



hearing loss and that it was caused or aggravated by his employment on September 17, 1998. Appellant explained that he had resigned as a firearms instructor due to related health reasons, as he was experiencing hearing loss and constant ringing in his ears. He further explained that when he resigned, he submitted a September 17, 1998 memorandum to the Area Port Director, Manuel Sloss. Appellant noted that Mr. Sloss never informed him that he could file a claim for compensation. Juan Villareal, a supervisor at the employing establishment, noted on the back of the claim form that appellant had retired on November 1, 2001 due to a hearing problem.

In support of his claim, appellant submitted a November 3, 1997 memorandum on the subject "Eye and Ear Protection Procurement" from Administrator Gary S. Runyon, sent to employees of the firearms unit, including appellant. It addressed the procurement of safety glasses and hearing protection for use by each INS officer during firearms training, practice and qualification sessions.

In a letter dated September 17, 1998, appellant stated that he was submitting his resignation as a firearm instructor on that date due to health reasons. He noted that he had served as a firearm instructor for the past 11 years as a collateral duty.

Appellant submitted an audiogram dated September 22, 2010 from Dr. Rafael Arredondo, a Board-certified otolaryngologist. The audiogram noted frequency levels in both ears and listed a severe bilateral hearing loss but offered no opinion regarding causal relationship.

In a December 12, 2010 statement, appellant related that, during his employment as an immigration inspector, from October 1983 until November 2001, he was responsible for inspections of persons and vehicles traveling into the U.S. at different bridge locations. He was continuously exposed to vehicular traffic noise from automobiles and trucks. Appellant's inspection duties in airports and seaports also exposed him to aircraft and vessel engine noise for eight or more hours a day. He did not recall that hearing protection was available, especially during the early years. In 1988, appellant was certified as a firearms instructor. He stated that he resigned due to hearing loss and ringing in the ears, which he attributed to his exposure to shooting noise in his duties as a firearms instructor and inspection duties.

In a January 20, 2011 letter, OWCP notified appellant of the deficiencies of his claim. Appellant was asked to submit within 30 days a statement giving the date he first noticed his hearing loss and the date he first realized his hearing loss was related to work exposure. He was also requested to submit medical evidence from a physician with a diagnosis and opinion on causal relation. A note to the employing establishment stated: "If the employee was treated at an agency medical facility for this injury, the employing agency must provide the treatment notes directly to OWCP."

In a January 30, 2011 response, appellant stated that he was aware of ringing in his ears during his employment, but was not aware of the cause of his hearing loss during his employment as he attributed it to his age. He did not realize his loss of hearing was due to his federal employment until May 2008, when he discussed it with a former coworker. Appellant stated that he was not given adequate hearing protection in either his immigration inspector position or as a firearms instructor.

By decision dated May 2, 2011, OWCP denied appellant's claim finding that it was not timely filed. The evidence did not support that the claim was filed within three years of the date of injury or that his immediate supervisor had actual knowledge within 30 days of the date of injury.

Appellant requested reconsideration on May 13, 2011. He noted that, while September 17, 1998 was his date of injury, his hearing loss had gradually worsened until he was examined on September 22, 2010 for a serious hearing loss and he became aware that his hearing loss might be compensable.

In a May 26, 2011 letter to the employing establishment, OWCP advised that appellant had requested reconsideration of the May 13, 2011 decision. The employer was provided 20 days to comment on appellant's request for reconsideration. OWCP received no response.

In a June 16, 2011 merit decision, OWCP denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant modification of the May 13, 2011 decision.

### **LEGAL PRECEDENT**

Under FECA,<sup>2</sup> as amended in 1974, a claimant has three years to file a claim for compensation.<sup>3</sup> In a case of an occupational disease, the Board has held that 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 the condition and his or her employment.<sup>4</sup> Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of last exposure to the implicated factors.<sup>5</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 his or her employment and the compensable disability.<sup>6</sup>

Even if the claim is not filed within the three-year period, it may be regarded as timely under section 8122(a)(1) if appellant's immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days such that the immediate superior was put reasonably on notice of an on-the-job injury or death.<sup>7</sup>

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<sup>2</sup> *Id.* at § 8122.

<sup>3</sup> See *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); see also 20 C.F.R. § 10.101(b).

<sup>4</sup> See *William C. Oakley*, 56 ECAB 519 (2005).

<sup>5</sup> See *Larry E. Young*, 52 ECAB 264 (2001); *William D. Goldsberry*, 32 ECAB 536, 540 (1981).

<sup>6</sup> 5 U.S.C. § 8122(b); see also *Bennie L. McDonald*, 49 ECAB 509, 514 (1998).

<sup>7</sup> See *Duet Brinson*, *supra* note 3; *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

## ANALYSIS

OWCP denied appellant's occupational disease claim on the grounds that it was not timely filed. The Board finds that the case is not in posture for decision.

Appellant filed a claim on December 14, 2010 alleging that he sustained hearing loss and tinnitus causally related to his duties of a firearms instructor and immigration inspector. He stated that he first became aware of his condition and that it was caused by his employment on September 17, 1998. The employing establishment noted that appellant retired from his employment on November 1, 2001.

Appellant submitted evidence that he resigned from his duties as a firearms instructor in 1998 due to his health concerns. He stated that he provided Mr. Sloss, the INS Area Port Director, with a September 17, 1998 memorandum that attributed the resignation to his hearing loss and tinnitus.

In a January 20, 2011 developmental letter, OWCP noted that the employer should submit any medical records directly to OWCP. There is no evidence that the employing establishment was asked to comment as to whether timely notice had been provided by appellant to his supervisor regarding his hearing loss. There is no evidence that the employer submitted any records pertaining to any audiometric testing or agency hearing conservation program. Appellant's claim could be regarded as timely if his immediate supervisor had actual knowledge or written notice that he sustained an employment-related injury within 30 days of appellant's resignation on November 1, 2001. His claim would also be timely if the employing establishment conducted a program of annual audiometric examination which would constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury.<sup>8</sup> This aspect of the claim was not developed.

Although appellant has the burden to establish his claim of hearing loss, OWCP shares the responsibility for the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source. The evidence pertaining to appellant's resignation, the September 17, the 1998 memorandum to Mr. Sloss, as well as health unit medical records, are in the possession of the employing establishment and should be obtained for the record.<sup>9</sup>

The case will be remanded to OWCP to request the records pertaining to appellant's 1998 letter of resignation and retirement in 2001, as well as any employing establishment records of audiometric testing. It should request that appellant's supervisor address the issue of knowledge of appellant's hearing loss, as far as possible. After such further development as necessary, OWCP shall issue an appropriate decision.

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<sup>8</sup> See *M.B.*, Docket No. 11-673 (issued January 10, 2012); see also *Jose Salaz*, 41 ECAB 743 (1990).

<sup>9</sup> *Marco A. Padilla*, 51 ECAB 202 (1998); *S.A.*, Docket No. 09-1551 (issued January 21, 2010).

**CONCLUSION**

The Board finds that this case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 16, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: August 29, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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