



loss which progressively worsened due to exposure to noise in the performance of duty. He alleged that he worked on an aircraft with exposure to noise at high decibel levels without adequate ear protection. Appellant asserted that he first became aware of his hearing loss and related it to his employment on January 14, 1978, but was not aware that he could file a claim. Appellant noted that he was last exposed to the conditions which allegedly caused his hearing loss on February 13, 1986 when he retired from federal employment.

On the reverse of the claim form, a representative of the employing establishment reported that appellant's claim could not be confirmed or denied since the former supervisor was no longer with the employing establishment.

By decision dated October 25, 2001, the Office denied appellant's claim as untimely filed. The Office indicated that appellant retired effective February 12, 1986 and that his last exposure to presumably hazardous noise occurred in 1978. The Office advised appellant that an original claim for compensation must be filed within 3 years of the date of injury or date of awareness of a relationship between the condition and employment, unless the immediate supervisor had actual knowledge of the injury within 30 days. The Office found that the evidence of record failed to support that his claim was filed in a timely manner or that his supervisor had actual knowledge of the injury within 30 days.

In a letter received November 15, 2001, appellant requested reconsideration and submitted additional evidence. Appellant submitted personnel documentation including his former position description and audiograms conducted by the employing establishment on January 10, 1971, January 7, 1972, December 15, 1974, May 16 and November 30, 1976, January 7, 1978, November 3, 1980, July 3, 1981 and June 2, 1982. The January 7, 1978 audiogram indicated testing at 500, 1,000, 2,000, 3,000, 4,000 and 6,000 cycles per second (cps) and revealed in the right ear decibel (dB) levels of 10, 5, 5, 5, 10 and 25; and in the left ear dB levels of 20, 25, 25, 30, 30 and 35 respectively. Appellant's hearing was estimated as fair in the report. The November 3, 1980 audiogram also indicated testing at the same dB levels and revealed in the right ear dB levels of 10, 5, 5, 10, 30 and 40 and dB levels of 25, 45, 30, 40, 60 and 60 in the left ear respectively. Appellant's hearing was estimated as poor in the 1980 report and it was further noted that he must return for a mandatory audiogram in three months. The July 3, 1981 audiogram indicated thresholds for the right ear at the same cycle levels and dB levels of 10, 5, 5, 5, 25 and 35 and in the left ear dB levels of 15, 35, 15, 40, 50 and 50 respectively. The June 2, 1982 audiogram revealed dB levels in the right ear of 15, 5, 5, 0, 10 and 15 and 15, 5, 0, 0, 0 and 20 dBs in the left ear at the same cycle levels. Each audiogram submitted indicated that appellant had adequate ear protection while performing duties in which he was exposed to work-related noise including earplugs and earmuffs.

Appellant also submitted a report dated October 22, 2001 from James C. Faust, an audiologist, who stated that he conducted a hearing test on appellant on October 19, 2001 which revealed moderate-to-severe bilateral hearing loss slightly poorer in the left ear. He further stated: "[Appellant] told me he had never seen a doctor about his hearing loss, and I suggested that this is the first thing he should do. He feels that his loss has been caused by exposure to high noise levels, which is possible. The audiogram shows a 66 percent loss of hearing in the right ear and a 76 percent loss in the left ear."

By decision dated May 1, 2002, the Office reviewed the October 22, 2001 report submitted by appellant on reconsideration and determined that the record failed to establish timely filing or prior knowledge of a hearing loss by the employing establishment before his retirement in 1986. The Office noted that the report submitted was not authored by a physician but an audiologist and that the report confirmed that appellant had sought no medical care for his alleged hearing loss until his initial examination on October 19, 2001. The Office denied modification of the October 25, 2001 decision.

Appellant again requested reconsideration on June 11, 2002. Appellant submitted additional personnel documentation, a notice approving disability retirement, test results from a May 13, 2002 audiogram, a 1971 audiogram already of record and medical reports from examinations taken in 1985.

By decision dated August 27, 2002, the Office denied modification of the May 1, 2002 prior decision. The Office found that the evidence submitted in support of the request still did not establish that appellant filed his hearing loss claim within the required time period.

Appellant requested reconsideration on September 24, 2002. By decision dated November 12, 2002, the Office denied appellant's request finding that the evidence submitted with the request neither raised substantive legal questions nor included new and relevant evidence or legal contentions not previously considered.

### **LEGAL PRECEDENT -- ISSUE 1**

In cases of injury on or after September 7, 1974, section 8122(a) of the Federal Employees' Compensation Act states that "an original claim for compensation for disability or death must be filed within three years after the injury or death."<sup>1</sup> Section 8122(b) of the Act 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.<sup>2</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 exposure.<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

Appellant indicated on his Form CA-2 that he first became aware that his hearing loss was caused by his employment in 1978. He stated that he worked on an aircraft and was exposed to noise at high decibel levels without adequate ear protection and that hearing tests were performed which showed hearing loss although nothing was done by the employing establishment. Appellant retired from the employing establishment on February 13, 1986 and thus, ceased to be exposed to the implicated employment conditions by that date. Appellant

---

<sup>1</sup> 5 U.S.C. § 8122(a).

<sup>2</sup> 5 U.S.C. § 8122(b).

<sup>3</sup> *Garyleane A. Williams*, 44 ECAB 441 (1993).

noted his belief that there was a relationship between his hearing loss and his noise exposure at the employing establishment beginning as early as 1978 and continuing until he stopped work on February 13, 1986. Therefore, the time limitations began to run on February 13, 1986, appellant's last day of work and exposure to the implicated employment factors. Since appellant did not file a claim until July 10, 2001 his claim was filed outside the three-year time limitation period.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor or agency physician or dispensary had actual knowledge of the injury within 30 days of his last exposure to noise on February 13, 1986.<sup>4</sup> The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.<sup>5</sup> Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days pursuant to 5 U.S.C. § 8119.<sup>6</sup> In the instant case, there is no indication that appellant provided written notice of injury prior to July 10, 2001, the date he filed his Form CA-2.

The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program 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>7</sup> The Office's procedure manual, interpreting section 8122(a)(1) of the Act, states:

“If an agency, in connection with a recognized environmental hazard, has an employee testing program and a test shows the employee to have positive findings this should be accepted as constituting actual knowledge. For example, an agency where employees may be exposed to hazardous noise levels may give annual hearing tests for exposed employees. A hearing loss identified on such a test would constitute actual knowledge on the part of the agency of a possible work injury.”<sup>8</sup>

In this case, the record contains audiograms performed by the employing establishment at least every other year for work-related noise exposure from January 10, 1971 to June 2, 1982. On each audiogram of record it is noted that the hearing evaluation was considered an annual test by the employing establishment for noise exposure. The Board notes that a hearing loss was identified in the left ear in the November 3, 1980 and July 3, 1981 audiograms and, in the

---

<sup>4</sup> *Larry E. Young*, 52 ECAB 264 (2001). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

<sup>5</sup> *Kathryn A. Bernal*, 38 ECAB 470 (1987).

<sup>6</sup> 5 U.S.C. §§ 8122(a)(1), 8122(a)(2).

<sup>7</sup> See *Joseph J. Sullivan*, 37 ECAB 526, 527 (1986) (constructive knowledge of possible employment-related hearing loss provided by annual employing establishment audiograms); see also Federal (FECA) Procedural Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(c) (March 1993).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2. 801.7(d) (September 1990).

November 3, 1980 audiogram, it was noted that appellant had poor hearing which required a second evaluation within three months.

The Board notes that the Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*).<sup>9</sup> Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.<sup>10</sup> The “fence” of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.<sup>11</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>12</sup> The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.<sup>13</sup> The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.<sup>14</sup>

In the November 3, 1980 audiogram, testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed dB levels of 25, 45, 30 and 40, respectively. These dBs are totaled at 140 and divided by 4 to obtain the average hearing loss at those cycles of 35 dBs. The sum of 35 is then reduced by 25 dBs (the first 25 dBs are discounted as discussed above) to equal 10, which is multiplied by the established factor of 1.5 to compute a 15 percent loss of hearing for the left ear. In the July 3, 1981 audiogram testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed dB levels of 15, 35, 15 and 40, respectively. These dBs are totaled at 105 and divided by 4 to obtain the average hearing loss at those cycles of 26.25 dBs. The sum of 26.25 is then reduced by 25 dBs (the first 25 dBs are discounted as discussed above) to equal 1.25, which is multiplied by the established factor of 1.5 to compute a rounded 2 percent loss of hearing for the left ear. Accordingly, pursuant to the Office’s standardized procedures, on both of the above occasions appellant had a ratable hearing loss in the left ear.

The Board finds that the evidence of record is sufficient to establish that the employing establishment did have constructive actual knowledge of a possible employment-related hearing loss. Accordingly, the May 1, 2002 decision of the Office is reversed and the case is remanded for further development of the claim. In light of the Board’s finding that the claim was timely based on the employing establishment’s actual knowledge of a possible work injury prior to

---

<sup>9</sup> A.M.A., *Guides* at 250 (5<sup>th</sup> ed. 2001).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

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

<sup>14</sup> *Donald E. Stockstad*, 53 ECAB \_\_\_\_ (Docket No. 01-1570, issued January 23, 2002); *petition for recon. granted (modifying prior decision)* (Docket No. 01-1570, issued August 13, 2002).

appellant's retirement, the question of whether the Office properly denied reconsideration on November 12, 2002 is moot.

**CONCLUSION**

The Board finds that appellant has established that he submitted a timely occupational disease claim.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated August 27 and May 1, 2002 are reversed and the case is remanded to the Office for further action consistent with this decision. The November 12, 2002 decision is set aside.

Issued: May 5, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member