United States Department of Labor
Employees' Compensation Appeals Board

K.A., Appellant	)	
and	)	**Docket No. 13-1349**
	)	**Issued: September 26, 2013**
DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 14, 2013 appellant filed a timely appeal from an April 2, 2013 nonmerit 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 OWCP properly determined that appellant's claim for occupational hearing loss is barred by the applicable time limitation provisions of FECA.

On appeal, appellant asserted that his supervisor had timely actual knowledge of a work-related hearing loss demonstrated by employing establishment audiograms.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 26, 2012 appellant, then a 78-year-old former shipwright, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral hearing loss due to hazardous noise exposure at work prior to his retirement on June 1, 1989. He stated that he first became aware of his hearing loss and of its possible relationship to his federal employment on January 1, 1980. In an accompanying form, appellant again stated that he was first aware of his hearing loss and its relationship to his federal duties on January 1, 1980. He provided a history showing that he worked at the employing establishment as a shipwright from 1959 to June 1, 1989, with exposure to saws, chipping guns, planes, grinders, drills, diesel motors, sandblasters, cranes and ventilation fans.

Appellant submitted August 28 and September 26, 2012 audiograms from a private sector medical office showing a mild-to-moderate bilateral sensorineural hearing loss. Dr. Gerald G. Randolph, an attending Board-certified otolaryngologist, stated on October 3, 2012 that he would need to review employing establishment audiograms to determine if appellant's hearing loss was related to hazardous noise exposure in his federal employment.

In an October 22, 2012 letter, the employing establishment noted that it could not confirm appellant's history of noise exposure as his duty station closed in 1989 and his supervisors were no longer available. The employing establishment submitted forms confirming that appellant worked there from 1959 through June 1, 1989.

In a December 17, 2012 letter, OWCP advised appellant of the additional evidence needed to establish his claim, including factual evidence demonstrating that he timely notified the employing establishment of the hearing loss within 30 days. Appellant was afforded 30 days to submit such evidence.

In a January 4, 2013 letter, appellant asserted that, on or about January 1, 1980, his supervisor scheduled repeat audiologic testing for him as he failed a preliminary screening test.

By decision dated April 2, 2013, OWCP denied appellant's claim on the grounds that it was not timely filed under the three-year time limitation at section 8122 of FECA. It found that appellant did not file his claim until September 26, 2012, more than three years after January 1, 1980, the date he first became aware of the connection between the claimed hearing loss and his federal employment. OWCP further found that the evidence did not establish that the employing establishment had actual notice of the hearing loss within 30 days of the date of injury.

LEGAL PRECEDENT

Under section 8122 of FECA,[2] as amended in 1974, a claimant has three years to file a claim for compensation.[3] In a case of occupational disease, the Board has held that the time for filing a claim begins to run when the employee first becomes aware or reasonably should have

[2] 5 U.S.C. § 8122.

[3] *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); *see* 20 C.F.R. § 10.101(b).

been aware, of a possible relationship between his condition and his employment. When an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitation period even though he does not know the nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[4] Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of his last exposure to the implicated factors.[5] 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 his employment and the compensable disability.[6]

Even if the claim is not filed within the three-year period, it may be regarded as timely under section 8122(a)(1) if appellant's immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days such that the immediate superior was put reasonably on notice of an on-the-job injury or death.[7] In interpreting section 8122(a)(1) of FECA, OWCP's procedure manual states that, if the employing establishment gives regular physical examinations, which might have detected signs of illness, such as hearing tests, it should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results.[8] The Board has held that a program of annual 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.[9] A hearing loss identified on such a test would constitute actual knowledge on the part of the agency of a possible work injury.[10]

ANALYSIS

In this case, appellant stated on his claim form and in associated statements that he was aware of a relationship between the claimed condition and his federal employment as of January 1, 1980. Under section 8122(b), the time limitation begins to run when appellant 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 on

[4] *Larry E. Young*, 52 ECAB 264 (2001); *Duet Brinson*, *supra* note 3.

[5] *See Larry E. Young*, *id*.

[6] 5 U.S.C. § 8122(b); *Bennie L. McDonald*, 49 ECAB 509, 514 (1998).

[7] *William C. Oakley*, 56 ECAB 519 (2005); *Duet Brinson*, *supra* note 3; *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6(c) (March 1993); *L.C.*, 57 ECAB 740 (2006); *Ralph L. Dill*, 57 ECAB 248 (2005).

[9] *James W. Beavers*, 57 ECAB 254 (2005); *Ralph L. Dill*, *id*.

[10] *See* 5 U.S.C. § 8122(a)(1); Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.801(3); *Ralph L. Dill*, *id.*; *Larry E. Young*, *supra* note 4; *Roger D. Dicus*, 56 ECAB 290 (2005).

June 1, 1989. Therefore, the three-year-time limitation began to run on June 1, 1989. As appellant did not file his occupational disease claim until September 26, 2012, the Board finds that it was not filed within the three-year-time period under section 8122(b).

As set forth above, appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate supervisor, another employing establishment official or employing establishment physician or dispensary had actual knowledge of the injury within 30 days of his last exposure to noise, *i.e.*, within 30 days of June 1, 1989.[11] In his January 4, 2013 letter, appellant asserted that employing establishment audiograms provided his supervisor actual notice of the hearing loss on or about January 1, 1980. However, he did not submit any employing establishment audiograms, supervisory statements or related documentation. The employing establishment noted that as appellant's duty station had closed in 1989, his noise exposure history could no longer be confirmed.

Appellant did not submit evidence demonstrating that the employing establishment had actual notice of the claimed hearing loss within 30 days of his retirement on June 1, 1989. Therefore, the Board finds that his claim was not timely filed within the three-year time limitation under section 8122 of FECA.

On appeal, appellant asserted that his supervisor had timely actual knowledge of a work-related hearing loss demonstrated by employing establishment audiograms. As stated, he did not submit employing establishment audiograms, supervisory statements or related documentation establishing actual notice of a hearing loss within 30 days of his retirement on June 1, 1989.

CONCLUSION

The Board finds that appellant's claim for hearing loss was not timely filed.

[11] *See* 5 U.S.C. § 8122(a)(1); Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.801(3); *Ralph L. Dill*, *id.*; *Larry E. Young*, *supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 2, 2013 is affirmed.

Issued: September 26, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board