United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 23-0556**
	)	**Issued: September 26, 2023**
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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 3, 2023 appellant filed a timely appeal from a December 1, 2022 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.[2]

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*.

[2] The Board notes that, following the December 1, 2022 decision, OWCP received additional evidence. The Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

FACTUAL HISTORY

On September 12, 2022[3] appellant, then a 78-year-old retired ocean engineering department head, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment including continuous occupational noise exposure at the employing establishment. He noted that he first became aware of his hearing loss on July 1, 1994, and realized its relation to his federal employment on July 14, 1994. Appellant retired from federal employment effective June 28, 2002.

Along with his claim, appellant submitted an April 14, 1997 position description, a January 10, 2018 description of his duties and work environment, and a June 28, 2022 notification of personnel action (Standard Form (SF) 50).

In a September 12, 2022 form report, appellant detailed his employment history noting that he was employed by the U.S. Air Force from 1963 to 1967 as an aircraft load master and was exposed to aircraft noise for eight hours per day with no hearing protection. From 1967 to 1994 he was employed as a draftsman to an ocean engineering department head where he was exposed to shop noise for six hours per day with no hearing protection, including lathes, mills, saws, cutters, cranes, and forklifts. From 1994 to 2002 appellant was employed as an ocean engineering department head with the employing establishment where he was exposed to similar shop noise for six hours per day with no hearing protection. He further related that from 2007 to 2012 he worked as a sales and scheduling employee at a country club with no noise exposure. In a statement of even date, appellant indicated that he was last exposed to occupational noise on June 28, 2002 and first noticed his hearing loss on July 1, 1994 as demonstrated by employer hearing tests revealing hearing loss from workplace noise exposure.

An audiometric evaluation dated September 12, 2022 recorded audiometric findings at the frequency levels of 500, 1,000, 2,000, and 3,000 hertz (Hz) demonstrating losses for the right ear of 30, 40, 50, and 65 decibels (dBs) and for the left ear of 35, 45, 50, and 60 dBs.

In an October 5, 2022 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of medical evidence needed to establish his claim and afforded him 30 days to submit the necessary evidence.

Thereafter, OWCP received an undated service card containing salary information and indicating that appellant retired on June 28, 2022.

In an October 27, 2022 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed to establish his claim and provided a factual questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

Appellant subsequently submitted a July 14, 1967 SF 50.

A reference audiogram from August 5, 1980 at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 0, 5, 0, and 5 dBs and for the left ear of 5, 10, 5, and 10 dBs. Hearing conservation data obtained on July 11, 1983 at the same frequency

[3] Appellant filed an additional Form CA-2 on September 23, 2022.

levels revealed losses for the right ear of 25, 25, 30, and 25 dBs and for the left ear of 15, 15, 10, and 15 dBs. Hearing conservation data dated July 20, 1984 at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 10, 10, 10, and 5 dBs and for the left ear of 15, 20, 15, and 15 dBs. A July 31, 1985 reference audiogram at the same frequency levels revealed losses for the right ear of 10, 10, 10, and 10 dBs and for the left ear of 10, 15, 5, and 10 dBs. Hearing conservation data obtained on March 19, 2002 at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 20, 25, 25, and 30 dBs and for the left ear of 15, 20, 15, and 25 dBs. Testing on March 26, 2002 at the same frequency levels revealed losses for the right ear of 10, 15, 20, and 25 dBs and for the left ear of 10, 20, 15, and 20 dBs. An April 22, 2002 audiogram at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 15, 15, 20, and 25 dBs and for the left ear of 15, 20, 20, and 20 dBs. Undated audiogram results at the same frequency levels revealed losses for the right ear of 15, 10, 10, and 5 dBs and for the left ear of 15, 20, 15, and 15 dBs. Additional undated audiogram results at the frequency levels of 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 10, 10, and 10 dBs.

In a November 1, 2022 statement, appellant noted that he first noticed his hearing loss on July 1, 1994 and related the condition to occupational noise exposure on July 14, 1994 due to employer hearing tests indicating hearing loss. He related that he retired on June 28, 2002 and had no prior ear or hearing problems and no hobbies involving noise exposure. Appellant indicated that the March 19 and April 22, 2002 hearing conservation data showed hearing loss.

By decision dated December 1, 2022, OWCP denied appellant's occupational disease claim, finding that it was untimely filed as he became aware of the relationship between his condition and his federal employment on July 1, 1994 but did not file the claim until September 12, 2022. It further found that there was no evidence that his immediate supervisor had actual knowledge within 30 days of the date of injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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 time limitation period of FECA,[5] 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.[6] 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.[7]

[4] *Supra* note 1.

[5] *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).

[6] *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).

[7] *L.S.*, *id.*; *B.M.*, Docket No. 19-1341 (issued August 12, 2020); *Delores C. Ellyett*, 41 ECAB 992 (1990).

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes a determination on the merits of the claim.[8] 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.[9]

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.[10] 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.[11] 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.[12] It is the employee's burden to establish that a claim is timely filed.[13]

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 the alleged employment-related injury within 30 days or written notice of the injury was provided within 30 days pursuant to section 8119.[14] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.[15]

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.[16] A hearing loss identified on such a

[8] *M.B.*, Docket No. 20-0066 (issued July 2, 2020); *Charles Walker*, 55 ECAB 238 (2004); *Charles W. Bishop*, 6 ECAB 571 (1954).

[9] 5 U.S.C. § 8122(a); *F.F.*, Docket No. 19-1594 (issued March 12, 2020); *W.L.*, 59 ECAB 362 (2008).

[10] *M.B.*, *supra* note 8; *S.O.*, Docket No. 19-0917 (issued December 19, 2019); *Larry E. Young*, 52 ECAB 264 (2001).

[11] *Id*.

[12] 5 U.S.C. § 8122(b).

[13] *M.B.*, *supra* note 8; *D.D.*, Docket No. 19-0548 (issued December 16, 2019); *Gerald A. Preston*, 57 ECAB 270 (2005).

[14] 5 U.S.C. § § 8122 (a)(1); 8122(a)(2); 8119(a), (c); *see also Larry E. Young*, *supra* note 10.

[15] *S.O.*, *supra* note 10; *B.H.*, Docket No. 15-0970 (issued August 17, 2015); *Willis E. Bailey*, 49 ECAB 511 (1998).

[16] *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).

test would constitute actual knowledge on the part of the employing establishment of a possible work injury.[17]

ANALYSIS

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

Appellant noted on his Form CA-2 claim that he was aware of a relationship between the claimed condition and his federal employment as of July 14, 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 of last exposure. Appellant retired from federal employment on June 28, 2002. Therefore, the latest date appellant could have been exposed to hazardous noise at work was the date of his retirement, and the three-year time limitation began to run on June 28, 2002.

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 that participation in an employing establishment hearing conservation program can also establish constructive notice of injury.[18] 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 to put the immediate superior on notice of an on-the-job injury.[19]

Herein, the results of a reference audiogram from August 5, 1980, at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 0, 5, 0, and 5 dBs and for the left ear of 5, 10, 5, and 10 dBs, respectively. Subsequently, hearing conservation data obtained July 11, 1983 through March 19, 2002 at the same frequency levels revealed bilateral hearing loss. Further, testing on March 26, 2022 and an April 22, 2002 reference audiogram continued to show bilateral hearing loss. This evidence 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 June 28, 2002, the date of appellant's retirement.[20] Therefore, based on the audiometric test results from the employing establishment's hearing conservation program, his hearing loss claim is considered timely.[21]

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.

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

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

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

[20] *See supra* notes 15, 16, and 17.

[21] *See J.C.*, *supra* note 16; *M.N.*, *supra* note 19.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2022 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: September 26, 2023
Washington, DC

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

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

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