



## **FACTUAL HISTORY**

On May 18, 2015 appellant, then a 68-year-old diesel generator mechanic, filed an occupational disease claim (Form CA-2) alleging bilateral hearing loss as a result of his employment. He indicated that he first became aware of his condition in June 1975 and realized it resulted from his employment in July 1981. Appellant noted that he did not file his claim within 30 days because he retired and was not informed regarding workers' compensation. On the back of the Form CA-2, the employing establishment indicated that appellant retired on April 3, 2007 and that the employing establishment closed in July 2013. It pointed out that appellant filed his claim well past the three-year time limitation.

By letter dated June 10, 2015, OWCP advised appellant that there was no evidence submitted to establish his claim. It requested that he respond to its questionnaire to substantiate the factual elements of his claim, including timeliness, and provide medical evidence to establish that he sustained hearing loss as a result of his employment. A similar letter was sent to the employing establishment. Appellant was afforded 30 days to submit this additional evidence.

On June 24, 2015 OWCP received appellant's response to its development letter. He listed the employment positions he held from December 1965 until he retired from federal service in April 2007 and described the type of and duration of noise he was exposed to for each employment position. Appellant submitted a March 2006 hospital record, which indicated that appellant had 39½ years of federal civil service. He also provided various employee health records dated August 1978 to September 2006, audiograms dated 1981 to 2008, and diagnostic measurements dated 1996 to 2006. Appellant submitted SF50 Personnel Action forms dated September 24, 2000 to May 26, 2015.

Appellant was treated by Dr. Edwin W. Aldous, a Board-certified otolaryngologist, who related in May 15, 2000 and September 23, 2004 narrative reports that appellant sustained sensorineural hearing loss in his left ear. Dr. Aldous noted that appellant worked around loud noises and tried to wear hearing protection.

In a July 28, 2015 statement, the employing establishment confirmed that appellant had worked until 2007 and indicated that industrial hygiene monitoring records revealed that appellant was exposed to hazardous noise. It provided noise assessments of various buildings and equipment associated with appellant's job. The employing establishment also provided appellant's Summary of Federal Service form.

On September 29, 2015 OWCP referred appellant, along with a statement of accepted facts and the medical record, to Dr. Stewart Barlow, a Board-certified otolaryngologist, for an audiogram and second opinion examination. In an October 23, 2015 report, Dr. Barlow diagnosed bilateral sensorineural hearing loss and tinnitus and indicated that appellant's conditions were due to his federal employment. He recommended hearing aids.

OWCP denied appellant's claim in a decision dated November 2, 2015. It determined that appellant's occupational disease claim was untimely filed because it was not filed within 3 years of the date of injury and appellant did not demonstrate that his immediate supervisor had actual knowledge of his condition within 30 days of the date of injury. OWCP pointed out that

although appellant noted that he first became aware of his condition in 1975 and first realized that his condition was caused or aggravated by his condition in 1981, he did not file his claim until May 2015.

On March 29, 2016 OWCP received appellant's request for reconsideration.

In support of his request, appellant submitted employing establishment records including a record of injury signed by appellant's supervisor on August 1, 1978 which related that appellant sustained a perforated right eardrum on August 1, 1978 when he was hit by a volleyball, as well an employing establishment request for authorization of medical treatment (Form CA-16) which described the alleged injury as right ear hit by a volleyball during a work break. OWCP also received employing establishment hearing conservation data which provided audiogram results from January 1, 1991 through March 19, 2007.

In a March 10, 2016 narrative report, Dr. Lisa Christensen, an audiologist, related that appellant was experiencing difficulty in hearing and understanding words as well as constant ringing noise in both ears. She noted that a review of appellant's reference audiogram results from the beginning of his employment in the mid-1970s, hearing test results from 2007 when he retired, and current hearing test results confirmed a progressive, significant, and permanent hearing impairment in both ears. Dr. Christensen explained that this type of high frequency sensorineural hearing loss was consistent with a history of loud noise exposure. She diagnosed mild-to-severe sensorineural hearing loss, bilaterally and abnormal acoustic reflexes. Dr. Christensen strongly recommended hearing aids to help correct his hearing impairment. She provided an audiogram examination report dated March 10, 2016. Dr. Christensen also submitted a schedule award report, which indicated that appellant had 29.1 percent binaural hearing impairment with a date of maximum improvement of 2007.

By decision dated April 28, 2016, OWCP denied further merit review of appellant's claim. It found that appellant's reconsideration letter failed to raise a substantive legal question and he failed to submit relevant and pertinent new evidence sufficient to warrant merit review pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.<sup>2</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by

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<sup>2</sup> 5 U.S.C. § 8128(a).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>3</sup>

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>4</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>5</sup> If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>6</sup>

### ANALYSIS

By decision dated November 2, 2015, OWCP denied appellant's occupational disease claim because it was not timely filed within three years of the date of injury. On March 29, 2016 it received appellant's request for reconsideration. OWCP denied further merit review in a decision dated April 28, 2016, finding that the evidence submitted on reconsideration neither raised a substantive legal question nor constituted relevant and pertinent new evidence sufficient to warrant merit review.

The Board notes initially that appellant did not show that OWCP erroneously interpreted a point of law, and he did not advance a legal argument not previously considered.<sup>7</sup> Appellant did however submit new evidence.

The Board finds that OWCP abused its discretion by denying merit review of the claim as appellant submitted relevant and pertinent new evidence. OWCP denied appellant's claim based upon a finding that appellant untimely filed his occupational disease claim.

Appellant's claim would be regarded as timely under 5 U.S.C. § 8122(a)(1) of FECA if his immediate superior had actual knowledge of the injury within 30 days or under section 8122(a)(2) if written notice of injury was given to his immediate superior within 30 days. However, participation in an employing establishment hearing conservation program can also establish constructive notice of injury.<sup>8</sup> A positive test result from an employing establishment program of regular audiometric examination as part of a hearing conservation program 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>9</sup>

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<sup>3</sup> 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>4</sup> *Id.* at § 10.607(a).

<sup>5</sup> *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

<sup>6</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>7</sup> *Supra* note 3.

<sup>8</sup> *See* *J.C.*, Docket No. 15-1517 (issued February 25, 2016); *see also* *M.W.*, Docket No. 16-0394 (issued April 8, 2016).

<sup>9</sup> *See* *W.P.*, Docket No. 15-0597 (issued January 27, 2016).

In support of his request for reconsideration appellant submitted employing establishment records including a document signed by his supervisor on August 1, 1978 which related that appellant sustained a perforated right ear drum on August 1, 1978 when he was hit by volleyball, as well as an authorization for medical treatment (Form CA-16) which related appellant's allegations that he sustained a right ear injury on August 1, 1978 during a work break. He also submitted other employing establishment hearing conservation data which provided audiogram results from January 1, 1991 through March 19, 2007. This evidence of hearing conservation records is pertinent and relevant to the underlying issue of whether the employing establishment had constructive timely notice of appellant's alleged injury.

The Board finds that appellant did submit relevant and pertinent new evidence with his request for reconsideration. Therefore, OWCP improperly refused to reopen his case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128.

**CONCLUSION**

The Board finds that OWCP improperly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 28, 2016 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further development consistent with this decision.

Issued: December 19, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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