

explain the relationship to the employment and why he came to this realization, appellant stated “lack of understanding conversation in groups.” The reverse of the claim form indicated that appellant last worked for the employing establishment on August 21, 1991.

The record contains audiograms from the employing establishment dated September 9 and December 31, 1975, January 12 and November 15, 1977, May 11, 1981 and September 6, 1989. The September 9, 1975 audiogram reported the following decibel levels for the right ear at 500, 1,000, 2,000 and 3,000 hertz, respectively: 20, 10, 20 and 25. For the left ear, the results were 15, 5, 20 and 20 at the same levels. The September 6, 1989 audiogram from the employing establishment revealed decibel levels, for the right ear, of 15, 10, 10 and 15; for the left ear, 15, 5, 15 and 25.

In a letter dated January 26, 2005, the employing establishment indicated that appellant was employed from September 10, 1975 to August 21, 1991 at various positions that included auxiliary operator, clerk, engineer aide, janitor and laborer. The employing establishment controverted the claim on timeliness grounds. In a report dated March 23, 2005, an Office medical adviser opined that the employment audiograms from 1975 to 1989 “do not show any significant worsening of hearing during the time frame.”

By decision dated April 6, 2005, the Office denied appellant’s claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. The Office determined that appellant did not file the claim within three years of the last exposure and there was no evidence that the supervisor had actual knowledge of an employment-related condition within 30 days of the injury.

LEGAL PRECEDENT

Section 8122(a) of the Federal Employees’ Compensation Act states, “An original claim for compensation for disability or death must be filed within three years after the injury or death.” 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. 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.¹

The statute provides an exception to the three-year limit for filing, which states that a claim may be regarded timely if an immediate superior had actual knowledge of the injury within 30 days, or if written notice of injury as specified in section 8119 was given within 30 days.² The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.³ The Board has held that a program of annual audiometric examinations

¹ *Garyleane A. Williams*, 44 ECAB 441 (1993).

² 5 U.S.C. § 8122(a)(1) and (2).

³ 5 U.S.C. § 8122(a)(1); *Eddie L. Morgan*, 45 ECAB 600 (1994).

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.⁴

ANALYSIS

In the present case, appellant reported on the Form CA-2 that he was aware of a relationship between the claimed condition and employment as of February 1988. Under section 8122(b), the time limitation begins to run when appellant 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. According to the record, appellant last worked in federal employment on August 21, 1991. Therefore, in this case, the three-year time limitation begins to run on August 21, 1991. Since appellant did not file the claim until December 15, 2004, he did not file the claim within the three-year time limitation.

Appellant did not present any evidence of written notice within 30 days or that his supervisor had actual knowledge of an employment injury within 30 days of August 21, 1991. As noted above, a claim may be found to be timely, notwithstanding the failure to file within three years, if a program of annual audiometric examinations constructively gave actual knowledge to the employing establishment of an employment-related hearing loss. In this case, however, the employing establishment audiograms do not demonstrate an employment-related hearing loss. The Office medical adviser noted that the 1989 audiogram does not show any progression of hearing loss from the initial audiogram performed when appellant was hired in 1975.⁵ The audiometric evidence from the employing establishment does not reveal an employment-related hearing loss, and therefore it does not constructively provide actual notice to the employing establishment. Pursuant to section 8122, appellant's claim is untimely.

CONCLUSION

The Board finds that the Office properly determined that appellant's claim for compensation was not timely filed under 5 U.S.C. § 8122.

⁴ *Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6c (February 2000).

⁵ Under the Act, hearing loss impairments are determined by the average of the hearing levels at 500, 1,000, 2,000 and 3,000 hertz. See American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) at 250. If the average is less than 25 decibels, the hearing impairment is not ratable.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 6, 2005 is affirmed.

Issued: December 7, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board