United States Department of Labor
Employees' Compensation Appeals Board

P.H., Appellant	)	
and	)	**Docket No. 24-0298**
	)	**Issued: May 1, 2024**
DEPARTMENT OF THE NAVY, RADIOLOGICAL CONTROL OFFICE, NORFOLK NAVAL SHIPYARD, Portsmouth, VA, Employer	)	

Appearances:
David G. Jennings, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On January 31, 2024 appellant, through counsel, filed a timely appeal from a January 19, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

[1] 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.

Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

ISSUE

The issue is whether appellant has met her burden of proof to establish that she filed a timely claim for compensation, pursuant to 5 U.S.C. § 8122(a).

FACTUAL HISTORY

On May 22, 2023 appellant, then a 60-year-old supervisory health physicist, filed an occupational disease claim (Form CA-2) alleging that she developed hearing loss in both ears due to factors of her federal employment, specifically her exposure to noise in the workplace. She further indicated that she first became aware of the condition and its relationship to her employment on January 1, 2020. On the reverse side of the claim form, appellant's supervisor indicated that appellant first reported her condition on April 26, 2023.

Appellant submitted an audiometric testing report dated April 19, 2021 taken as part of the employing establishment's hearing conservation program. A reference audiogram dated August 11, 2000, noted testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz) demonstrated losses for the left ear of 15, 15, 15, and 15, decibels (dBs), and losses for the right ear of 15, 5, 15, and 20 dBs, respectively. On April 19, 2021 testing at 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the left ear of 25, 25, 25, and 45 dBs, and losses for the right ear of 30, 25, 30, and 45 dBs, respectively.

In a narrative statement, appellant indicated that she had been working at the employing establishment since 2000 in various positions. She indicated noise exposure 12 hours a day as a radiological technician from 2000 to 2007, and 8 hours a day as a radiological instructor and branch head from 2007 to the present.

In a form dated May 24, 2023, the employing establishment indicated that appellant was "routinely" exposed to hazardous noise and her hearing loss "may" be attributed to her employment. It further indicated that she wore hearing protection.

In a development letter dated June 6, 2023, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 60 days to respond. In separate development letter of even date, it requested that the employing establishment provide additional information regarding the claim.

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[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the January 19, 2024 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

OWCP received a memorandum dated July 28, 2023 from the employing establishment signed by Erica L. Wenner, AuD., a licensed audiologist for the employing establishment. Ms. Wenner noted that appellant had worked in areas with potentially hazardous noise from 2000-2007, but in her current position she had minimal noise exposure. She opined that, based on 2017 testing which "would encompass any hearing loss she experienced prior to 2007," appellant's hearing loss was "not" likely caused or aggravated by her noise exposure at work.

On November 21, 2023 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Marci E. Lait, an otolaryngologist, serving as second opinion physician, regarding the nature and extent of appellant's hearing loss, and whether there was any causal relationship between her diagnosed hearing loss and her alleged employment-related noise exposure.

In a January 11, 2024 report, Dr. Lait reviewed the SOAF, appellant's history of injury, and medical evidence of record. Audiometric testing of even date at 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the right ear of 30, 25, 30, and 50 dBs, and losses for the left ear of 35, 30, 30, and 40 dBs, respectively. Dr. Lait diagnosed high frequency sensorineural hearing loss and minimal tinnitus. She further opined that appellant's employment noise exposure was "unlikely sufficient" to have caused a noise-induced hearing loss.

By decision dated January 19, 2024, OWCP denied appellant's claim, finding that she did not file a timely claim for compensation within the requisite three-year time limit provided under 5 U.S.C. § 8122. It found that the date she became aware of the condition was January 1, 2020, and that she had not filed a claim until May 22, 2023. 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[4] 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.[5] 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.[6]

[4] *Id.*

[5] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden*, *Sr.*, 40 ECAB 312 (1988).

[6] *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).

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

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 or the impairment or whether the ultimate result of such affect would be temporary or permanent.[9] 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.[10] 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.[11] It is the employee's burden of proof to establish that a claim is timely filed.[12]

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.[13] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.[14]

ANALYSIS

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

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[7] *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).

[8] *Id.*

[9] *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).

[10] *T.R. id.*; *S.O.*, Docket No. 19-0917 (issued December 19, 2019); *Larry E. Young*, *id.*

[11] 5 U.S.C. § 8122(b).

[12] *T.R. supra* note 9; *D.D.*, Docket No. 19-0548 (issued December 16, 2019); *Gerald A. Preston*, 57 ECAB 270 (2005).

[13] 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); *J.S.*, *supra* note 7; *see also Larry E. Young*, *supra* note 9.

[14] *J.S.*, *id.*; *B.H.*, Docket No. 15-0970 (issued August 17, 2015); *Willis E. Bailey*, 49 ECAB 511 (1998).

Appellant stated on her CA-2 claim form that she was aware of a relationship between the claimed condition and her federal employment as of January 1, 2020. Under section 8122(b), the time limitation begins to run when she became aware of causal relationship, or, if she continued to be exposed to noise after awareness, the date she is no longer exposed to noise.

Appellant's claim would still be regarded as timely filed under 5 U.S.C. § 8122, however, if her 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 her 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.[15] The Board has held that 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.[16]

Herein, the results of a reference audiogram dated August 11, 2000, and administered under the employing establishment's hearing conversation program noted testing at the frequencies of 500, 1,000, 2,000, and 3,000, Hz demonstrated losses for the left ear of 15, 15, 15, and 15 dBs, and losses for the right ear of 15, 5, 15, and 20 dBs, respectively. On April 19, 2021 testing by the employing establishment at 500, 1,000, 2,000, and 3,000 Hz demonstrated losses for the left ear of 25, 25, 25, and 45 dBs, and losses for the right ear of 30, 25, 30, and 45 dBs. This audiogram, as part of the employing establishment's hearing conservation program, demonstrated 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.[17] Therefore, based on the audiometric test results from the employing establishment's hearing conservation program, her hearing loss claim is considered timely.[18]

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 has met her burden of proof to establish that she timely filed an occupational disease claim, pursuant to 5 U.S.C. § 8122(a).

[15] *T.R., supra* note 9; *see J.C.*, Docket No. 15-1517 (issued February 25, 2016); *see also M.W.*, Docket No. 16-0394 (issued April 8, 2016).

[16] *T.R. id.*; *see M.N.*, Docket No. 17-0931 (issued August 15, 2017); *W.P.*, Docket No. 15-0597 (issued January 27, 2016).

[17] *T.R. id.*; *see 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).

[18] *T.R. id.*; *see J.C.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2024 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 1, 2024
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board