

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

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A.A., Appellant )

and )

DEPARTMENT OF THE NAVY, FIRE )  
DEPARTMENT, NAVAL AIR STATION, )  
Key West, FL, Employer )

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**Docket No. 14-764  
Issued: July 28, 2014**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 21, 2014 appellant filed a timely appeal of a January 22, 2014 Office of Workers' Compensation Programs' (OWCP) merit decision denying his occupational disease claim as untimely. 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 to consider the merits of the case.

**ISSUE**

The issue is whether appellant's claim for hearing loss was timely filed.

**FACTUAL HISTORY**

On August 9, 2013 appellant, then a 77-year-old firefighter filed an occupational disease claim alleging that he developed hearing loss due to performing crash and rescue drill under jets without ear protection. He stated that he first became aware of his condition on June 24, 2009

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

and first related his condition to his employment on that date. Appellant noted that he was not aware of compensation for the problem until recently and that this was the reason for his delay in filing his claim. On the reverse of the form, the employing establishment noted that he retired on May 2, 1992 and that his supervisor was not available.

OWCP requested additional factual and medical evidence from appellant in a letter dated October 11, 2013. It stated that the evidence did not support that his claim was timely filed and allowed him 30 days to submit additional supportive evidence that his supervisor was aware of his condition. The employing establishment responded on September 5, 2013 stating that appellant voluntarily retired on May 2, 1992 and that his supervisors were retired and unavailable. The employing establishment stated that the last audiogram it performed was dated April 10, 1992 and that audiograms performed in 1990 and 1991 seem to demonstrate a significant shift of appellant's hearing.

Appellant provided medical evidence of hearing loss including an audiogram dated June 24, 2009. He also provided employing establishment medical records of his audiograms dated November 3, 1975, 1986, 1987, 1988, 1990, 1991 and 1992.

OWCP referred the employment audiograms to OWCP's medical adviser who reviewed the findings on January 17, 2014 and stated that the findings were positive for noise-induced hearing loss, but were not consistent with a progression of hearing loss from 1986 through 1992.

By decision dated January 22, 2014, OWCP denied appellant's claim for an employment-related hearing loss on the grounds that it was not timely filed within three years after he first became aware of his condition in 2009 and that there was no evidence that his supervisor had actual knowledge within 30 days of the date of injury.

### **LEGAL PRECEDENT**

Section 8122(a) of FECA<sup>2</sup> provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.<sup>3</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 the employment and the compensable disability.<sup>4</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>5</sup> Even if a claim is not timely 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 alleged employment-related injury within 30 days or written notice of the injury was provided within 30 days pursuant to

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<sup>2</sup> *Id.* at §§ 8101-8193, 8122.

<sup>3</sup> *Id.* at § 8122(a).

<sup>4</sup> *Id.* at § 8122(b)

<sup>5</sup> *See W.B.*, Docket No. 14-276 (issued May 2, 2014); *Linda J. Reeves*, 48 ECAB 373 (1997).

section 8119.<sup>6</sup> The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.<sup>7</sup> The Board has indicated that an employee need only be aware of a possible relationship between his or her condition and his or her employment to commence the running of the applicable statute of limitations.<sup>8</sup> The Board has also held that a program of annual audiometric examinations conducted by an employing establishment may constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury.<sup>9</sup>

In interpreting section 8122(a)(1) of FECA, OWCP procedures provide that, if the employing establishment gives regular physical examinations which might have detected signs of illness, such as hearing tests, it should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results.<sup>10</sup>

### ANALYSIS

The Board finds that appellant's claim was timely filed. As noted above, if an employee continues to be exposed to injurious working conditions, the time limitation begins to run on the date of last exposure.<sup>11</sup> Appellant ceased to be exposed to work-related noise when he retired on May 2, 1992. Therefore, the time-limitation provisions began to run on that date. As appellant did not file a claim for hearing loss until August 9, 2013, his claim was filed outside the three-year time-limitation period.<sup>12</sup> However, his 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 his last exposure to the implicated employment factors. To have actual knowledge, the supervisor must be aware that appellant attributed his hearing loss to an injury sustained in the performance of duty or to some other factor of employment.<sup>13</sup>

The record indicates that appellant was part of a hearing conservation program. The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with employee testing programs is sufficient to constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of

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<sup>6</sup> 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); *see also* *Larry E. Young*, 52 ECAB 264 (2001).

<sup>7</sup> *Willis E. Bailey*, 49 ECAB 509 (1998).

<sup>8</sup> *Edward C. Horner*, 43 ECAB 834, 840 (1992).

<sup>9</sup> *See J.B.*, Docket No. 10-2025 (issued June 17, 2011); *Jose Salaz*, 41 ECAB 743 (1990).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(c) and 6(c) (March 1993); *see also* *James A. Sheppard*, 55 ECAB 515 (2004).

<sup>11</sup> *See Larry E. Young*, *supra* note 6.

<sup>12</sup> 5 U.S.C. § 8122(b).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3a(3)(b) (March 1993).

an on-the-job injury.<sup>14</sup> OWCP's procedure manual, interpreting section 8122(a)(1) of FECA 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>15</sup>

The record supports that appellant participated in an annual hearing conservation program as early as 1986 and that the results indicated various levels of hearing loss. As noted, OWCP procedures provide that, if the employing establishment gives regular physical examinations which might have detected signs of illness, such as hearing tests, it should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results.<sup>16</sup> In 2013 the employing establishment stated that the last audiogram performed by the employing establishment was dated April 10, 1992 and that audiograms performed in 1990 and 1991 seem to demonstrate a significant shift of appellant's hearing.

The Board finds that the evidence of record is sufficient to establish that the employing establishment had actual knowledge within 30 days of the date of last exposure that appellant believed that he had hearing loss as a result of his employment duties. While it is not clear whether appellant's hearing loss resulted totally from his federal employment, audiograms from the employing establishment document hearing loss and it appears that the employing establishment was aware in 1990 that he attributed some of his hearing loss at least in part to federal employment. Consequently, his claim for compensation for hearing loss was timely filed.<sup>17</sup> The case will be remanded to OWCP for further development to determine if appellant sustained hearing loss causally related to factors of his federal employment. Following such further development as OWCP deems necessary, it shall issue a *de novo* decision.

### CONCLUSION

The Board finds that appellant's claim was timely filed.

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<sup>14</sup> See *Joseph J. Sullivan*, 37 ECAB 526 (1986); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(c) (March 1993).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(c) (March 1993).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(c) and 6(c) (March 1993); see also *James A. Sheppard*, *supra* note 10.

<sup>17</sup> See *Gerald A. Preston*, 57 ECAB 270 (2005); *James A. Sheppard*, *supra* note 10.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 22, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 28, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board