



## **FACTUAL HISTORY**

On June 14, 2005 appellant, a 62-year-old general foreman piperfitter, filed an occupational disease claim alleging that he sustained a bilateral hearing loss due to his job at the employing establishment. He first became aware of his hearing loss and of its possible causal relationship to his employment in January 1990. The employing establishment noted appellant's last date of exposure was September 1, 1995. Appellant submitted copies of audiometric test results dated 1966 to 2005. A hearing conservation test performed on April 29, 1992 contained a notation to "refer to audiologist for annual hearing conservation surveillance testing" and contained a comparison with results from an October 23, 1985 hearing test, which revealed a change in his hearing. Appellant's last hearing test at the employing establishment was August 28, 1995 which revealed a 28.13 percent hearing loss in his right ear and a 15 percent hearing loss in his left ear. The employing establishment noted an August 30, 1966 medical examination revealed that appellant had a preexisting bilateral hearing loss prior to working for the employing establishment and "we are unable to provide comment from a knowledgeable supervisor on the accuracy of the claimant's statements."

By decision dated February 3, 2006, the Office denied appellant's claim on the grounds that it was untimely filed in accordance with 5 U.S.C. § 8122. It found that his last federal exposure was on September 1, 1995 and his June 14, 2005 filing was not within the three-year time limitation period. The Office found that the record contained no evidence that appellant's supervisors had actual knowledge of his hearing loss.

On February 13, 2006 appellant, through counsel, requested reconsideration and submitted copies of audiograms which he contends show that the employing establishment was aware of appellant's employment-related hearing loss.

On February 20, 2006 the Office received copies of previously submitted audiograms for the period 1966 to 1995.

By decision dated May 10, 2006, the Office denied appellant's request for reconsideration on the grounds that the evidence was not sufficient to warrant a review of his claim on the merits.

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

In cases of injury on and after September 7, 1974, section 8122(a) of the Federal Employees' Compensation Act provides 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

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<sup>1</sup> 5 U.S.C. § 8122(a).

<sup>2</sup> 5 U.S.C. § 8122(b).

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>

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. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.<sup>4</sup> The Board has 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>5</sup>

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

Appellant indicated that he became aware of his hearing loss and that it was employment related in 1990. His last exposure to factors of employment was September 1, 1995, his date of retirement. Therefore, the time limitations period began to run no later than September 1, 1995 and ended September 1, 1998. Since appellant did not file a claim until June 14, 2005, the Board finds that his claim was filed outside the three-year time limitation period which ended September 1, 1998. The Board finds that he reasonably should have been aware of his hearing loss on September 1, 1995, appellant's last date of exposure to noise at the employing establishment since he indicated that he was aware of a hearing loss and its relationship to his employment as early as 1990. To be timely, his claim should have been filed within three years of his last exposure, but it was not filed until approximately 10 years later on June 14, 2005.

The Office's February 13, 2006 decision, however, did not address whether the audiograms performed at the employing establishment during appellant's employment showed actual knowledge of his hearing loss. The employing establishment appears to have run a hearing conservation program by mandating the use of earplugs and conducting annual audiograms to test its employees for hearing loss. The employing establishment maintained that it was not put on notice of appellant's hearing loss as he had a preexisting hearing loss at the time he started work with the employing establishment. A medical certification and an audiogram performed on August 30, 1966, the date appellant began employment at the employing establishment, does indicate a hearing loss. The more recent audiograms, though, should be reviewed by an Office medical adviser to determine if they show a change in his hearing acuity. The Office should then issue a decision addressing whether these audiograms

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<sup>3</sup> *Roger W. Robinson*, 54 ECAB 846 (2003).

<sup>4</sup> 5 U.S.C. § 8122(a)(1); *William C. Oakley*, 56 ECAB \_\_\_\_ (Docket No. 05-140, issued May 6, 2005).

<sup>5</sup> *Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6(c) (February 2000) states: "If the employing agency gave regular physical examinations which might have detected signs of illness (for example, regular x-rays or hearing tests), the agency should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results. If the claimant was still exposed to employment hazard on or after September 7, 1974 and the agency's testing program disclosed the presence of an illness or impairment, this would constitute actual knowledge on the part of the agency and timeliness would be satisfied even if the employee was not informed."

establish actual knowledge by the employing establishment such that appellant's failure to file a claim within the three-year time limit of the Act should be excused.

In light of the disposition of this case, the issue of whether the Office properly denied appellant's request for reconsideration is moot.

**CONCLUSION**

The Board finds that the case is not in posture for decision on whether appellant's claim for a hearing loss is timely under the Act. The case must be remanded to the Office for a determination as to the timeliness of appellant's claim for a hearing loss based upon whether the employing establishment had actual knowledge of the hearing loss and its relation to his federal employment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated May 10 and February 3, 2006 are set aside. The case is remanded for further action consistent with this opinion.

Issued: October 31, 2006  
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