United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 24-0274**
	)	**Issued: July 29, 2024**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 25, 2024 appellant filed a timely appeal from a December 11, 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 timely filed an occupational disease claim for compensation, pursuant to 5 U.S.C. § 8122(a).

FACTUAL HISTORY

On January 11, 2023 appellant, then a 71-year-old retired rigger, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal

[1] 5 U.S.C. § 8101 *et seq*.

employment. He noted that he first became aware of his hearing loss and realized its relation to his federal employment on March 15, 2005. Appellant retired effective March 3, 2006. On the reverse side of the form, the employing establishment controverted the claim arguing that it was untimely filed.[2]

In support of his claim, appellant submitted employing establishment audiograms performed as part of a hearing conservation program dated February 5, 1985 through March 7, 2001. A reference audiogram from February 5, 1985, revealed the following decibel (dB) losses at 500, 1,000, 2,000, and 3,000 Hertz (Hz): 35, 35, 20, and 25 for the right ear, and 5, 0, 0, and 5 for the left ear, respectively. The baseline audiogram indicated normal hearing and showed no ratable loss in both ears. Prior to appellant's retirement, the most recent March 7, 2001, audiogram revealed the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 55, 50, 45, and 55 for the right ear, and 15, 10, 5, and 15 for the left ear, respectively. The audiograms from the hearing conservation program showed a progression in his hearing loss for the right ear. The March 7, 2001 audiogram also contained remarks from the audiologist at that time who noted that appellant's evaluation revealed a significant threshold shift greater than 20 decibels, his supervisor would be notified, and he would need to be cleared by an occupational medicine provider or audiologist. He also submitted a September 19, 2022 audiometric evaluation reflecting hearing loss of the right ear.

On February 4, 2004 Charles Moore, a physician assistant, noted that appellant's baseline hearing was reestablished due to a permanent threshold shift under the hearing conservation program. He noted that the high-frequency noise exposure exceeded 45 dBs bilaterally and advised that appellant was referred to an audiologist or physician for evaluation. On March 15, 2005 Mr. Moore noted a loss or change in hearing and exposure due to excessive noise. On February 15, 2006 a baseline in appellant's hearing was reestablished due to a permanent threshold shift under the hearing conservation program.

In an employment history dated September 19, 2022, appellant noted that he worked for the U.S. Air Force from 1969 through 1973 in supply with no significant noise exposure. From 1973 through March 2006, he worked for the employing establishment as a rigger and was exposed to hazardous noise from needle guns, grinders, sanders, cranes, forklifts, chain falls, and sandblasters for eight hours a day. Appellant noted that he was provided safety devices to protect against hazardous noise exposure.

Appellant provided an exposure data record noting that he worked for the employing establishment beginning in July 1979 in various positions. He described his exposure to hazardous noise at work where he worked as a rigger in various ships and shops and was exposed to hazardous noise from chipping guns, needle guns, ventilation system, carbon and pneumatic tools, pumps and motors, sandblasters, deck crawlers, and jack hammers. Appellant was provided with hard

[2] OWCP assigned the present claim OWCP File No. xxxxxx131. Appellant has a prior occupational disease claim (Form CA-2), filed on July 31, 1995, for hearing loss in the right ear due to factors of his federal employment. OWCP assigned that claim OWCP File No. xxxxxx967. Appellant's claims in OWCP File Nos. xxxxxx967 and xxxxxx131 have not been administratively combined by OWCP.

rubber earplugs to protect against hazardous noise exposure. He also provided a position description for a rigger general foreman.

In a January 20, 2023 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence required and provided a questionnaire for completion. OWCP afforded appellant 30 days to submit the requested evidence.

In response to OWCP's development letter, appellant submitted a January 25, 2023 statement, wherein he indicated that he was last exposed to work-related hazardous noise on March 3, 2006 and had no prior hearing problems. He explained that he has had hearing loss for many years and he was uncertain when he first noticed the loss. Appellant related that his hearing loss had become more severe and unmanageable, and his hearing tests had shown progressive hearing loss. He reported filing a Form CA-2 for hearing loss in 1995, OWCP File No. xxxxxx967, which was denied. Appellant noted that he did not participate in hobbies involving loud noise. He asserted that his claim was timely filed and referenced the hearing conservation program that he participated in from February 2, 1993 through February 14, 2001, which revealed a significant threshold shift in his hearing. Appellant noted that part of the significant threshold protocol was to notify his supervisor and indicated that his supervisor and the dispensary had knowledge of the injury at the time it was documented.

In a February 27, 2023 development letter, OWCP requested additional information from the employing establishment, including comments from a knowledgeable supervisor on the accuracy of the employees statements, and factual and medical evidence related to appellant's employment-related noise exposure in the course of his federal employment. It afforded the employing establishment 30 days to submit the requested evidence.

The employing establishment provided a service card for appellant, which noted that he worked from November 5, 1973 through March 3, 2006 in various positions including as a laborer, general helper, component cleaner, rigger helper, rigger worker, rigger, rigger leader, rigger foreman, rigger general foreman, rigger supervisor I/II, combined trades supervisor II, and transportation supervisor II. Appellant also received an honorable discharge from the armed forces dated December 1, 1971.

By decision dated April 14, 2023, OWCP denied appellant's claim, finding that he did not file his 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 March 15, 2005, as indicated on his claim form, and noted that he did not file his claim within three years of the date of last exposure on March 3, 2006. OWCP further found that there was no evidence that appellant's immediate supervisor had actual knowledge of the injury within 30 days of the date of last exposure.

On April 24, 2023 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on September 26, 2023.

In an October 12, 2023 statement, appellant indicated that his immediate supervisor had actual knowledge of his hearing loss on August 2, 1996. He noted that his hearing conservation sheet noted a significant threshold shift when he had his annual hearing evaluation. Appellant

noted that the procedure following a significant threshold shift was to notify the supervisor and then undergo a follow-up evaluation after a minimum of 15 hours noise free. He indicated that he needed hearing aids. Appellant resubmitted audiograms dated February 6 through 23, 1987.

By decision dated December 11, 2023, OWCP's hearing representative affirmed the April 14, 2023 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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 filed within the applicable time limitation period 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.[4] 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.[5]

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.[6] 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.[7] 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.[8] 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.[9]

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

[3] *See R.B.*, Docket No. 18-1327 (issued December 31, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *Y.K.*, Docket No. 18-0806 (issued December 19, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[5] *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).

[6] *R.S.* Docket No. 24-0419 (issued May 22, 2024); *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002); *Charles Walker*, 55 ECAB 238 (2004); *Charles W. Bishop*, 6 ECAB 571 (1954).

[7] *Supra* note 1 at § 8122(a). *See also S.F.*, Docket No. 19-0283 (issued July 15, 2019); *W.L.*, 59 ECAB 362 (2008); *Gerald A. Preston*, 57 ECAB 270 (2005); *Laura L. Harrison*, 52 ECAB 515 (2001).

[8] *Id.* at § 8122(b).

[9] *See G.M.*, Docket No. 18-0768 (issued October 4, 2018); *Linda J. Reeves*, 48 ECAB 373 (1997).

start the limitation period even though the employee does not know the precise nature or the impairment or whether the ultimate result of such affect would be temporary or permanent.[10]

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.[11] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.[12] 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.[13] A hearing loss identified on such a test would constitute actual knowledge on the part of the employing establishment of a possible work injury.[14]

ANALYSIS

The Board finds that appellant has met his burden of proof to establish that he timely filed an occupational disease claim, pursuant to 5 U.S.C. § 8122(a).

On January 11, 2023 appellant filed a Form CA-2, noting that he first became aware of his condition and realized its relation to his federal employment on March 15, 2005. 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.[15] Appellant retired from federal employment on March 3, 2006. Therefore, the three-year time limitation began to run on March 3, 2006. As appellant did not file his occupational disease claim until January 11, 2023, the Board finds that it was not filed within the three-year time period under section 8122(b).[16]

Appellant's claim, however, should still be regarded as timely under section 8122(a)(1) of FECA if his immediate supervisor had actual knowledge of the injury within 30 days of appellant's last exposure to hazardous noise in federal employment, *i.e.*, within 30 days of his March 3, 2006 retirement.[17] The Board finds that the employing establishment conducted a program of audiometric testing for which he submitted a series of audiograms obtained prior to his retirement. These audiograms obtained as part of an employing establishment hearing conservation program,

[10] *See A.M.*, Docket No. 19-1345 (issued January 28, 2020); *Larry E. Young*, 52 ECAB 264 (2001).

[11] *Supra* note 1 at §§ 8122(a)(1); 8122(a)(2); *see also Larry E. Young*, *id*.

[12] *R.S.*, *supra* note 6; *B.H.*, Docket No. 15-0970 (issued August 17, 2015); *Willis E. Bailey*, 49 ECAB 511 (1998).

[13] *L.B.*, Docket No. 12-1548 (issued January 10, 2013); *James W. Beavers*, 57 ECAB 254 (2005).

[14] *Id*.

[15] *Supra* note 1 at § 8122(b).

[16] *G.C.*, Docket No. 12-1783 (issued January 29, 2013).

[17] *Id*. at § 8122(b).

are sufficient to establish actual knowledge of the claimed hearing loss within 30 days of appellant's last noise exposure, which occurred no later than March 3, 2006.[18] As such, the Board finds that the hearing conservation audiograms from February 5, 1985 through March 7, 2001 demonstrate a progressive worsening of appellant's hearing loss while still employed. This is further established by the audiologist's comments on the March 7, 2001 audiometric test, which specifically revealed a significant threshold shift greater than 20 decibels and his supervisor would be notified and he would need to be cleared by an occupational medicine provider or audiologist. The documented worsening of appellant's hearing 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 March 3, 2006.[19] Therefore, based on the audiometric test results from the employing establishment's hearing conservation program, his hearing loss claim is considered timely.[20]

The case shall, 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.[21]

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that he timely filed an occupational disease claim, pursuant to 5 U.S.C. § 8122(a).

[18] *B.H.*, Docket No. 15-0970 (issued August 17, 2015); *Willis E. Bailey*, 49 ECAB 511 (1998); *L.B.*, *supra* note 13; *James W. Beavers*, *supra* note 13.

[19] *See R.F.*, Docket No. 16-1398 (issued December 19, 2016).

[20] *J.C.*, Docket No. 18-1178 (issued February 11, 2019); *L.B.*, *supra* note 13; *James W. Beavers*, *supra* note 13.

[21] *T.R.*, Docket No. 21-1167 (issued April 4, 2022); *L.E.*, Docket No. 14-1551 (issued October 28, 2014).

ORDER

IT IS HEREBY ORDERED THAT the December 11, 2023 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: July 29, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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