



## **FACTUAL HISTORY**

On June 18, 2012 appellant, then an 80-year-old former ordnance equipment repairman, filed an occupational disease claim (Form CA-2) alleging that he sustained a bilateral hearing loss due to hazardous noise exposure at work on or before January 1, 1975.<sup>2</sup> He first became aware of his hearing loss and its relationship to his federal employment on January 1, 1975. Appellant delayed filing a claim for more than 30 days after January 1, 1975 and only recently learned that he could file one. He retired from federal employment on July 1, 1989.

In a May 9, 2012 letter, appellant noted working in the employing establishment's ordnance division from August 1960 until his retirement on July 1, 1989. Throughout his employment, he was exposed to hazardous noise from overhead cranes, air wrenches, air compressors, forklifts and hammering. Appellant wore earplugs and earmuffs provided by the employing establishment.

The employing establishment provided position descriptions, medical surveillance questionnaires and a June 20, 2012 memorandum documenting that appellant was exposed to hazardous noise above 85 decibels (dBA) at work from 1960 through July 1, 1989. In a June 11, 2012 letter, the employing establishment noted that he participated in a hearing conservation program monitored through annual audiograms. Appellant's final audiogram was obtained on May 11, 1989.

The employing establishment submitted appellant's baseline audiogram obtained on August 8, 1960. Audiometric testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed decibel losses of 15, 15, 15 and 20 decibels in both ears, indicating normal hearing. A hearing conservation audiogram performed on May 14, 1974 revealed decibel losses of 20, 20, 55 and 70 decibels on the left and 20, 30, 60 and 65 decibels on the right, demonstrating a ratable binaural hearing loss.<sup>3</sup> Annual hearing conservation audiograms from May 18, 1983 through May 11, 1989 demonstrated a worsening binaural hearing loss.<sup>4</sup> On July 9, 1984 Dr. John R. Wechsler, an employing establishment physician, diagnosed a severe hearing loss despite his use of earplugs and earmuffs.

In a June 25, 2012 letter, counsel asserted that annual employing establishment audiograms performed as part of a hearing conservation program established actual, timely notice that appellant had a work-related hearing loss. He submitted a March 16, 2012 audiogram from a private audiology clinic which showed a severe bilateral hearing loss, with decibel losses on the left at 85, 80, 80 and 80 decibels and 45, 60, 70 and 80 decibels on the right at the frequencies of 500, 1,000, 2,000 and 3,000 cps.

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<sup>2</sup> In a June 21, 2012 letter, OWCP advised appellant of the type of additional medical and factual evidence needed to establish his claim. It afforded appellant 30 days to submit such evidence.

<sup>3</sup> Under FECA, hearing loss impairments are determined by the average of the hearing levels at 500, 1,000, 2,000 and 3,000 cps. See American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed., 2008) at section 11.2d, page 250. If the average is less than 25, the hearing impairment is not ratable.

<sup>4</sup> In a June 20, 2012 report, an OWCP medical adviser noted that there was no significant threshold shift in employing establishment audiograms from May 14, 1974 to May 11, 1989.

By decision dated August 1, 2012, OWCP denied appellant's claim on the grounds that it was not timely filed under the three-year time limitation at section 8122 of FECA. It found that appellant did not file his claim until June 14, 2012, more than three years after he first noticed a hearing loss on January 1, 1975. OWCP further found that the evidence did not establish that the employing establishment had actual notice of the hearing loss within 30 days of the date of injury.

### **LEGAL PRECEDENT**

Under section 8122 of 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. When an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitation period even though he does not know the nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.<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> In interpreting section 8122(a)(1) of FECA, OWCP's procedure manual states that, if the employing establishment provides regular physical examinations, which might have detected signs of illness, such as hearing tests, it should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results.<sup>11</sup> The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program for

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<sup>5</sup> 5 U.S.C. § 8122.

<sup>6</sup> *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); see 20 C.F.R. § 10.101(b).

<sup>7</sup> *Larry E. Young*, 52 ECAB 264 (2001); *Duet Brinson*, *id.*

<sup>8</sup> See *Larry E. Young*, *id.*

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

<sup>10</sup> *William C. Oakley*, 56 ECAB 519 (2005); *Duet Brinson*, *supra* note 4; *Delmont L. Thompson*, 51 ECAB 155 (1999).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6(c) (March 1993); *L.C.*, 57 ECAB 740 (2006); *Ralph L. Dill*, 57 ECAB 248 (2005).

hazardous noise exposure is sufficient to constructively establish actual knowledge of a hearing loss, such as to put the immediate supervisor on notice of an on-the-job injury.<sup>12</sup> A hearing loss identified on such a test would constitute actual knowledge on the part of the agency of a possible work injury.<sup>13</sup>

### ANALYSIS

Appellant stated on his claim form that he was aware of a relationship between the claimed condition and his federal employment as of January 1, 1975. Under section 8122(b), the time limitation begins to run when appellant 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. Appellant retired from federal employment on July 1, 1989. Therefore, the three-year time limitation began to run on July 1, 1989. As appellant did not file his occupational disease claim until May 7, 2012, the Board finds that it was not filed within the three-year time period under section 8122(b).

As set forth above, appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate supervisor, another employing establishment official or employing establishment physician or dispensary had actual knowledge of the injury within 30 days of his last exposure to noise, *i.e.*, within 30 days of July 1, 1989.<sup>14</sup> The Board finds that the employing establishment hearing conservation audiograms, obtained on May 14, 1974 and annually from May 18, 1983 to May 11, 1989, are sufficient to establish actual knowledge of the claimed hearing loss within 30 days of July 1, 1989. Each of the audiograms from May 14, 1974 onward demonstrated a ratable hearing loss. Additionally, in a July 9, 1984 report, Dr. Wechsler, an employing establishment physician, diagnosed a severe hearing loss based on a hearing conservation program audiogram. The ratable bilateral hearing loss<sup>15</sup> evident on the hearing conservation audiograms and associated report constitutes actual knowledge by the employing establishment of a possible work-related hearing loss within 30 days of July 1, 1989.<sup>16</sup> Therefore, appellant's hearing loss claim is considered timely.

The case must, therefore, be remanded for OWCP to address the merits of the claim. After any further development as deemed necessary, it should issue an appropriate decision.

On appeal, counsel asserts that employing establishment audiograms performed as part of a hearing conservation program provided timely actual notice of a ratable hearing loss. As stated

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<sup>12</sup> *James W. Beavers*, 57 ECAB 254 (2005); *Ralph L. Dill*, *id.*

<sup>13</sup> *See* 5 U.S.C. § 8122(a)(1); Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.801(3); *Ralph L. Dill*, *supra* note 11; *Larry E. Young*, *supra* note 7; *Roger D. Dicus*, 56 ECAB 290 (2005).

<sup>14</sup> *See* 5 U.S.C. § 8122(a)(1); Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.801(3); *Ralph L. Dill*, *supra* note 11; *Larry E. Young*, *supra* note 7.

<sup>15</sup> *See* A.M.A., *Guides* 250.

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.8016(c) (March 1993); *Ralph L. Dill*, *supra* note 11; *Larry E. Young*, *supra* note 7; *Roger D. Dicus*, *supra* note 13.

above, appellant's claim is timely. The case will be remanded to OWCP for consideration of the merits of the claim.

**CONCLUSION**

The Board finds that appellant's claim for hearing loss was timely filed. The employing establishment had actual knowledge of a possible work-related hearing loss within 30 days of July 1, 1989, the date appellant was last exposed to hazardous noise at work.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 1, 2012 is set aside and the case remanded for further development in accordance with this decision.

Issued: January 29, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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