

**United States Department of Labor  
Employees' Compensation Appeals Board**

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M.W., Appellant )

and )

DEPARTMENT OF THE NAVY, NAVAL )  
UNDERSEA WARFARE CENTER, Newport, RI, )  
Employer )

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**Docket No. 16-0394  
Issued: April 8, 2016**

*Appearances:*  
David G. Jennings, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On December 29, 2015 appellant, through counsel, filed a timely appeal from a December 3, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant's claim is timely pursuant to 5 U.S.C. § 8122(a) of FECA.

On appeal counsel asserts that the claim was timely because the employing establishment had a hearing conservation program.

**FACTUAL HISTORY**

On August 4, 2015 appellant, then a 60-year-old retired engineering technician, filed an occupational disease claim (Form CA-2) for binaural hearing loss. He indicated that he first

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

became aware of the condition and its relationship to employment on June 16, 2009. On the claim form, the employing establishment noted that appellant retired in December 2011 and maintained that the claim was untimely because medical reports showed that appellant was aware of his hearing loss in June 2009.

In letters dated August 13, 2015, OWCP advised appellant of the evidence needed to support his claim and asked the employing establishment to provide information on noise exposure.

Appellant provided a description of his job titles from 1971 until his retirement in 2011, which included work at three employing establishment facilities.

In a statement dated August 20, 2015, Michael Budziszek indicated that he was appellant's supervisor from May 11, 2008 until he retired on December 31, 2011. He described noise exposure at that facility.

The record contains employing establishment audiograms from August 30, 1976 to November 1, 2002, which were part of a hearing conservation program and a June 16, 2009 audiogram performed at the request of a private physician.

In September 2015 OWCP referred appellant to Dr. Jeffrey Powell, a Board-certified otolaryngologist, for an otologic examination and audiological evaluation. In a November 24, 2015 report, Dr. Powell noted a history of noise exposure at work, his review of the statement of accepted facts and medical record, and appellant's complaint of bilateral hearing loss and tinnitus. He described physical examination findings and attached an audiogram report dated November 24, 2015 which, he advised, demonstrated normal-to-moderately severe bilateral high-frequency noise-induced sensorineural hearing loss, worse on the left. Dr. Powell diagnosed bilateral high-frequency noise-induced sensorineural hearing loss, and tinnitus secondary to this hearing loss which was caused by appellant's federal employment. He related that he came to this conclusion after his review of the record, questioning, and examining appellant, including a full audiometric examination.

By decision dated December 3, 2015, OWCP denied appellant's hearing loss claim as untimely filed. It identified June 16, 2009 as the date of injury, and noted that he did not file his claim until August 4, 2015, and the evidence did not support that his immediate superior had actual knowledge within 30 days of the date of injury.

### **LEGAL PRECEDENT**

An original claim for compensation for disability or death must be filed within three years after the injury or death.<sup>2</sup> A claim filed outside this time frame must be disallowed unless the immediate superior had actual knowledge of the injury or death within 30 days.<sup>3</sup> 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

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<sup>2</sup> 5 U.S.C. § 8122(a).

<sup>3</sup> *Id.* at § 8122(a)(1).

aware of the causal relationship of the compensable disability to his or her employment.<sup>4</sup> An employee with actual or constructive knowledge of his or her employment-related condition, who continues to be exposed to injurious working conditions, must file a claim within three years of the date of last exposure to the implicated conditions.<sup>5</sup>

A positive test result from an employing establishment program of regular audiometric examination as part of a hearing conservation programs is sufficient to establish knowledge of a hearing loss so as to put the immediate superior on notice of an on-the-job injury.<sup>6</sup>

### ANALYSIS

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

On the claim form appellant noted that he was aware of his employment-related hearing loss on August 16, 2009. Based on his reported employment history, appellant's occupational noise exposure continued until his retirement on December 31, 2011. After retiring, appellant did not file an occupational disease claim until August 4, 2015, which was outside three years of the date of last exposure to the implicated conditions. Under these circumstances, his claim must be disallowed unless an immediate superior had actual knowledge of the injury or death within 30 days.

In finding there was no evidence that appellant's immediate superior had actual knowledge of his injury, OWCP failed to acknowledge that, for more than three decades, appellant regularly participated in the employing establishment's hearing conservation program. The December 3, 2015 decision merely referenced diagnostic tests without acknowledging that audiograms had been submitted. As described above, the record contains employing establishment hearing conservation audiograms dated from August 1976 to November 2002. If any of the conservation program test results were positive, this would suffice for purposes of establishing that appellant's immediate superior received notice of an on-the-job injury.<sup>7</sup>

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<sup>4</sup> *Id.* at § 8122(b).

<sup>5</sup> See *James A. Sheppard*, 55 ECAB 515 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993).

<sup>6</sup> *Id.*

<sup>7</sup> OWCP's procedure manual provides in relevant part:

“If the employing agency 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...].”

Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6c (March 1993).

Because OWCP failed to address the evidence regarding the employing establishment's hearing conservation program, the case shall be remanded for further development.<sup>8</sup> After such further development as deemed necessary, it shall issue a *de novo* decision.

**CONCLUSION**

The Board finds the case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 3, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: April 8, 2016  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

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<sup>8</sup> See. *R.G.*, Docket No. 15-167 (issued February 27, 2015).