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

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| **JORDON W.Y. WONG, Appellant** | ) | |
| **and** | ) | **Docket No. 04-2187** |
| | ) | **Issued: February 2, 2005** |
| **DEPARTMENT OF THE NAVY, PEARL HARBOR NAVAL SHIPYARD, Pearl Harbor, HI, Employer** | ) | |

*Appearances:*
*Jordon W.Y. Wong, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

### *JURISDICTION*

On September 7, 2004 appellant filed an appeal of the Office of Workers' Compensation Programs' merit decisions dated July 16 and August 20, 2004 finding that he had an employment-related loss of hearing and that he had 23 percent impairment of his right ear due to a loss of hearing related to his federal employment, respectively. Pursuant to 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's claim for an occupational hearing loss was timely filed pursuant to 5 U.S.C. § 8122(a).

### *FACTUAL HISTORY*

On August 10, 2003 appellant, then a 58-year-old sheetmetal worker filed an occupational disease claim alleging that he had developed a loss of hearing in both ears due to noise exposure at work. Appellant stated that he first became aware of his condition in 1980 and

first attributed it to his employment in 1980. Appellant stated that he delayed in filing his claim because he was unaware of his rights.

Appellant completed a form requesting a schedule award on August 18, 2003. He stated that he began working for the federal government in 1977, retired from his federal employment in 1998 and was last exposed to hazardous noise at that time. Appellant submitted a report from the employing establishment dated September 16, 1977 which indicated that he had no limitations. An August 13, 1990 report listed appellant's limitation as high frequency hearing loss. An audiographic report dated August 21, 1992 stated that there was a reference audiogram on January 19, 1989 and that appellant had increased loss of hearing since that date.

The Office requested additional factual and medical information from the employing establishment on May 3, 2004. The Office specifically asked that the employing establishment provide a copy of all medical examinations pertaining to hearing or ear problems, including preemployment examinations and all audiograms including an exit audiogram if available. The employing establishment did not respond.

On May 7, 2004 the Office referred appellant for a second opinion evaluation with Dr. Meredith Pang, a Board-certified otolaryngologist, to determine the cause and extent of his alleged loss of hearing. In a report dated June 14, 2004, Dr. Pang noted appellant's history of noise exposure. He opined that appellant's hearing loss was due to or aggravated by hazardous noise exposure in the performance of his federal job duties. Dr. Pang found that appellant had a 22.5 percent loss of hearing on the right and no loss of hearing on the left. The record does not include a copy of the audiogram prepared in concert with the June 14, 2004 report, but does contain a copy of the audiometric results.

By decision dated July 16, 2004, the Office accepted appellant's claim for binaural noise-induced hearing loss.

The district medical director reviewed Dr. Pang's report on July 14, 2004 and found that he had a 23 percent loss of hearing in his right ear and no ratable loss of hearing in his left ear.

By decision dated August 20, 2004, the Office granted appellant a schedule award for a 23 percent monaural loss of hearing in the right ear.

## ***LEGAL PRECEDENT***

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.[1] The Board may raise the issue on appeal even if the Office did not base its decision on the time limitation provisions of the Federal Employees' Compensation Act.[2]

[1] 5 U.S.C. §§ 8101-8193; *David R. Morey*, 55 ECAB ___ (Docket No. 04-967, issued August 16, 2004); *Charles Walker*, 55 ECAB ___ (Docket No. 03-1732, issued January 8, 2004).

[2] *Id.*

In cases of injury on or after September 7, 1974, section 8122(a) of the Act provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless:

> "(1) the immediate superior had actual knowledge of the injury or death with 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death; or
>
> "(2) written notice of injury or death as specified in section 8119 of this title was given within 30 days."[3]

The three-year time period begins to run from the time the employee is aware or by the exercise of reasonable diligence should have been aware, that his or her condition is causally related to the employment. For actual knowledge of a supervisor to be regarded as timely filing, an employee must show not only that the immediate supervisor knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.[4]

Even if an original claim for compensation for disability or death is not filed within three years after the injury or death, compensation for disability or death may be allowed if written notice of injury or death as specified in section 8119 was given within 30 days. Section 8119 provides that a notice of injury or death shall be given within 30 days after the injury or death; be give to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury or in the case of death, the employment factors believed to be the cause, and be signed by and contain the address of the individual giving the notice.[5] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[6]

In the case of occupational disease, 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 condition and his employment. When an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitation period even though he does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[7] Where the employee continues in the same employment after he or she reasonably should have been aware that he or she has a condition

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[3] 5 U.S.C. § 8122(a).

[4] *Duet Brinson*, 52 ECAB 168 (2000).

[5] *Larry E. Young*, 52 ECAB 2645 (2001).

[6] *Aura L. Harrison*, 52 ECAB 515 (2001).

[7] *Larry E. Young, supra* note 5.

which has been adversely affected by factors of the federal employment awareness, the time limitation begins to run on the date of the last exposure to the implicated factors.[8] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[9]

## ***ANALYSIS***

Appellant indicated on his claim form that he first became aware that his hearing loss was caused by his employment in 1980. Appellant retired from the employing establishment on March 20, 1998 and thus ceased to be exposed to the implicated employment conditions by that date. Appellant noted his belief that there was a relationship between his hearing loss and his noise exposure at the employing establishment beginning as early as 1980 and continuing until he stopped work on March 20, 1998. Therefore, the time limitations began to run on March 20, 1998, appellant's last day of work and exposure to the implicated employment factors. Since appellant did not file a claim until August 10, 2003, his claim was filed outside the three-year time limitation period.

Appellant's claim would still be regarded as timely under section 8122(a) 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 March 20, 1998.[10] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury.[11] 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.[12] In the instant case, there is no indication that appellant provided written notice of injury prior to August 10, 2003, the date he filed his claim for occupational disease.

The Board has held that a program of annual audiometric examination 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.[13] The Office procedure manual, interpreting section 8122(a) of the Act, states:

> "In an agency, in connection with a recognized environmental hazard, has an employee testing program and a test shows that 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

[8] *Id.*

[9] *Debra Young Bruce*, 52 ECAB 315 (2001).

[10] *Larry E. Young*, *supra* note 5.

[11] *Kathryn A. Bernal*, 38 ECAB 470 (1987).

[12] 5 U.S.C. §§ 8122(a)(1); 8122(a)(2).

[13] *See James A. Sheppard*, 55 ECAB ___ (Docket No. 03-692, issued May 5, 2004); *Joseph J. Sullivan*, 37 ECAB 526, 527 (1986).

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."[14]

In this case, the record contains evidence that the employing establishment performed audiograms in 1989, 1990 and 1992. The audiometric data from 1992 stated that appellant demonstrated an increased loss of hearing from 1989 to 1992. However, the record before the Board is not sufficient to determine if these audiograms were part of an annual test program by the employing establishment for noise exposure and whether the audiograms were sufficient to provide the employing establishment with constructive actual knowledge of a possible employment-related hearing loss.

The Office requested that the employing establishment provide additional medical evidence regarding appellant's loss of hearing. The record does not contain a response from the employing establishment. Proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[15] Once the Office has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible.[16] The Office has an obligation to see that justice is done.[17] On remand, the Office should again request that the employing establishment provide any medical evidence in its possession pertinent to appellant's claim, and should then determine whether such evidence is sufficient to accord the employing establishment knowledge of appellant's loss of hearing such that his claim is timely. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.

## ***CONCLUSION***

The Board finds that this case is not in posture for decision. Appellant submitted evidence suggesting that the employing establishment might have had constructive actual knowledge of his possible employment-related hearing loss. The Office attempted to address this issue, but failed to require a response from the employing establishment. On remand, the Office should further develop the evidence and issue an appropriate decision.

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.7(d) (September 1990).

[15] *John J. Carlone*, 41 ECAB 354, 359-60 (1989).

[16] *Edward Schoening*, 41 ECAB 277, 282 (1989).

[17] *Lourdes Davila*, 45 ECAB 139, 143 (1993).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 20 and July 16, 2004 decisions of the Office of Workers' Compensation Programs are set aside and remanded for further development consistent with this decision of the Board.

Issued: February 2, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member