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

| | | |
|---|---|---|
| **B.S., Appellant** | ) | |
| **and** | ) | **Docket No. 23-0582** |
| | ) | **Issued: September 14, 2023** |
| **TENNESSEE VALLEY AUTHORITY, BROWNS FERRY NUCLEAR PLANT, Athens, AL, 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 14, 2023 appellant filed a timely appeal from a February 27, 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).

### *FACTUAL HISTORY*

On October 6, 2022 appellant, then a 63-year-old retired equipment operator, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of

[1] 5 U.S.C. § 8101 *et seq*.

his federal employment, specifically exposure to high levels of noise while performing electrical work at the employing establishment. He noted that he first became aware of his condition and its relationship to his federal employment on October 1, 1999. On the reverse side of the claim form, the employing establishment noted that appellant did not report his condition until October 6, 2022 and that his last date of exposure was February 6, 2014.

An unsigned audiometric hearing assessment dated January 10, 2022, was submitted by appellant indicating his level of hearing loss.

Appellant submitted a narrative statement on October 6, 2022 relating his employment history and exposure to noisy conditions for long periods of time. He indicated that hearing protection was not required in many areas until 1996 and hearing loss was considered "part of the job" and culture of the workforce. Appellant further indicated that he realized in the mid-1990s that he could no longer hear high-frequency sounds. By 1999, he noted having trouble understanding voices in conversation or on a television. Appellant retired in February 2014 and purchased hearing aids on July 9, 2015, which he indicated now needed replacement.

In a development letter dated October 18, 2022, OWCP indicated that the evidence provided was insufficient to establish that appellant had filed a timely claim for compensation. It also noted that there was no diagnosis of any condition, nor a physician's opinion as to how the alleged injury resulted in a medical condition and provided a questionnaire to him to substantiate the factual elements of his claim. OWCP afforded appellant 30 days to respond. In a separate development letter of even date, it requested that the employing establishment provide additional information regarding his claim, including comments from a knowledgeable supervisor regarding appellant's allegations. OWCP also requested that the employing establishment submit all medical examinations pertaining to his hearing loss.

In a report dated October 18, 2022, Dr. Richard Gresham, a Board-certified audiologist, related that appellant suffered bilateral hearing loss that began in the 1990s. He indicated difficulty hearing and understanding average conversational speech. Dr. Gresham further related a long work history of excessive noise exposure. He indicated that audiometry results revealed a sloping, moderate-to-profound, high frequency, and sensorineural hearing loss in each ear. Dr. Gresham opined that appellant's hearing loss was consistent with his work history of excessive noise exposure.

In a letter dated December 1, 2022, the employing establishment controverted appellant's claim, contending that the claim was not filed timely as he filed his claim beyond the three-year requirement for timely filing. It related that it had a mandatory Hearing Conservation Program (HCP) since March 1983. The employing establishment also detailed its efforts regarding surveillance, monitoring, and protection, but noted it was unable to locate hearing test records for appellant.

The employing establishment submitted a series of e-mails regarding attempts to locate appellant's medical records. The last e-mail dated October 25, 2022 related that "MedGate" and "ECM" had been checked, but that it was possible a hard copy of his records could be found in the Chattanooga file room, which would be checked later in the week.

OWCP received a report summarizing a sample of routine noise levels that appellant would have been exposed to in his work environment.

By decision dated February 27, 2023, 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.

## ***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 any 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 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 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 his or her federal

[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] *S.H.*, Docket No. 22-0610 (issued October 21, 2022); *A.S.*, Docket No. 18-1094 (issued February 7, 2019); *C.D.*, Docket No. 58 ECAB 146 (2006).

[6] 5 U.S.C. § 8122(a).

[7] *R.H.*, Docket No. 21-1364 (issued April 5, 2022); *see A.M.*, Docket No. 19-1345 (issued January 28, 2020); *Larry E. Young*, 52 ECAB 264 (2001).

employment, the time limitation begins to run on the date of the last exposure to the implicated factors.[8]

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 supervisor 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.[9] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.[10]

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.[11] A hearing loss identified on such a test would constitute actual knowledge on the part of the employing establishment of a possible work injury.[12]

## ***ANALYSIS***

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

Appellant submitted an occupational disease claim on October 6, 2022 alleging that he developed hearing loss due to factors of his federal employment. He further indicated that he first became aware of the condition and of the relationship to his federal employment on October 1, 1999. The evidence of record establishes that appellant was last exposed to the allegedly causative factors of employment on February 6, 2014 the date he retired from federal employment. Since he filed his occupational disease claim on October 6, 2022 his claim was filed outside the three-year time limitation period set forth in section 8122(a) of FECA.[13]

Appellant's claim, however, would still be regarded as timely under FECA if his immediate supervisor had actual knowledge of appellant's injury and any possible relation to his federal employment within 30 days, or if written notice of injury was given to his immediate supervisor within 30 days of injury.[14]

---

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993); *R.H., id.*; *see also S.O.*, Docket No. 19-0917 (issued December 9, 2019).

[9] 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); *J.S.*, Docket No. 22-0347 (issued September 16, 2022); *see also Larry E. Young*, 52 ECAB 264 (2001).

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

[11] *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).

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

[13] *R.H., supra* note 7; *R.T.*, Docket No. 18-1590 (issued February 15, 2019).

[14] *Supra* note 11.

The Board finds that OWCP must further develop the factual aspect of this record. The record reflects that the employing establishment had an HCP in place since 1983 and appellant has indicated that he participated in the program. In a development letter dated October 18, 2022, OWCP requested that the employing establishment submit his records pertaining to his hearing loss claim. In an e-mail dated October 25, 2022, an employing establishment official indicated that a further search would be conducted for appellant's records, however, no further information was received. Appellant's audiological and other medical records from the HCP were not provided 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.[15]

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.[16] OWCP has an obligation to see that justice is done.[17]

On remand, OWCP shall obtain all records from the employing establishment's HCP relevant to appellant's claim.[18] Following this and other such further development deemed necessary, it shall issue a *de novo* decision.

## ***CONCLUSION***

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

[15] *See S.N.*, Docket No. 21-0258 (issued October 19, 2021); *see also J.V.*, Docket No. 17-0973 (issued July 19, 2018).

[16] *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).

[17] *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).

[18] *Supra* note 8 at Chapters 2.800.4, 2.800.7, 2.800.8, and 2.800.10 (June 2011).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the February 27, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 14, 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