

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

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<b>J.M., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 24-0144</b>
	)	<b>Issued: April 19, 2024</b>
<b>DEPARTMENT OF THE NAVY, PRODUCTION</b>	)	
<b>RESOURCES DEPARTMENT, NORFOLK</b>	)	
<b>NAVAL SHIPYARD, Portsmouth, VA, Employer</b>	)	
	)	

*Appearances:* *Case Submitted on the Record*  
*Margaret Marshall*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 6, 2023 appellant, through his representative, filed a timely appeal from an October 31, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## 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 August 1, 2023 appellant, then a 63-year-old retired pipefitter supervisor, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hearing loss due to factors of his federal employment, specifically his exposure to loud noise in the workplace. He noted that he first became aware of the condition and its relationship to his federal employment on October 20, 1997. On the reverse side of the claim form, the employing establishment indicated that appellant first reported his condition on July 31, 2023, and his last date of exposure was August 9, 2019 when he retired.

OWCP received a position description form on August 1, 2023 describing appellant's duties as a pipefitter. The form indicated environmental factors of constant noise and intermittent excessive noise in indoor and outdoor work areas. OWCP also received appellant's summary of his employment history, which indicated that he had worked as a pipefitter at the employing establishment commencing in 1984, as a pipefitter work leader from 1998 through 2010, and a pipefitter supervisor from 2010 through his retirement on August 9, 2019.

Appellant submitted a June 27, 2019 audiometric testing report by Erica Wenner, an audiologist, who therein indicated that he recounted a history of hearing loss due to noise exposure as a pipefitter supervisor. Testing at the frequencies of 500, 1,000, 2,000, and 3,000, Hertz (Hz) demonstrated losses for the right ear of 25, 20, 30, and 50 decibels (dBs) and losses for the left ear of 20, 20, 25, and 55 dBs, respectively.

In a development letter dated August 8, 2023, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 60 days to respond. In a separate development letter of the same date, it requested that the employing establishment provide additional information regarding the claim, including the dates, locations, and durations of exposure to hazardous noise. OWCP afforded the employing establishment 30 days to respond.

In an August 8, 2023 e-mail, Ms. Wenner identified herself as an occupational audiologist at the employing establishment. She indicated that, as appellant retired in 2019, his medical record had been archived.

OWCP received a June 27, 2019 audiometry report wherein Ms. Wenner recounted appellant's history of bilateral high-frequency sensorineural hearing loss, with tinnitus and a sensation of fullness in both ears. She conducted a diagnostic audiometric evaluation in 2013. Ms. Wenner noted that his duties as a pipefitter supervisor entailed "minimal workplace noise exposure." She recommended a hearing aid evaluation.

OWCP also received a June 27, 2019 letter from the employing establishment's audiology division, which notified appellant that his recent audiometric evaluation demonstrated a permanent

threshold shift in one or both ears. It noted that appellant had been provided with hearing protection and refresher training regarding the employing establishment's hearing conservation program.

In an October 13, 2023 report, Ms. Wenner noted that noise dosimetry samples for pipefitters and pipefitter work leaders ranged from 67.1 to 103 A-weighted decibels (dBA), and from 71.7 to 85.5 dBA for pipefitter supervisors. This data indicated that appellant had worked in areas with potentially hazardous noise. Hearing conservation data obtained from an August 22, 1984 audiogram at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses for the right ear of 10, 10, 5, and 5 dBs and losses for the left ear of 5, 5, 5, and 15 dBs, respectively. A June 27, 2019 audiogram at the same frequency levels revealed losses for the right ear of 25, 20, 30, and 50 dBs and for the left ear 20, 20, 25, and 55 dBs, which demonstrated hearing loss greater than predicted for presbycusis.

By decision dated October 31, 2023, OWCP denied appellant's claim, finding that he had not filed a timely claim for compensation within the requisite three-year time limit provided under 5 U.S.C. § 8122. It found that the date he became aware of the condition was October 20, 1997 and his exposure to work factors ended on August 9, 2019. However, appellant had not filed a claim until August 1, 2023, beyond the three-year time limitation. OWCP further found that there was no evidence that appellant's immediate supervisor had actual knowledge within 30 days of the date of injury.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes a determination on the merits of the claim.<sup>6</sup> In cases of injury on or after September 7,

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<sup>3</sup> *Id.*

<sup>4</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>5</sup> *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).

<sup>6</sup> *J.S.*, Docket No. 22-0347 (issued September 16, 2022); *F.F.*, Docket No. 19-1594 (issued March 12, 2020); *R.T.*, Docket No. 18-1590 (issued February 15, 2019); *Charles Walker*, 55 ECAB 238 (2004); see *Charles W. Bishop*, 6 ECAB 571 (1954).

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.<sup>7</sup>

In an occupational disease claim, 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> It is the employee's burden of proof to establish that a claim is timely filed.<sup>11</sup>

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 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.<sup>12</sup> The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.<sup>13</sup>

### ANALYSIS

The Board finds that appellant timely filed his claim for compensation, pursuant to 5 U.S.C. § 8122(a).

Appellant stated on his claim form that he was aware of a relationship between the claimed condition and his federal employment as of October 20, 1997. 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

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<sup>7</sup> *Id.*

<sup>8</sup> *T.R.*, Docket No. 21-1167 (issued April 4, 2022); *see A.M.*, Docket No. 19-1345 (issued January 28, 2020); *Larry E. Young*, 52 ECAB 264 (2001).

<sup>9</sup> *T.R. id.*; *S.O.*, Docket No. 19-0917 (issued December 19, 2019); *Larry E. Young, id.*

<sup>10</sup> 5 U.S.C. § 8122(b).

<sup>11</sup> *T.R.*, *supra* note 8; *D.D.*, Docket No. 19-0548 (issued December 16, 2019); *Gerald A. Preston*, 57 ECAB 270 (2005).

<sup>12</sup> 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); *V.J.*, Docket No. 23-0787 (issued December 20, 2023); *J.S.*, Docket No. 23-0556 (issued September 26, 2023); *see also Larry E. Young, supra* note 8.

<sup>13</sup> *V.J., id.*; *J.S., id.*; *B.H.*, Docket No. 15-0970 (issued August 17, 2015); *Willis E. Bailey*, 49 ECAB 511 (1998).

federal employment on August 9, 2019. Therefore, the latest date he could have been exposed to any hazardous noise at work was the date of his retirement, and the three-year time limitation thus began to run on August 9, 2019.

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, however, that participation in an employing establishment hearing conservation program can also establish constructive notice of injury.<sup>14</sup> 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.<sup>15</sup>

Herein, the results of a reference audiogram dated August 22, 1984, testing at 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 10, 10, 5, and 5 dBs and losses for the left ear of 5, 5, 5, and 15 dBs, respectively. On June 27, 2019 testing at 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 25, 20, 30, and 50 dBs and losses for the left ear of 20, 20, 25, and 55 dBs. This demonstrates a hearing loss, which constitutes actual knowledge by the employing establishment of a possible work-related hearing loss within 30 days of appellant's last noise exposure, which occurred no later than August 9, 2019, the date of his retirement.<sup>16</sup> Therefore, based on the audiometric test results from the employing establishment's hearing conservation program, his hearing loss claim is considered timely.<sup>17</sup>

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

### CONCLUSION

The Board finds that appellant timely filed his claim for compensation, pursuant to 5 U.S.C. § 8122(a).

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<sup>14</sup> *T.R.*, *supra* note 8; *see J.C.*, Docket No. 15-1517 (issued February 25, 2016); *see also M.W.*, Docket No. 16-0394 (issued April 8, 2016).

<sup>15</sup> *V.J.*, *supra* note 12; *J.S.*, *supra* note 12; *see M.N.*, Docket No. 17-0931 (issued August 15, 2017); *W.P.*, Docket No. 15-0597 (issued January 27, 2016).

<sup>16</sup> *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); *see also L.E.*, Docket No. 14-1551 (issued October 28, 2014).

<sup>17</sup> *V.J.*, *supra* note 12; *J.S.*, *supra* note 12; *M.N.*, *supra* note 15.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 31, 2023 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 19, 2024  
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