



aggravated by his employment on August 1, 1989. Appellant retired from federal employment on December 31, 2005.

In support of his claim, appellant submitted results of a February 21, 2011 audiogram which showed that he had mild to severe bilateral, sensorineural hearing loss.

By letter dated March 28, 2011, OWCP advised appellant that the evidence he submitted was not sufficient to establish that he provided timely notification of his work injury and that he needed to submit additional factual and medical evidence in support of his claim. It stated that he had 30 days to submit the requested information.

In a statement dated April 14, 2011, appellant contended that he did not file within three years of knowing his hearing loss was work related because he was not aware of the three-year limitation for filing a claim. He submitted results of employing establishment audiograms, conducted pursuant to a hearing conservation program, dated May 28, 1985, May 20, 1986 and July 18, 1995 which showed varying degrees of bilateral hearing loss.

By decision dated May 6, 2011, OWCP denied appellant's claim, finding that he failed to file a timely claim under section 8122. It advised him 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. OWCP stated that 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 the condition is causally related to employment, whether or not there is a compensable disability. It found that appellant did not file his claim within three years of the date of injury and that he had not established that his immediate supervisor had actual knowledge within 30 days of the date of injury. OWCP found that there was insufficient medical evidence supporting a hearing loss in the reports appellant submitted dated 1985, 1986 and 1995. It further found that, as appellant retired from the employing establishment on December 31, 2005, the last date he could have filed a timely claim would have been December 31, 2008.

By letter dated June 3, 2011, appellant requested a review of the written record.

By decision dated September 22, 2011, OWCP's hearing representative affirmed the May 6, 2011 decision.

By letter dated January 26, 2012, appellant requested reconsideration. By decision dated March 6, 2012, OWCP denied modification of the September 22, 2011 decision.

### **LEGAL PRECEDENT**

Section 8122(a) of FECA states, "an original claim for compensation for disability or death must be filed within three years after the injury or death."<sup>2</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

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<sup>2</sup> 5 U.S.C. § 8122(a).

between his employment and the compensable disability.<sup>3</sup> The Board has 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 this exposure.<sup>4</sup> A claim, however, would still be regarded as timely under section 8122(a)(1) of FECA if the 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>5</sup>

### ANALYSIS

In the present case, appellant stated that he became aware of his alleged bilateral hearing loss and its relationship to his federal employment on August 1, 1989. As noted above, the time for filing a claim in a case of latent disability 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. Appellant did not file his claim within three years of the date he became aware of his latent disability and its relationship to his employment, which he stated occurred on August 1, 1989.

The time limitation would be extended if appellant continued to be exposed to the factors of employment which caused the injury. He retired from the employing establishment on December 31, 2005 and was last exposed to factors of employment on that date. Therefore, the last date appellant could have filed a timely claim due to continued exposure to factors of employment would have been December 31, 2008.

However, there is evidence of record indicating that appellant's immediate supervisor was provided with actual knowledge of the injury within 30 days of the injury. 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>6</sup>

Appellant has submitted employing establishment audiograms from 1985, 1986 and 1995, which on their face are entitled to "hearing conservation data." These audiograms do establish an increasing hearing loss through the years of appellant's employment. While these audiograms do not address causal relationship, the issues of causal relationship and timeliness of a claim are separate and distinct. The Board finds that these audiograms do establish timely constructive notice on part of the employing establishment of appellant's alleged injury.

The Board will set aside the March 6, 2012 OWCP decision and remand the case for evaluation of appellant's hearing loss claim by a district medical adviser. After such further development as necessary, OWCP shall issue an appropriate decision.

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<sup>3</sup> 5 U.S.C. § 8122(b).

<sup>4</sup> *J.P.*, 59 ECAB 178 (2007); *Linda J. Reeves*, 48 ECAB 373 (1997).

<sup>5</sup> *Id.*

<sup>6</sup> *Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987).

**CONCLUSION**

The Board finds that OWCP improperly denied appellant's compensation claim on the grounds that his claim was not filed within the applicable time limitation provisions of FECA.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 6, 2012 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this opinion.

Issued: December 3, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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