United States Department of Labor
Employees' Compensation Appeals Board

J.G., Appellant	)	
and	)	**Docket No. 23-0943**
	)	**Issued: September 26, 2024**
DEPARTMENT OF THE NAVY, MARINE CORPS LOGISTICS BASE, Albany, GA, Employer	)	

Appearances:
Margaret Marshall, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On June 30, 2023 appellant, through his representative, filed a timely appeal from a June 22, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the 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.

[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.

[2] 5 U.S.C. § 8101 *et seq*.

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 March 30, 2023 appellant, then a 68-year-old retired maintenance mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment. He noted that he first became aware of his hearing loss and realized its relation to his federal employment on March 20, 1990. Appellant retired effective December 31, 2016.[3] On the reverse side of the claim form, the employing establishment controverted the claim arguing that it was untimely filed. It also noted that appellant first reported the condition to his supervisor on March 20, 1990.

In support of his claim, appellant submitted employing establishment audiograms. A reference audiogram from February 5, 2004, revealed the following decibel (dB) losses at 500, 1,000, 2,000, and 3,000 Hertz (Hz): 10, 10, 55, and 60 for the right ear, and 5, 5, 60, and 65 for the left ear, respectively. The May 2, 2012, audiogram revealed the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 5, 10, 55, and 60 for the right ear, and 5, 10, 55, and 65 for the left ear, respectively.

In an April 4, 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 60 days to submit the necessary evidence. In a development letter of even date, it requested additional information from the employing establishment, including comments from a knowledgeable supervisor, and factual and medical evidence related to appellant's employment-related noise exposure in the course of his federal employment. OWCP afforded the employing establishment 30 days to submit the requested evidence.

OWCP subsequently received audiograms dated July 30, 1987 through May 2, 2012 performed as part of an employing establishment hearing conservation program.

By decision dated June 22, 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.

[3] The reverse side of the claim form indicates appellant's retirement date as December 31, 2018. However, the case record supports that appellant worked in federal employment for the Charleston Naval Shipyard as a wharf builder from 1987 to 1994 and for the Marine Corps Recruit Depot -- Parris Island as a carpenter/maintenance mechanic from 1994 to December 31, 2016.

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 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.[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]

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

[4] *Supra* note 2.

[5] *D.B.*, Docket No. 24-0274 (issued July 29, 2024); *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).

[7] *P.H.*, Docket No. 24-0298 (issued May 1, 2024); *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] *P.H.*, *supra* note 7; *T.R., id.; S.O.,* Docket No. 19-0917 (issued December 19, 2019); *Larry E. Young, id*

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 his burden of proof to establish that he timely filed his occupational disease claim, pursuant to 5 U.S.C. § 8122(a).

Appellant stated on his Form CA-2 that he first became aware of his condition and realized its relationship to his federal employment on March 20, 1990. 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'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 reverse side of the CA-2 notes that appellant reported his hearing loss to his supervisor on March 20, 1990, the same day that he reportedly became aware of his hearing loss. The evidence of record also establishes that he was part of an annual hearing conversation program as early as 1987, as shown in hearing conservation program data noting a reference audiogram dated July 30, 1987. These audiograms, 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.[15] Therefore, based on the audiometric test results from the employing establishment's hearing conservation program, his hearing loss claim is considered timely.[16]

The Board therefore finds that the evidence of record is sufficient to establish that the employing establishment had actual knowledge of appellant's hearing loss on March 20, 1990,

[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); *P.H., supra* note 7; *J.S., supra* note 7; *see also Larry E. Young, supra* note 9.

[14] *P.H., supra* note 7; *J.S., id.*; *B.H.,* Docket No. 15-0970 (issued August 17, 2015); *Willis E. Bailey,* 49 ECAB 511 (1998).

[15] *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).

[16] *Id.*

when he first became aware of his hearing loss. Consequently, the exception to the three-year time limitation was met and appellant's hearing loss claim was timely filed.[17]

The case shall therefore be remanded for OWCP to address the merits of the claim. Following this and such other development as necessary, OWCP shall issue a *de novo* decision.[18]

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).

ORDER

IT IS HEREBY ORDERED THAT the June 22, 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: September 26, 2024
Washington, DC

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

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

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

[17] *D.B.*, *supra* note 5; *Gerald A. Preston*, 57 ECAB 270 (2005); *see also J.B.*, Docket No. 10-2025 (issued June 17, 2011).

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