United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 23-0633**
	)	**Issued: January 18, 2024**
DEPARTMENT OF DEFENSE, MARINE CORPS LOGISTICS BASE BARSTOW, Barstow, CA, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 24, 2023 appellant filed a timely appeal from a February 9, 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 October 7, 2022[2] appellant, then a 67-year-old retired fireman, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss and tinnitus due to factors of his federal employment. He noted that he first became aware of his hearing loss and realized its relation to his federal employment on April 25, 2012.[3] Appellant related that he retired from federal employment at the end of April 2012. On the reverse side of the claim form, an employing establishment supervisor indicated that appellant was last exposed to the conditions alleged to have caused his disease or illness on April 30, 2012.

Along with his claim, appellant submitted an undated statement relating that he was employed at the Nebo and Yermo fire stations from September 1980 to April 2012, during which time he worked on and around fire engines. His duties included pump operation, ladder use, equipment testing, and operating engine trucks and emergency vehicles. Appellant noted that he was not provided hearing protection during the early years of his employment, and the ear protection he was provided later was not completely effective. He explained that he wore no ear protection during trainings because it was necessary to hear radio communications. Appellant indicated that firefighters had to start and run machines and vehicles every shift to ensure they were operational, and that he directed helicopter landings and used chainsaws, generators, and Jaws of Life. Additionally, he tested the sirens and horns of fire engines, and the fire alarm included a siren and large bells that alerted the firehouse during an emergency. Appellant related that his hearing loss and tinnitus were affected by 31 years of working around loud noise as a firefighter, and that he was informed that he did not pass his final hearing test on April 24, 2012. He retired at the end of April 2012 and subsequently experienced ringing in his ears, an inability to hear clearly, and tinnitus that grew louder over time.

OWCP received copies of hearing conservation data, records of audiometric testing, and audiograms administered by the employing establishment covering the period March 9, 1983 to April 25, 2012, which demonstrated hearing loss.

An April 22, 2003 hearing conservation disposition noted a positive standard threshold shift and a provisional diagnosis of noise-induced sensorineural hearing loss, and recommended a follow-up with an audiologist. A May 1, 2003 chronological record of medical care indicated that appellant was referred for evaluation of a significant, permanent threshold shift and that his hearing in both ears was still within normal limits.

A reference audiogram dated April 25, 2012 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 10, 10, 40, and 35 decibels (dBs) and for the left ear of 5, 10, 20, and 30 dBs, respectively.

[2] On the reverse side of the claim form, an employing establishment supervisor indicated that appellant first reported the condition to a supervisor on October 5, 2022.

[3] The Form CA-2 indicates that appellant first became aware of his hearing loss on April 25, 2012 and realized its relation to his federal employment on April 25, 2021; however, the second date appears to be a typographic error in which appellant meant April 25, 2012 for both dates.

In an October 12, 2022 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the evidence necessary to establish his claim and provided a factual questionnaire for his completion. In a second development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor regarding appellant's occupational noise exposure. It afforded both parties 30 days to submit the requested evidence.

Subsequently, OWCP received an undated statement from an employing establishment supervisor, R.T., relating that he concurred with appellant's allegations and advised that fire and emergency personnel were exposed to hazardous noise during their careers. R.T. explained that the noise exposures occur at training and on route to emergency scenes, and that noise sources include fire apparatus, sirens, emergency equipment, and emergency scenes. He indicated that he would request the most recent hearing survey and that fire personnel work 72 hours per week, 144 hours per pay period, during which they are exposed to occupational noise. R.T. noted that employees were provided disposable ear protection as well as over-ear hearing protection, and that it was unknown what type of protection appellant was provided throughout his career. The date of appellant's last exposure to hazardous noise was his retirement date.

In a workplace evaluation dated March 23, 2004, an employing establishment supervisor related that Yermo fire station employees worked two shifts, 24 hours on and 24 hours off, and worked half of the time on the ambulance and half on the fire truck. Equipment was tested weekly and hazardous noise included chainsaws, circular saws, exhaust fans, backup generators, and sirens. Firefighters wore communication headsets with earmuffs on the fire truck and in the workshop and wore triple flange earplugs or foam plugs for equipment testing. In a March 25, 2004 workplace evaluation, an employing establishment supervisor related that the Nebo fire station had two fire engines, one ambulance, and one hazmat truck. Firefighters routinely checked powered emergency equipment, rotated between Nebo and Yermo fire stations, and responded to 1200 to 1300 calls per year. They also used a breathing air compressor and diesel air compressor for adding air to fire sprinkler systems.

A May 6, 2004 position description described the duties and responsibilities of a firefighter.

In workplace evaluations dated January 31, 2008, and March 13, 2012, an employing establishment supervisor described the firefighting team and noted that firefighters worked two 24-hour shifts and the fire stations had four fire engines, one ambulance, one hazmat vehicle, and one emergency command vehicle. The noise protection equipment on fire engines included headsets with earmuffs and triple flange or foam earplugs for equipment testing. Employees were exposed to noise hazards from a breathing air compressor, a diesel air compressor, water pumps, compressors, and sirens.

By decision dated February 9, 2023, OWCP denied appellant's occupational disease claim, finding that it was untimely filed as the date of his injury was April 25, 2012, but he did not file the claim until October 5, 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]

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

[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).

[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*.

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

ANALYSIS

The Board finds that appellant filed a timely claim for compensation.

Appellant indicated on his CA-2 claim form that he was aware of a relationship between the claimed condition and his federal employment as of April 25, 2012 and, on the reverse side of the claim form, an employing establishment supervisor indicated that he was last exposed to the conditions alleged to have caused his disease or illness on April 30, 2012. 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 effective April 30, 2012. Therefore, the latest date he 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 April 30, 2012.

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

[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] *T.R.*, Docket No. 21-1167 (issued April 4, 2022); *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).

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

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, so as to put the immediate superior on notice of an on-the-job injury.[19]

Herein, hearing conservation data, records of audiometric testing, and audiograms administered by the employing establishment covering the period March 9, 1983 to April 25, 2012 demonstrated hearing loss. An April 22, 2003 hearing conservation disposition noted a positive standard threshold shift and a provisional diagnosis of noise-induced sensorineural hearing loss. Also, a May 1, 2003 chronological record of medical care indicated that appellant was referred for evaluation of a significant, permanent threshold shift in his hearing. An April 25, 2012 reference audiogram recorded audiometric findings at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz, demonstrating losses for the right ear of 10, 10, 40, and 35 dBs and for the left ear of 5, 10, 20, and 30 dBs, respectively. This demonstrates 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 April 30, 2012, the date of his retirement.[20] Therefore, based on these reports and audiometric test results from the employing establishment's hearing conservation program, appellant's hearing loss claim is considered timely.[21]

The case must, therefore, be remanded for OWCP to address the merits of the claim. Following this and such other development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant filed a timely claim for compensation.

[18] *See J.C.*, Docket No. 15-1517 (issued February 25, 2016); *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 T.R., supra* note 16.

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

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2023 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 18, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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