United States Department of Labor
Employees' Compensation Appeals Board

E.R., Appellant	)	
and	)	**Docket No. 14-645**
	)	**Issued: July 24, 2014**
DEPARTMENT OF THE NAVY, NAVAL UNDERSEA WARFARE CENTER, KEYPORT DIVISION, Keyport, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 29, 2014 appellant filed a timely appeal from a January 17, 2014 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 filed a timely claim for compensation under 5 U.S.C. § 8122.

FACTUAL HISTORY

On September 16, 2013 appellant, then a 59-year-old electronics engineer, filed an occupational disease claim (Form CA-2) alleging that on December 20, 2004, he became aware

[1] 5 U.S.C. § 8101 *et seq.*

of his bilateral hearing loss and first realized that it was caused or aggravated by duties of his federal employment. He stated that he was unaware of any government program that could be used to mitigate his hearing loss until September 10, 2013. Appellant explained that from October 1995 through March 2006 he was a member of an electronic equipment installation team, which installed system upgrades to Navy vessels. Some of the equipment he installed was located in very noisy main machinery spaces. Appellant noted that he purchased hearing aids using personal funds in December 2005 and that there was no documented evidence in his personnel records to support his claim. Scott Hultquist, a supervisor, noted that appellant was already present at work when hired, that he wore hearing aids when he was hired and that he had difficulty hearing even with the devices. The employing establishment challenged appellant's claim on the basis that it was untimely.

On September 30, 2013 OWCP requested that appellant submit additional evidence to establish his claim. It noted that the evidence of record did not establish that he provided timely notification of his work injury. OWCP also requested that the employing establishment submit any factual and medical evidence related to appellant's noise exposure.

Appellant submitted a record of diagnostic testing from Dr. Stephen Habener, a Board-certified otolaryngologist, dated May 17, 2006. He also submitted several unsigned audiological evaluations from September 8, 2008, June 15, 2012 and July 5, 2013. None of the records contained an opinion on the cause of appellant's condition.

In an undated statement and an exposure data record, appellant reviewed his employment history with the Federal Government. He noted that from January 1977 through June 1980, he was employed on U.S. Navy vessels, where he was exposed to high levels of noise seven hours a day. On June 1, 1986 appellant was involved in a training exercise that exposed him to high levels of noise for four hours. From October 1980 through January 1988, he was an electronics mechanic at the employing establishment, where he was exposed to high levels of noise. From February 1988 through May 2004, appellant was an electronics engineer at the same employing establishment, where he was exposed to loud hammering noise for at least eight hours a day. He noted that he remained an electronics engineer at the employing establishment in a different unit from June 2004 through April 2007 and then switched to yet another unit in the same position from April 2007 through the present. On the exposure data record, appellant stated that he always wore hearing protection.

On October 4, 2013 appellant stated that he first noticed his hearing loss on approximately December 20, 2004. He stated that he had no previous hearing problems and that there were no employer-sponsored noise evaluation studies or preemployment physical examinations regarding his hearing. Appellant explained that his claim was not filed earlier because he was unaware that he could file a claim until September 13, 2013. He submitted a Form SF-50, Notification of Personnel Action, that indicated that he remained employed as an electronics engineer as of September 9, 2012.

On November 1, 2013 the employing establishment controverted appellant's claim and stated that he had not filed his claim in a timely manner, as he was last exposed to hazardous noise in 2004 and did not file a claim until September 16, 2013.

By decision dated January 17, 2014, OWCP denied appellant's claim for hearing loss as untimely filed. It found that his claim was not timely filed within three years of the date of last exposure or that his immediate supervisor had actual knowledge within 30 days of the date of last exposure. OWCP found that the date of appellant's last exposure was in June 2004, the date of injury was December 20, 2004, and his claim for compensation was not filed until September 11, 2013.

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.[2] 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. Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless: (1) the immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death; or (2) written notice of injury or death as specified in section 8119 was given within 30 days.[3]

Section 8119 of FECA provides that a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury or in the case of death, the employment factors believed to be the cause; and be signed by and contain the address of the individual giving the notice.[4] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[5] For actual knowledge of a supervisor to be regarded as timely filed, an employee must show not only that the immediate superior knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.[6]

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 and the Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.[7]

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[2] *Charles Walker*, 55 ECAB 238, 239 (2004); *see Charles W. Bishop*, 6 ECAB 571 (1954).

[3] 5 U.S.C. § 8122(a).

[4] *Id*. at § 8119; *Larry E. Young*, 52 ECAB 264, 266 (2001).

[5] *Laura L. Harrison*, 52 ECAB 515, 517 (2001).

[6] *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

[7] 5 U.S.C. § 8122(b); *see Luther Williams, Jr*., 52 ECAB 360, 361 (2001).

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 condition and his employment. When an employee becomes aware or reasonably should have been aware that he or she has a condition which has been adversely affected by factors of 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.[8] 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.[9] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[10]

ANALYSIS

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

On September 16, 2013 appellant filed an occupational disease claim alleging hearing loss due to factors of his federal employment. He stated that he first became aware of the condition's relationship to his employment on December 20, 2004, and this is the date that OWCP accepted as his date of injury. Appellant's noise exposure data record indicated that he was last exposed to hazardous noise in June 2004; however, he also indicated that he remained in the same position through March 2006 on his Form CA-2. The record also indicates that he remained an electronics engineer at the employing establishment in a different unit from June2004 through April 2007 in his review of his employment history. Furthermore, appellant submitted a Form SF-50, Notification of Personnel Action, that indicated he remained employed as an electronics engineer as of September 9, 2012. In its decision of January 17, 2014, OWCP noted that it accepted a date of last exposure to hazardous noise in June 2004 on the basis of his employment history and the employing establishment's November 1, 2013 statement. The November 1, 2013 statement itself listed a date of last exposure in 2004 and otherwise relied entirely upon an attached noise exposure record provided by appellant. The Board finds that OWCP did not adequately develop the issue of appellant's last date of exposure to hazardous noise as there is contradictory evidence of record.

Appellant's claim would be regarded as timely under section 8122(a) of FECA if his immediate supervisor had actual knowledge of the injury or if he provided written notice, within 30 days of his injury, *i.e.*, within 30 days of December 20, 2004.[11] In OWCP's January 17, 2014 decision, the claims examiner stated that the evidence did not support that appellant's immediate supervisor had actual knowledge within 30 days of appellant's injury. The Board finds that this issue was not adequately developed.

[8] *Larry E. Young*, *supra* note 4.

[9] *Id.*

[10] *Debra Young Bruce*, 52 ECAB 315, 317 (2001).

[11] *See* 5 U.S.C. § 8122(a); *Ralph L. Dill*, 57 ECAB 248, 251 (2005).

In appellant's Form CA-2 filed on September 16, 2013, Mr. Hultquist, a supervisor, noted that appellant was already present at work when he was hired as supervisor. He noted that appellant wore hearing aids and had difficulty hearing even with the device. This statement is relevant to the issue of actual knowledge of appellant's hearing loss. OWCP did not request additional information or clarification from his supervisor regarding whether and when he was aware of appellant's hearing loss. The development letter sent to the employing establishment on September 30, 2013 only requested that it submit factual and medical evidence related to appellant's noise exposure.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While appellant has the burden to establish her claim, OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment.[12] Once OWCP has begun investigation of a claim, it must pursue the evidence as far as reasonably possible.[13]

The Board finds that the issues of appellant's date of last exposure to hazardous noise and whether his immediate supervisor had actual knowledge of his hearing loss within 30 days were not fully developed by OWCP. Accordingly, the case will be remanded to OWCP to further develop a date of last exposure to hazardous noise by asking appellant and the employing establishment whether he continued to be exposed to such noise in his position after June 2004. It should also secure a supplemental statement from Mr. Hultquist to clarify the issue of whether he had actual knowledge of appellant's hearing loss within 30 days of December 20, 2004 or the date of last exposure to hazardous noise (if found to be later), in addition to any available statements from appellant's former supervisors regarding their knowledge at that time. After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[12] *See Robert C. Fay*, 39 ECAB 163 (1987).

[13] *See Monroe Fears*, 42 ECAB 608 (1992).

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development of the evidence consistent with this decision.

Issued: July 24, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board