. The employing establishment referenced the May 25, 2011 audiogram which contained remarks from the audiologist of "early warning for a decrease in hearing." Therefore, it asserted that appellant's claim should be denied as untimely filed.

In a March 23, 2023 report, Dr. Beasley, serving as the second opinion physician, obtained audiology testing on that date at frequency levels of 500, 1,000, 2,000, and 3,000 Hz, which demonstrated losses for the right ear of 25, 30, 65, and 60 dBs and for the left ear of 25, 25, 15, and 50 dBs. He reported that appellant's hearing was normal at the start of his federal employment. Dr. Beasley diagnosed bilateral sensorineural hearing loss and indicated that appellant's hearing condition was due to his federal employment-related noise exposure. He recommended a hearing aid evaluation and use of noise protection.

By decision dated April 12, 2023, OWCP denied appellant's claim, finding that he did not file a timely claim for compensation with 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 January 1, 1995, as indicated on his claim form, and noted that his claim was not filed within three years of the date of last exposure on December 31, 2011. OWCP further found that there was no evidence that appellant's immediate supervisor had actual knowledge of the injury within 30 days of the date of last exposure.

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 filed within the applicable time limitation period 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.[4] 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.[5]

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.[6] 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.[7] Section 8122(b) provides that, in latent disability cases, the time limitation 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.[8] The Board has held that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.[9]

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.[10]

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

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[3] *See R.B.*, Docket No. 18-1327 (issued December 31, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *Y.K.*, Docket No. 18-0806 (issued December 19, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[5] *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).

[6] *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002).

[7] *Supra* note 2 at § 8122(a). *See also S.F.*, Docket No. 19-0283 (issued July 15, 2019); *W.L.*, 59 ECAB 362 (2008); *Gerald A. Preston*, 57 ECAB 270 (2005); *Laura L. Harrison*, 52 ECAB 515 (2001).

[8] *Id.* at § 8122(b).

[9] *See G.M.*, Docket No. 18-0768 (issued October 4, 2018); *Linda J. Reeves*, 48 ECAB 373 (1997).

[10] *See A.M.*, Docket No. 19-1345 (issued January 28, 2020).

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] 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.[13] A hearing loss identified on such a test would constitute actual knowledge on the part of the employing establishment of a possible work injury.[14]

ANALYSIS

The Board finds that appellant has met his burden of proof to establish that he timely filed an occupational disease claim, pursuant to 5 U.S.C. § 8122(a).

On February 2, 2023 appellant filed a Form CA-2, noting that he first became aware of his condition and realized its relation to his federal employment on January 1, 1995. 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.[15] Appellant retired from federal employment on December 31, 2011. Therefore, the three-year time limitation began to run on December 31, 2011. As appellant did not file his occupational disease claim until February 2, 2023, the Board finds that it was not filed within the three-year time period under section 8122(b).[16]

Appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate supervisor had actual knowledge of the injury within 30 days of appellant's last exposure to hazardous noise in federal employment, *i.e.*, within 30 days of his last exposure no later than December 31, 2011.[17] The Board finds that the employing establishment conducted a program of audiometric testing for which he submitted a series of audiograms obtained prior to his retirement. These audiograms obtained as part of an employing establishment hearing conservation program, are sufficient to establish actual knowledge of the claimed hearing loss within 30 days of appellant's last noise exposure, which occurred no later than December 31, 2011.[18] Of note, a May 19, 1976 reference audiogram revealed the following dB losses at 500, 1000, 2000, and 3000 Hz: 10, 15, 20, and 10 for the right ear and 15, 10, 10, and 0 for the left ear. In addition, a subsequent May 25, 2011 audiometric test revealed the following

[11] *Supra* note 2 at §§ 8122(a)(1); 8122(a)(2); *see also Larry E. Young*, 52 ECAB 264 (2001).

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

[13] *L.B.*, Docket No. 12-1548 (issued January 10, 2013); *James W. Beavers*, 57 ECAB 254 (2005).

[14] *Id*.

[15] *Supra* note 2 at § 8122(b).

[16] *G.C.*, Docket No. 12-1783 (issued January 29, 2013).

[17] *See supra* note 8.

[18] *See supra* notes 12 and 13.

dB losses at 500, 1000, 2000, and 3000 Hz: 25, 25, 30, and 55 for the right ear and 25, 15, 20, and 40 for the left ear. As such, the Board finds that the hearing conservation audiograms from May 19, 1976 through May 25, 2011 demonstrate a progressive worsening of appellant's hearing loss while still employed. This is further established by the audiologist's comments on the May 25, 2011 audiometric test, which specifically identified a decrease in hearing at that time. This ratable hearing loss 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 December 31, 2011.[19] Therefore, based on the audiometric test results from the employing establishment's hearing conservation program, his hearing loss claim would be considered timely.[20]

Appellant has established that this occupational disease claim was timely filed. The case will, therefore, be remanded for OWCP to address the merits of the claim. After carrying out this development, OWCP shall issue a *de novo* decision.[21]

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that he timely filed an occupational disease claim, pursuant to 5 U.S.C. § 8122(a). The case is remanded to OWCP for further development.

[19] *See R.F.*, Docket No. 16-1398 (issued December 19, 2016).

[20] *J.C.*, Docket No. 18-1178 (issued February 11, 2019); *L.B.*, *supra* note 13; *James W. Beavers*, *supra* note 13.

[21] *T.R.*, Docket No. 21-1167 (issued April 4, 2022); *L.E.*, Docket No. 14-1551 (issued October 28, 2014).

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further development consistent with this decision of the Board.

Issued: November 1, 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