



On appeal, appellant contends that OWCP improperly rescinded its prior acceptance of his claim for occupational disease of hearing loss and, therefore, erred in its July 13, 2011 decision denying his claim.

### **FACTUAL HISTORY**

On February 27, 2001 appellant, then a 65-year-old former supervisory civil engineer, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss caused or aggravated by factors of his federal employment. He indicated that he first became aware of his hearing loss and attributed it to his federal employment in May 1971. Appellant explained on the claim form that he did not file within 30 days because he felt that it would be held or used against him, so he waited until his hearing worsened. He submitted undated and unsigned audiograms and a narrative statement indicating that he first noticed his hearing loss when U.S. Air Force (USAF) physicians pointed it out at a physical examination for overseas assignment in the spring 1971. Appellant retired in March 1997.

By letter dated February 27, 2002, OWCP notified appellant of the deficiencies of his claim and requested additional factual and medical information. It afforded him 30 days to submit additional evidence.

On June 7, 2002 OWCP's medical adviser found that appellant had binaural sensorineural hearing loss and a date of maximum medical improvement of September 12, 1998.

Appellant submitted a July 8, 2010 report by Dr. M. Stephen Wilson,<sup>3</sup> who opined that appellant sustained binaural hearing loss and tinnitus due to factors of his federal employment.

By letter dated June 8, 2011, OWCP notified appellant that the evidence submitted was not sufficient to establish timely notification of injury. It afforded him 30 days to submit additional evidence in support of his claim.

Subsequently, counsel submitted a June 14, 2011 statement contending that appellant's claim was accepted for hearing loss, a March 27, 1989 task assignment and an OWCP case compensation payment history document indicating that appellant's reported condition was "hearing loss d/t [due to] noise."

On June 21, 2011 OWCP advised that further development was necessary before a decision on whether appellant was eligible for compensation benefits was made. It requested evidence establishing that he filed a claim within three years of the date of injury or that his immediate supervisor had actual knowledge within 30 days of the date of injury. OWCP also noted that a review of the case file determined that an acceptance letter was not issued on appellant's claim.

By decision dated July 13, 2011, OWCP denied appellant's claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. It found that he had failed to file a claim within

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<sup>3</sup> The Board notes that the professional qualifications of Dr. Wilson are not contained in the case record.

three years of the date of injury, May 1971.<sup>4</sup> OWCP further noted that there was no evidence that a supervisor had actual knowledge of appellant's claim within 30 days of the date of injury.

### **LEGAL PRECEDENT**

Under FECA,<sup>5</sup> as amended in 1974, a claimant has three years to file a claim for compensation.<sup>6</sup> In a case of 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 his condition and his employment.<sup>7</sup> Where 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.<sup>8</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 employment and the compensable disability.<sup>9</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>10</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>11</sup>

### **ANALYSIS**

The Board finds that the evidence of record establishes that appellant did not timely file a claim for compensation under FECA. Appellant reported on the claim form that he was aware of

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<sup>4</sup> In its July 13, 2011 decision, OWCP indicated that the date of injury was February 28, 1987. The Board finds that this is harmless error as the date of injury indicated on the original claim form, May 1971, is more than three years before the claim was filed on February 27, 2001.

<sup>5</sup> 5 U.S.C. § 8122.

<sup>6</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>7</sup> See *William C. Oakley*, 56 ECAB 519 (2005).

<sup>8</sup> See *Larry E. Young*, 52 ECAB 264 (2001); *William D. Goldsberry*, 32 ECAB 536, 540 (1981).

<sup>9</sup> 5 U.S.C. § 8122(b); see also *Bennie L. McDonald*, 49 ECAB 509, 514 (1998).

<sup>10</sup> See *Duet Brinson*, *supra* note 6; *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

<sup>11</sup> See *Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3c and 6c (October 2010) which states: "If the employing [establishment] 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...]."

a relationship between the claimed condition and employment as of May 1971. Under section 8122(b), the time limitation begins to run when he 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 retired in March 1997. Therefore, in this case, the three-year time limitation began to run on March 1997 and expired no later than the 31<sup>st</sup> day of March 2000. Since appellant did not file the claim until February 27, 2001, he did not file the claim within the three-year time limitation.

Furthermore, the evidence shows that appellant was aware or should have been aware of the relationship of his hearing loss to his federal employment prior to the date of last exposure in March 1997. The evidence shows that he first became aware of his hearing loss on or about May 1971. Appellant reported that he first noticed his hearing loss when USAF physicians pointed it out at a physical examination for overseas assignment in the spring 1971. On the claim form he explained that he did not file within 30 days because he felt that it would be held or used against him, so he waited until his hearing worsened. Consequently, there is no evidence to support that the time limitation began to run any later than March 1997.

Although appellant's claim for compensation was not timely filed within the three-year statute of limitations, his claim would be regarded as timely if his immediate supervisor had actual knowledge or written notice that he sustained an employment-related injury within 30 days. However, he provided no evidence to establish that his supervisor had actual knowledge of the injury within 30 days or that written notice of the injury was given to the supervisor within 30 days. The record does not contain evidence of annual audiograms by the employing establishment and OWCP's document indicating that appellant reported a hearing loss condition is an internal memorandum, not a decision accepting his claim. Thus, the Board finds no probative evidence to establish that appellant's supervisors had actual knowledge, sufficient to put them reasonably on notice, that appellant's hearing loss was related to his federal employment within 30 days of March 1997, the month he retired and the date of last exposure.

The Board has held that an employee's unawareness of possible entitlement, lack of access to information or ignorance of the law or one's rights and obligations under it do not constitute exceptional circumstances that excuse a failure to file a timely claim.<sup>12</sup> Appellant was not under 21 years old and provided no evidence to show that he was incompetent or was prevented from giving notice by exceptional circumstances.<sup>13</sup> Thus, he did not timely file a claim for compensation.

On appeal, appellant contends that OWCP improperly rescinded its prior acceptance of his claim for occupational disease of hearing loss and, therefore, erred in its July 13, 2011 decision denying his claim. The Board finds that the record does not contain a decision issued

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<sup>12</sup> *B.J. (B.J.)*, 59 ECAB 660 (2008).

<sup>13</sup> The time limitations in section 8122(a) and (b) do not: (1) begin to run against a minor until he reaches 21 years of age or has had a legal representative appointed; (2) run against an incompetent individual while he is incompetent and has no duly appointed legal representative; or (3) run against any individual whose failure to comply is excused by the Secretary on the grounds that such notice could not be given because of exceptional circumstances. 5 U.S.C. § 8122(a)-(b); *J.P.*, 59 ECAB 178 (2007).

by OWCP accepting a hearing loss condition. It is not possible for OWCP to rescind a decision accepting a claim it has not issued. Therefore, appellant's argument is not substantiated.

**CONCLUSION**

The Board finds that appellant did not file a timely claim for compensation and, therefore, his claim is barred by the applicable time limitation provisions of FECA.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 13, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 8, 2012  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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