

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

C.D., Appellant	)	
	)	
and	)	Docket No. 24-0902
	)	Issued: September 30, 2024
DEPARTMENT OF THE AIR FORCE, HILL	)	
AIR FORCE BASE, UT, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On September 9, 2024 appellant filed a timely appeal from April 30 and June 13, 2024 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 February 21, 2024 appellant, then a 69-year-old retired machinist, 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

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

his federal employment on February 7, 2014. Appellant retired effective May 28, 2020. On the reverse side of the form, the employing establishment controverted the claim arguing that it was not timely filed.

In support of his claim, appellant submitted employing establishment audiograms performed as part of a hearing conservation program dated May 4, 2001 through February 4, 2020. A reference audiogram from May 5, 2001, revealed the following decibel (dB) losses at 500, 1,000, 2,000, and 3,000 Hertz (Hz): 5, 5, 0, and 20 for the right ear and 10, 5, 5, and 10 for the left ear, respectively. The baseline audiogram indicated normal hearing and showed non ratable loss in both ears. Prior to appellant's retirement, the most recent February 4, 2020, audiogram revealed the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 10, 5, 10, and 30 for the right ear and 20, 0, 15 and 30 for the left ear, respectively. The audiograms from the hearing conservation program showed a progression in his hearing loss. The February 4, 2020 audiogram also contained remarks from the audiologist at that time who noted that appellant's evaluation revealed early warning for a decrease in hearing. Appellant also submitted a December 4, 2023 audiometric evaluation reflecting bilateral hearing loss.

In a supplemental statement dated December 12, 2023, appellant indicated that he first became aware of a hearing problem and first related the problem to his federal employment on February 7, 2014. He noted that he retired on May 28, 2020. Appellant reported that he did not have a history of ear or hearing problems. From June 2001 through March 2004, he worked as a machinist and was exposed to noise from machines for nine hours a day and was provided ear plugs and muffs. From March 2004 through May 2020, appellant worked as a machinist and was exposed to noise from machines and aircraft for nine hours a day and was provided ear plugs and muffs. He noted wearing hearing protection at all times as required. Appellant indicated that the machine shop was located off the runway, and he was exposed to noise from aircraft taking off from the runway. He reported motor cycling riding as a hobby.

OWCP received a position description for a machinist.

In a February 27, 2024 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 his completion. OWCP afforded 60 days to respond. In a letter of even date, it 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. OWCP afforded the employing establishment 30 days to respond.

On March 16, 2024 appellant responded to OWCP's questionnaire, and resubmitted his supplemental statement dated December 12, 2023.

On March 18, 2024 Kerry S. Braunberger, an audiologist, noted treating appellant since December 4, 2023 for hearing loss due to noise exposure while at work. He performed an audiogram on December 4, 2023, which revealed bilateral hearing loss. Dr. Braunberger recommended hearing aids.

By decision dated April 30, 2024, OWCP denied appellant's claim, finding that he 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 he became aware of the condition was February 7, 2014, as indicated on his claim form, and noted that his claim was not filed within three years of the date of last exposure on May 28, 2020. 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.

In a June 4, 2024 letter, Dr. Braunberger noted treating appellant since December 4, 2023 for hearing loss and tinnitus due to noise exposure while at work. He noted the December 4, 2023 audiogram findings, and recommended hearing aids.

On June 11, 2024 appellant requested reconsideration.

By decision dated June 13, 2024, OWCP denied modification of the April 30, 2024 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>2</sup> 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.<sup>3</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>4</sup>

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.<sup>5</sup> 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.<sup>6</sup> 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

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<sup>2</sup> See *R.B.*, Docket No. 18-1327 (issued December 31, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>3</sup> *Y.K.*, Docket No. 18-0806 (issued December 19, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>4</sup> *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>5</sup> *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).

<sup>6</sup> *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).

the employment and the compensable disability.<sup>7</sup> 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.<sup>8</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>9</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>10</sup> The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.<sup>11</sup> 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.<sup>12</sup> A hearing loss identified on such a test would constitute actual knowledge on the part of the employing establishment of a possible work injury.<sup>13</sup>

### 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 February 21, 2024 appellant filed a Form CA-2, noting that he first became aware of his condition and realized its relation to his federal employment on February 7, 2014. 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.<sup>14</sup> Appellant retired from federal employment on May 28, 2020. Therefore, the three-year time limitation began to run on May 28, 2020. As appellant did not file his occupational disease

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<sup>7</sup> *Id.* at § 8122(b).

<sup>8</sup> *See G.M.*, Docket No. 18-0768 (issued October 4, 2018); *Linda J. Reeves*, 48 ECAB 373 (1997).

<sup>9</sup> *See A.M.*, Docket No. 19-1345 (issued January 28, 2020).

<sup>10</sup> *Supra* note 1 at §§ 8122(a)(1); 8122(a)(2); *see also Larry E. Young*, 52 ECAB 264 (2001).

<sup>11</sup> *B.H.*, Docket No. 15-0970 (issued August 17, 2015); *Willis E. Bailey*, 49 ECAB 511 (1998).

<sup>12</sup> *L.B.*, Docket No. 12-1548 (issued January 10, 2013); *James W. Beavers*, 57 ECAB 254 (2005).

<sup>13</sup> *Id.*

<sup>14</sup> *Supra* note 1 at § 8122(b).

claim until February 21, 2024, the Board finds that it was not filed within the three-year time period under section 8122(b).<sup>15</sup>

Appellant's claim would 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 last exposure no later than May 28, 2020.<sup>16</sup> 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, 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 May 28, 2020.<sup>17</sup> Of note, a reference audiogram from May 5, 2001, revealed the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 5, 5, 0, and 20 for the right ear and 10, 5, 5, and 10 for the left ear, respectively. The baseline audiogram indicated normal hearing and showed non ratable loss in both ears. Prior to appellant's retirement, the most recent February 4, 2020, audiogram revealed the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 10, 5, 10, and 30 for the right ear and 20, 0, 15 and 30 for the left ear, respectively. The audiograms from the hearing conservation program showed a progression in his hearing loss. As such, the Board finds that the hearing conservation audiograms from May 4, 2001 through February 4, 2020 demonstrate a progressive worsening of appellant's hearing loss while still employed. This is further established by the audiologist's comments on February 4, 2020 audiometric test, which specifically identified a decrease in hearing at that time. The documented worsening of appellant's hearing loss 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 May 28, 2020.<sup>18</sup> Therefore, based on the audiometric test results from the employing establishment's hearing conservation program, his hearing loss claim is considered timely.<sup>19</sup>

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.<sup>20</sup>

### 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).

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<sup>15</sup> *G.C.*, Docket No. 12-1783 (issued January 29, 2013).

<sup>16</sup> *Id.* at § 8122(b).

<sup>17</sup> *B.H.*, *supra* note 11; *Willis E. Bailey*, *supra* note 11; *L.B.*, *supra* note 12; *James W. Beavers*, *supra* note 12.

<sup>18</sup> *See D.B.*, Docket No. 24-0274 (issued July 29, 2024); *R.F.*, Docket No. 16-1398 (issued December 19, 2016).

<sup>19</sup> *J.C.*, Docket No. 18-1178 (issued February 11, 2019); *L.B.*, *supra* note 12; *James W. Beavers*, *supra* note 12.

<sup>20</sup> *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 April 30 and June 13, 2024 decisions of the Office of Workers' Compensation Programs are reversed, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 30, 2024  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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