

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

H.W., Appellant

and

**DEPARTMENT OF THE AIR FORCE, TINKER
AIR FORCE BASE, Midwest City, OK, Employer**

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**Docket No. 11-1198
Issued: December 8, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 10, 2011 appellant filed a timely appeal from a January 6, 2011 decision of the Office of Workers' Compensation Programs (OWCP) which denied his occupational disease claim as untimely filed and a February 28, 2011 decision which denied his request for reconsideration. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant's October 25, 2010 occupational disease claim was untimely filed pursuant to 5 U.S.C. § 8122; and (2) whether OWCP properly denied his January 31, 2011 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant contends that his supervisor had actual knowledge of his hearing loss as he was part of a hearing conservation program and written evidence of possible work-related injury was forwarded to his supervisor.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 25, 2010 appellant, then a 62-year-old aircraft engine mechanic, filed an occupational disease claim alleging that he suffered from bilateral hearing loss as a result of his employment. He first became aware of his condition and realized it resulted from his employment on May 14, 1992. Appellant explained that he did not file his claim within 30 days because he was unaware of the time limitation. The employing establishment noted that he first reported his condition on October 25, 2010 and was last exposed to the alleged employment factors on April 14, 2000 when he was separated from the employing establishment.

In an April 29, 1991 hearing conservation disposition, John C. Campbell, audiologist, informed appellant that a change called a standard threshold shift (STS) of 10 decibels was identified in his hearing and advised him to see the clinical audiologist.

In a May 14, 1992 hearing conservation disposition, Mr. Campbell stated that appellant's hearing test revealed a decrease STS in his hearing and advised him that if he believed his hearing loss was related to his federal employment he should contact the compensation office.

Appellant submitted his employment history, which indicated that he worked at the employing establishment from November 1979 to April 2000 and was exposed to eight hours of machinery everyday. He also submitted a series of audiograms from 1980 to 1998 and handwritten occupational health records dated April 29, 1991 to February 20, 1998.

In a letter dated October 27, 2010, the employing establishment controverted appellant's claim on the grounds that he did not file his claim in a timely manner. It noted that compensation claims must be filed within three years of the occurrence of the injury or death and pointed out that he filed his claim on October 25, 2010, more than three years from the date he first became aware of his illness on May 14, 1992.

On November 9, 2010 OWCP advised appellant that the evidence submitted was insufficient to show that he provided timely notification of his hearing loss and requested additional evidence.

On November 22, 2010 OWCP received a statement from appellant's wife, who stated that appellant had severe psychological problems and that she had maintained his affairs for years. Appellant's wife explained that, during their last move, she discovered his 1991 and 1992 notifications.

In a decision dated January 6, 2011, OWCP denied appellant's claim finding that he did not timely file his occupational disease claim. It noted that a claim must be filed within three years of the date of injury unless the claimant's supervisor had actual knowledge of the injury or received written notice of the injury within 30 days. OWCP explained that appellant's time began to run on May 14, 1992 when he first became aware or reasonably should have been aware, of a possible relationship between his condition and his employment. It also noted that because his exposure to the alleged employment factors continued after this knowledge, the time for filing begins to run on the date of last exposure, which was April 14, 2000. As appellant filed

his occupational disease claim on October 25, 2010, more than three years after, OWCP determined that he did not timely file his claim.

On January 31, 2011 appellant submitted a request for reconsideration.

In a nonmerit decision dated February 28, 2011, OWCP denied appellant's reconsideration request.

LEGAL PRECEDENT -- ISSUE1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his claim by the weight of the reliable, probative and substantial evidence,² including that he filed his claim within the applicable time limitation.³

Section 8122(b) provides that, in a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware or by the exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment. In such a case, the time for giving notice of injury begins to run when the employee is aware or by the exercise of reasonable diligence should have been aware, that his condition is causally related to his employment, whether or not there is a compensable disability.⁴ When the employee continues in the same employment after such awareness, the time limitation begins to run on the date of his last exposure to the implicated factors.⁵

A claim filed outside this time frame must be disallowed unless the immediate superior had actual knowledge of the injury or death within 30 days.⁶ 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.⁷

² *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

³ *Paul S. Devlin*, 39 ECAB 715 (1988); *Emmet L. Pickens*, 33 ECAB 1807 (1982); *Kathryn A. O'Donnell*, 7 ECAB 227 (1954).

⁴ 5 U.S.C. § 8122(b); 20 C.F.R. § 10.101(c) (2009).

⁵ *James A. Shepherd*, 55 ECAB 515 (2004); *William D. Goldsberry*, 32 ECAB 536 (1981).

⁶ The knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury. 5 U.S.C. § 8112(a)(1).

⁷ See *Jose Salaz*, 41 ECAB 743 (1990); See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801. 6c (October 2010).

ANALYSIS -- ISSUE 1

Appellant alleged that he suffered from bilateral hearing loss as a result of his work as an aircraft engine mechanic. OWCP denied his claim finding that his claim was not timely filed. The Board finds that appellant's claim for hearing loss was timely filed.

Appellant noted that he first became aware of his condition and realized that it resulted from his employment on May 14, 1992. He was last exposed to the alleged employment factors on April 14, 2000 when he was separated from the employing establishment. Therefore, the three-year time limitation to file appellant's claim ended on April 14, 2000. Since appellant did not file a claim for hearing loss until October 25, 2010, his claim was filed outside the three-year time limitation period. However, his claim could still be regarded as timely under section 8122(a)(1) of FECA if his immediate supervisor had actual knowledge or received written notification of the injury within 30 days of the date.

On appeal, appellant contends that his supervisor Lee North had actual knowledge and received written notification of the hearing loss because he was a copy of the May 14, 1992 appellant's hearing tests reflecting a hearing loss as part of a hearing conservation program. The record indicates that he was part of an annual hearing conservation program as early as 1980 and that a May 14, 1992 hearing test indicated a decrease in his hearing.

The Board finds that the evidence of record is sufficient to establish that the employing establishment had actual knowledge of appellant's hearing loss. Consequently, the exception to the three-year time limitation was met and appellant's hearing loss claim was timely filed.⁸ The January 6, 2011 decision of OWCP will be set aside. The case is remanded for further development of the claim.

CONCLUSION

The Board finds that appellant timely filed a claim for hearing loss on October 25, 2010.⁹

⁸ *Gerald A. Preston*, 57 ECAB 270 (2005); see also *J.B.*, Docket No. 10-2025 (issued June 17, 2011).

⁹ In light of the Board's findings regarding Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2011 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further action consistent with this decision.

Issued: December 8, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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