

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

M.S., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL SEA
SYSTEMS COMMAND, San Diego, CA,
Employer**

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**Docket No. 16-1221
Issued: November 8, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 18, 2016 appellant filed a timely appeal from an April 21, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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's hearing loss claim was timely filed pursuant to 5 U.S.C. § 8122.

FACTUAL HISTORY

On December 9, 2015 appellant, then a 60-year-old electronics engineer, filed an occupational disease claim (Form CA-2) alleging bilateral hearing loss and tinnitus as a result of

¹ 5 U.S.C. § 8101 *et seq.*

employment-related noise exposure. He reported that his hearing loss occurred from hazardous noise exposure at the employing establishment which started while he worked in the machine shop and continued as he worked in other noisy areas. Appellant first became aware of his condition and of its relationship to his employment on December 1, 2005. He remained employed at the employing establishment as an electronics engineer. Appellant underwent medical evaluation on November 23, 2015 and notified the employing establishment on November 24, 2015. A November 23, 2015 audiogram was submitted with his claim.

By letter dated December 15, 2015, OWCP requested additional factual information from both appellant and the employing establishment. Appellant was requested to provide information regarding whether he continued to be exposed to hazardous noise at work and if not, his date of last exposure. OWCP noted that it did not appear his claim was filed in a timely manner as he first became aware of his condition and its relationship to his employment on December 1, 2005. It requested evidence to establish that his claim was filed within three years of the date he became aware of a relationship between his condition and his employment. OWCP requested that the employing establishment provide noise survey reports for each site where appellant worked, the sources and period of noise exposure for each location, and copies of all medical examinations pertaining to hearing or ear problems.

By letter dated December 29, 2015, appellant responded to OWCP's questionnaire stating that his work continued to expose him to hazardous noise in waterfront operations and other duties. He noted that he only recently became aware of his hearing condition when his family and coworkers suggested that he have his hearing tested. Appellant stated that he used the December 1, 2005 date as he remembered having his hearing tested as part of his physical examination requirement for certification to work with explosives. He reported that he did not receive those test results until his latest hearing test in November 2015. Appellant described his employment duties stating that his career working for employing establishment exposed him to hazardous noise from machine shops, ordnance operations, waterfront operations, and disposal of unserviceable munitions on open detonation ranges.

In a January 5, 2016 narrative statement, R.A., appellant's supervisor, reported that he agreed with appellant's statements. He noted that he had been appellant's supervisor for the last three years and had been assigning him duties since 2005 which exposed him to prolonged and intermittent noise from working around piers, barges, and machine shops. R.A. reported no knowledge of periodic audiometric evaluations to document hearing loss.

By letter dated January 26, 2016, OWCP requested the employing establishment provide additional information pertaining to hearing tests, medical assessments, diagnostic reports, a copy of appellant's job description, and whether he participated in a hearing conservation program. In another letter dated January 26, 2016, it requested appellant provide a copy of his audiometric evaluation from December 1, 2005 and also asked whether he participated in a hearing conservation program.

By letter dated February 5, 2016, appellant reported that he had requested all audiograms from the employing establishment clinic, but he had not received an audiogram from December 1, 2005. However, he received four other audiograms. Appellant noted that he had

only guessed that December 1, 2005 was the date of his last audiogram because he could not specifically remember the date and estimated it occurred 10 years ago.

In support of his claim, appellant submitted audiograms dated January 3, 2001, December 16, 2002, September 16, 2010, and December 21, 2015.

In a February 17, 2016 e-mail correspondence, R.A. reported that as appellant's supervisor for the last two years, he did not have any records pertaining to his hearing loss. He noted that he believed the employing establishment had eliminated the hearing conservation program years ago during reorganization. An official position description for electronics engineer was submitted which indicated appellant began his employment on December 16, 1999.

By decision dated April 21, 2016, OWCP denied appellant's claim finding that it was untimely filed. It found no evidence that the claim had been filed within three years of the December 1, 2005 injury date or that his immediate supervisor had actual knowledge of his injury within 30 days of the injury date.

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.³ 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 the employment and the compensable disability.⁴ The Board has held that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.⁵

Even if a claim is not filed within the three-year time limitation period, it would still be regarded as timely under section 8122(a)(1) if the immediate superior had actual knowledge of his alleged employment-related injury within 30 days or written notice of the injury was provided within 30 days pursuant to section 8119.⁶ The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.⁷ The Board has indicated that an employee need only be aware of a possible relationship between his or her

² *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002).

³ *W.L.*, 59 ECAB 362 (2008); *Gerald A. Preston*, 57 ECAB 270 (2005); *Laura L. Harrison*, 52 ECAB 515 (2001).

⁴ *Id.* at § 8122(b).

⁵ See *Linda J. Reeves*, 48 ECAB 373 (1997).

⁶ 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); see also *Larry E. Young*, 52 ECAB 264 (2001).

⁷ *Willis E. Bailey*, 49 ECAB 511 (1998); *B.H.*, Docket No. 15-0970 (issued August 17, 2015).

condition and his or her employment to commence the running of the applicable statute of limitations.⁸

ANALYSIS

The Board finds that appellant has established that he filed a timely claim for compensation under the three-year time limitation of section 8122 of FECA.⁹

In his notice of occupational disease, appellant advised that he first became aware of his hearing loss and its relation to his federal employment in 2005. Although he did not file his claim or give notice to his supervisor until November 24, 2015, he continued to work as an electronics engineer for the employing establishment. Appellant claimed that he was exposed to hazardous noise from machine shops, ordnance operations, waterfront operations, and disposal of unserviceable munitions on open detonation ranges. R.A., his supervisor, agreed with appellant's statements regarding his prolonged and hazardous noise exposure. As such, the employing establishment did not contest that he continued to be exposed to hazardous noise during his employment as an electronics engineer. As noted, the Board has held that, if an employee continues to be exposed to injurious working conditions, the time limitation begins to run on the last date of this exposure.¹⁰

As appellant filed a timely claim for compensation while still exposed to hazardous noise, the case is remanded to OWCP to further develop and adjudicate the claim to determine whether appellant established a compensable hearing loss.¹¹

Following this and any other development that it deems necessary, OWCP shall issue a *de novo* decision in the case.

CONCLUSION

The Board finds that appellant has filed a timely occupational disease claim for compensation under 5 U.S.C. § 8122.

⁸ *Edward C. Hornor*, 43 ECAB 834, 840 (1992).

⁹ *J.C.*, Docket No. 15-1596 (issued November 5, 2015).

¹⁰ *B.H.*, Docket No. 15-970 (issued August 17, 2015).

¹¹ *Supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2016 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded to OWCP for further development consistent with this decision.

Issued: November 8, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board