

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

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<b>W.P., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 23-0544</b>
	)	<b>Issued: September 15, 2023</b>
<b>DEPARTMENT OF JUSTICE, U.S.</b>	)	
<b>ATTORNEYS OFFICE, Newport News, VA,</b>	)	
<b>Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On March 13, 2023 appellant filed a timely appeal from a September 19, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

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. Appellant noted that he first became aware of his condition and realized its relationship to his federal employment on November 16, 2007. He contended that his claim was timely filed because his supervisor, H.Z., had actual, contemporaneous knowledge of his disease/injury and took steps to accommodate him. On the reverse side of the claim form, H.Z., acknowledged that appellant first reported his condition on November 16, 2007, but contended that he was unaware that appellant's condition was caused by his federal employment. He also indicated that appellant stopped work on 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 reiterated his diagnosis of Meniere's disease and allegation that his condition was caused by stress and other factors. Appellant related that, in November 2007, he was assigned violent crime 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 to further reduce his stress and in November 2013 he accepted early retirement. He continued to allege that H.Z. had actual, contemporaneous knowledge of his disease and took steps to accommodate him.

By decision dated October 21, 2019, OWCP denied appellant's occupational disease claim, finding that it was untimely filed pursuant to 5 U.S.C. § 8122. It determined that the evidence of record did not support that he filed his claim within three years of the date of injury, or that his immediate supervisor had actual knowledge of the claimed condition within 30 days of the date of injury.

On October 26, 2019 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 11, 2020.

On April 9, 2020 the employing establishment controverted appellant's claim. It reiterated that, while appellant's supervisor had been aware of appellant's medical condition, his supervisor was not aware of any causal connection between his condition and his federal employment.

In a May 5, 2020 response, appellant asserted that his supervisor knew of his condition and accommodated it by reassigning him to less stressful work. Appellant explained that he accepted

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<sup>2</sup> Docket No. 22-0396 (issued July 19, 2022); Docket No. 21-0107 (issued May 4, 2021).

early retirement because it was an opportunity to reduce his stress level, and manage his Meniere's disease.

By decision dated May 12, 2020, OWCP's hearing representative affirmed the October 21, 2019 decision.

On November 2, 2020 appellant filed a timely appeal to the Board. By decision dated May 4, 2021, the Board affirmed the May 12, 2020 decision, finding that appellant's occupational disease claim was untimely filed pursuant to 5 U.S.C. § 8122.<sup>3</sup> The Board found 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 May 3, 2021 appellant requested reconsideration. In support of his request, he again asserted that H.Z. and the employing establishment were aware of his work-related illness. Appellant also submitted an April 12, 2021 letter in which he asked Dr. Timothy Queen, an otolaryngologist, if he was on the right track in attributing his Meniere's disease to stress caused by his federal prosecutor job. Dr. Queen responded to appellant's letter indicating his approval by writing "Yes" on the same document.

By decision dated July 30, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

On January 21, 2022 appellant filed a timely appeal to the Board. By decision dated July 19, 2022, the Board set aside the July 30, 2021 decision, finding that the case was not in posture for decision because OWCP did not address all relevant evidence received prior to the issuance of its July 30, 2021 final decision.<sup>4</sup> The Board remanded the case for OWCP to consider and address all evidence of record, and following any further development as deemed necessary, it issue an appropriate decision.

By decision dated September 19, 2022, OWCP reviewed the additional evidence received on reconsideration and denied modification.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> 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

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<sup>3</sup> Docket No. 21-0107 (issued May 4, 2021).

<sup>4</sup> Docket No. 22-0396 (issued July 19, 2022).

<sup>5</sup> *Supra* note 1.

time limitation period of FECA,<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes a determination on the merits of the claim.<sup>9</sup> 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.<sup>10</sup>

In a case of occupational disease, 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 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> It is the employee's burden to establish that a claim is timely filed.<sup>14</sup>

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<sup>6</sup> *S.K.*, Docket No. 21-0592 (issued February 21, 2023); *L.S.*, Docket No. 20-0705 (issued January 27, 2021); *M.O.*, Docket No. 19-1398 (issued August 13, 2020); *G.L.*, Docket No. 18-1057 (issued April 14, 2020); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>7</sup> *S.K.*, *id.*; *L.S.*, *id.*; *J.R.*, Docket No. 20-0496 (issued August 13, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>8</sup> *S.K.*, *id.*; *L.S.*, *id.*; *B.M.*, Docket No. 19-1341 (issued August 12, 2020); *M.B.*, Docket No. 20-0066 (issued July 2, 2020); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>9</sup> *J.T.*, Docket No. 20-1093 (issued August 23, 2022); *M.B.*, *id.*; *Charles Walker*, 55 ECAB 238 (2004); *Charles W. Bishop*, 6 ECAB 571 (1954).

<sup>10</sup> 5 U.S.C. § 8122(a); *S.H.*, Docket No. 22-0610 (issued October 21, 2022); *F.F.*, Docket No. 19-1594 (issued March 12, 2020); *W.L.*, 59 ECAB 362 (2008).

<sup>11</sup> *S.H.*, *id.*; *M.B.*, *supra* note 8; *S.O.*, Docket No. 19-0917 (issued December 19, 2019); *Larry E. Young*, 52 ECAB 264 (2001).

<sup>12</sup> *Id.*

<sup>13</sup> 5 U.S.C. § 8122(b).

<sup>14</sup> *S.K.*, *supra* note 6; *M.B.*, *supra* note 8; *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.<sup>15</sup> The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.<sup>16</sup>

### 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).

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's May 12, 2020 decision because the Board considered that evidence in its May 4, 2021 decision. In its May 4, 2021 decision, the Board found that appellant's claim was not timely filed within the three-year time limitation. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>17</sup>

Following OWCP's May 12, 2020 decision, appellant submitted additional evidence in support of his claim.

As noted above, 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 the date of injury. The knowledge must be such as to put the immediate superior reasonably on notice of a job-related injury or death.<sup>18</sup>

Appellant submitted an April 12, 2021 letter, wherein Dr. Queen responded "Yes" regarding whether appellant was on the right track in attributing his Meniere's disease to stress caused by his federal prosecutor job. Dr. Queen's response, however, does not establish that appellant's supervisor had any knowledge, or was on notice that the alleged injury was related to appellant's employment duties or that the employee attributed it thereto.<sup>19</sup> Therefore, the Board finds that appellant has not established actual knowledge by his supervisor of his work-related condition within 30 days of the date of injury and therefore has not established a timely claim.

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<sup>15</sup> 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); *see also* *Larry E. Young*, *supra* note 11.

<sup>16</sup> *S.O.*, *supra* note 11; *B.H.*, Docket No. 15-0970 (issued August 17, 2015); *Willis E. Bailey*, 49 ECAB 511 (1998).

<sup>17</sup> *R.C.*, Docket No. 21-0617 (issued August 25, 2023); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

<sup>18</sup> 5 U.S.C. § 8122(a)(1); *J.T.*, *supra* note 9; *L.H.*, Docket No. 19-0818 (issued December 9, 2019); *Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

<sup>19</sup> *J.T., id.*; *C.S.*, Docket No. 18-0009 (issued March 22, 2018); *see Roseanne S. Allexenberg*, 47 ECAB 498 (1996) (knowledge of an employee's illness is insufficient to establish actual knowledge and timeliness of a claim, it must be shown that the circumstances were such as to put the supervisor on notice that the alleged injury was actually related to the employment or that the employee attributed it thereto).

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 September 19, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 15, 2023  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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