

condition and first realized that it was employment related on June 14, 2006. Appellant noted that for years he let it go, but after years of not hearing, he felt he had to open a claim when it started to get worse. John P. Stanley of the employing establishment noted that appellant reported the condition on September 28, 2012. The employing establishment stated that appellant was last exposed to the condition alleged to have caused his condition on June 1, 1996 and that he retired in 2011.

On November 16, 2012 OWCP requested that appellant submit additional evidence to establish his claim. It also requested that the employing establishment submit any factual and medical evidence related to appellant's noise exposure.

In a letter dated December 11, 2012, Mr. Stanley stated that from September 1978 through June 1996 appellant worked in a sheet metal shop at the depot where he would have been exposed to the normal sounds of working in a shop such as from shears, air hammers, drill presses, saws, grinders, etc. He noted that from July 1996 until his retirement on November 30, 2011, appellant worked in business management, in the barracks. Mr. Stanley also indicated that appellant was exposed to almost no noise as the barracks were empty 75 percent of the time, and even when being used, the noise levels were similar to that of a quiet office environment. He explained that, because appellant worked in the sheet metal shop so long ago, any noise level records were no longer available. Mr. Stanley advised that, when appellant worked in the sheet metal shop, he was enrolled in the hearing conservation program. He explained that there were no noise survey reports for the barracks as they were never identified as noisy. Mr. Stanley indicated that employees in the shop areas worked for eight hours per day with two 15-minute breaks and a one-half hour lunch break each day. He indicated that a variety of forms of hearing protection were provided. Mr. Stanley enclosed appellant's medical records, including hearing conservation data and audiograms. He noted that appellant retired on November 30, 2011.

Accompanying Mr. Stanley's letter were audiograms and employing establishment hearing conservation data from 1978 to 1995. A September 12, 1994 audiogram indicated that there was a significant threshold shift from a May 24, 1983 reference audiogram. A September 11, 1995 audiogram indicated that there was no significant threshold shift.

On March 28, 2013 OWCP referred appellant for a second opinion. It provided a statement of accepted facts, a set of questions, and the medical record to Dr. Philip G. Liu, a Board-certified otolaryngologist.

On April 5, 2013 OWCP accepted the claim for bilateral hearing loss.

In a report dated April 25, 2013, Dr. Liu described appellant's history of injury and treatment, and determined that he had moderate sensorineural hearing loss most likely 70 percent secondary to noise exposure at the employing establishment. He advised that other factors included noise exposure in the Navy, age, and genetic factors. Dr. Liu recommended hearing and noise protection. An audiogram performed for him at testing levels of 500, 1000, 2000, and 3000 hertz revealed in the right ear losses of 15, 25, 30, and 35 decibels; and in the left ear losses of 20, 20, 35, and 45 decibels.

The employing establishment forwarded to OWCP an August 16, 2013 claim for compensation (Form CA-7) which claimed a schedule award.

In a September 30, 2013 report, an OWCP medical adviser determined that appellant had 1.88 percent right ear hearing loss, 7.5 percent left ear hearing loss, and 2.82 percent binaural hearing loss under OWCP standard formula for determining hearing loss. The medical adviser recommended that hearing aids not be authorized.

In a letter dated January 8, 2014, OWCP advised appellant that additional evidence was needed to support his claim. It explained that the evidence was not sufficient to support that the claim was timely filed. The employing establishment was provided a copy of the letter and why it was requested to provide any medical treatment notes.²

In a January 14, 2014 response, appellant indicated that the last time he was exposed to hazardous noise was June 1996. He explained that he related it to his work exposure on September 28, 2012 when he filed his claim. Appellant noted that a fellow coworker and a supervisor told him he had a problem hearing. He indicated that he had to ask people to speak louder and repeat it back to him. Appellant also explained that he had read the employing establishment's response and noted that he also worked overtime on a regular basis. He noted that, while he worked in the barracks beginning in 1996, it was not a quiet environment. Appellant explained that he was a reserve component training coordinator, and the barracks were full for many years, particularly after the attacks of September 11, 2001. He indicated that billeting occurred there and he spent many hours in the shop to include training and use of: generators; sheet metal, welding, sandblasting, machine shop, and working with the soldiers to evaluate their training. Appellant noted that it was anything but a quiet environment and he was exposed to noise right up until the date he retired.

In a January 30, 2014 letter to the employing establishment, OWCP provided a copy of appellant's response to the development letter and requested comments. It also inquired as to whether any of the employing establishment hearing examinations indicated hearing loss. The employing establishment was allotted 15 days to submit the requested evidence. No response was received.

In a telephone call memorandum dated March 14, 2014, OWCP noted that appellant was upset with the status of his claim. Appellant noted that he became aware of his hearing loss on April 23, 2013 when he went to see his doctor. OWCP noted that he indicated a different date on his claim form.

By decision dated March 25, 2014, OWCP rescinded the prior approval of appellant's claim. It found that the decision was incorrect, and denied his claim on the basis that his claim for hearing loss was untimely filed. OWCP found that appellant's claim was not timely filed within three years of the date of injury or that his immediate supervisor had actual knowledge within 30 days of the day of injury. It found that the date of his injury was June 14, 2006, and that his claim for compensation was not filed until September 28, 2012. OWCP further found

² The employing establishment did not respond other than to provide the copy of the previously submitted letter dated December 11, 2012.

appellant's statements that he was exposed to loud noise until his retirement and that he was not aware of his hearing loss until September 2, 2012 were not credible. It advised that the employing establishment's statement that he was exposed to loud noise until 1996 was accepted as factual.

LEGAL PRECEDENT

Pursuant to section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application.³ The Board has upheld OWCP's authority under this section to reopen a claim at any time on its own motion and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.⁴ The Board has noted, however, that the power to annul an award is not arbitrary and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁵

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits. This also holds true where OWCP later decides that it erroneously accepted a claim.⁶

OWCP bears the burden of justifying rescission of acceptance on the basis of new evidence, legal argument and/or rationale.⁷ Probative and substantial positive evidence⁸ or sufficient legal argument⁹ must establish that the original determination was erroneous. OWCP must also provide a clear explanation of the rationale for rescission.¹⁰

Section 8122(a) of FECA provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.¹¹ 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

³ 5 U.S.C. § 8128.

⁴ See *John W. Graves*, 52 ECAB 160, 161 (2000). See 20 C.F.R. § 10.610.

⁵ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

⁶ See *V.C.*, 59 ECAB 137 (2007).

⁷ See *John W. Graves*, *supra* note 4; *Alice M. Roberts*, 42 ECAB 747, 753 (1991).

⁸ See *Michael W. Hicks*, 50 ECAB 325, 329 (1999).

⁹ See, e.g., *Beth A. Quimby*, 41 ECAB 683, 688-89 (1990).

¹⁰ See *V.C.*, *supra* note 6.

¹¹ 5 U.S.C. § 8122(a).

condition and his employment.¹² When an employee becomes aware or reasonably should have been aware that he or she has a condition which has been adversely affected by factors of his or her federal employment, such awareness is competent to start the limitation period even though he or she does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.¹³ 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.¹⁴ Also, a claim would be regarded as timely under section 8122(a)(1) if the immediate supervisor, another employing establishment official or an employing establishment physician or dispensary had actual knowledge of the alleged employment-related injury within 30 days.¹⁵ This provision removes the bar of the three-year time limitation if met.¹⁶ The knowledge must be such as to put the immediate supervisor reasonably on notice of appellant's injury.¹⁷ Additionally, section 8122(a)(2) provides that the claim would be deemed timely if written notice of injury or death was provided within 30 days after the injury pursuant to 5 U.S.C. § 8119.¹⁸ Section 8122(d)(3) provides that time limitations for filing a claim do not 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.¹⁹

The Board has also held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program was 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.²⁰ OWCP's procedures provide:

“If an agency, in connection with a recognized environmental hazard, has an employee testing program and a test shows the employee to have positive findings this should be accepted as constituting actual knowledge. For example, an agency where employees may be exposed to hazardous noise levels may give annual hearing tests for exposed employees. A hearing loss identified on such a test would constitute actual knowledge on the part of the agency of a possible work injury.”²¹

¹² *Duet Brinson*, 52 ECAB 168 (2000).

¹³ *Larry E. Young*, 52 ECAB 264 (2002); *Duet Brinson, id.*; see also *Leo Ferraro*, 47 ECAB 350 (1996).

¹⁴ See *L.C.*, 57 ECAB 740 (2006); *Garyleane A. Williams*, 44 ECAB 441 (1993); *Charlene B. Fenton*, 36 ECAB 151 (1984).

¹⁵ 5 U.S.C. § 8122(a)(1); *Larry E. Young, supra* note 13.

¹⁶ *Hugh Massengill*, 43 ECAB 475 (1992).

¹⁷ *Kathryn A. Bernal*, 38 ECAB 470 (1987).

¹⁸ 5 U.S.C. § 8122(a)(2).

¹⁹ *Id.* at § 8122(d)(3).

²⁰ See *James A. Sheppard*, 55 ECAB 515 (2004).

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(a)(3)(c) (March 1993).

ANALYSIS

The Board finds that OWCP improperly rescinded appellant's claim.

In this case, OWCP accepted appellant's claim on April 15, 2013 for bilateral hearing loss. It was in the process of determining his eligibility for a schedule award when it determined that additional evidence was needed to support whether his claim was timely filed under the applicable guidelines. After additional development, OWCP issued a decision on March 25, 2014, in which it found that appellant's claim was not timely filed as he did not file his claim within three years of the date of injury or that his immediate supervisor did not have actual knowledge within 30 days of the day of injury. It specifically found that the date of injury was June 14, 2006, and that because his claim was not filed until September 28, 2012, it was not timely.

The Board finds that OWCP has not established that appellant's claim was untimely filed. As noted, if an employee continued to be exposed to injurious working conditions, the time limitation begins to run on the last date of this exposure.²² In a January 14, 2014 letter, appellant indicated that he continued to be exposed to noise until he retired on November 30, 2011. He explained that, while he worked in the barracks beginning in 1996, it was not a quiet environment, particularly after the September 11, 2001 attacks. Appellant indicated that billeting occurred there and he spent many hours in the shop to include training and use of: generators; sheet metal, welding, sandblasting, machine shop, and working with the soldiers to evaluate their training. On January 30, 2014 OWCP requested comments from the employing establishment but no response was received. Appellant's January 14, 2014 letter coupled with the lack of rebuttal from the employing establishment suggests that he had some workplace noise exposure until he retired on November 30, 2011.²³ As noted above, probative and substantial positive evidence or sufficient legal argument must establish that the original determination was erroneous.²⁴ Appellant's assertion of continuing exposure coupled with the lack of any evidence from the employing establishment refuting any continued noise exposure does not support OWCP's rescission determination. The Board finds there is probative evidence that appellant's claim for compensation was timely filed.²⁵

Furthermore, as explained, a program of annual audiometric examinations conducted by an employer may be 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.²⁶ The employing establishment provided hearing conservation data from 1978 to 1995. In particular, a

²² See *supra* note 14.

²³ See *H.G.*, 59 ECAB 552 (2008) (an employee's statement regarding the circumstances surrounding an injury is of great probative value and will be accepted unless refuted by persuasive evidence).

²⁴ See *supra* notes 8 and 9.

²⁵ See *William F. Dotson*, 47 ECAB 253 (1995) (where Board found that claim forms signed by appellant established a timely filing of his claim and that OWCP provided insufficient justification for rescinding acceptance of the claim, as being untimely filed).

²⁶ *Supra* notes 20 and 21.

September 12, 1994 employing establishment's audiogram indicated that there was a significant threshold shift from a May 24, 1983 reference audiogram. The record does not indicate that OWCP considered whether this shows actual knowledge under section 8122(a)(1).²⁷

As he filed his claim on September 28, 2012, which was within three years of his last exposure on November 30, 2011, the date of his retirement, his claim was timely filed. Under these circumstances, the Board finds that there is sufficient reliable and probative evidence establishing that appellant's claim for compensation was timely filed and OWCP did not meet its burden of proof to rescind his claim for bilateral hearing loss.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to rescind appellant's claim for bilateral hearing loss.

²⁷ See A.A., Docket No. 14-764 (issued July 28, 2014) (the Board found the claim timely filed where appellant participated in an annual hearing conservation program and where audiograms performed in 1990 and 1991 seemed to demonstrate a significant shift of appellant's hearing; the Board found that the evidence was sufficient to establish that the employing establishment had actual knowledge within 30 days of the date of last exposure that appellant believed that he had hearing loss due to his employment). Compare P.M., Docket No. 07-723 (August 2, 2007) (where the Board affirmed OWCP's rescission of appellant's claim for hearing loss on the grounds that the claim was not timely filed pursuant to 5 U.S.C. § 8122(a); the Board found that the evidence did not show continuing noise exposure and that the record did not establish that the employing establishment had constructive knowledge of appellant's hearing loss as the employing establishment indicated that it had no records showing that appellant was part of the employing establishment's hearing conservation program).

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 10, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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