



## **FACTUAL HISTORY**

On March 10, 2001 appellant, a 70-year-old border patrol agent, filed an occupational disease claim alleging that he first became aware of his disease on March 15, 1980 and realized his hearing loss was caused or aggravated by factors of his federal employment related on February 9, 1994.<sup>1</sup> He noted that he was exposed to prolonged and loud noises and gunfire without proper ear protection.

In support of his claim he submitted a history of his employment with the federal and nonfederal employees for the period 1948 to 1984. He stated that he was exposed to minimum noise as a truck driver and he was exposed to extreme noise while working at a Locomotive Manufacturing Foundry, in the military and as a Border Patrol agent. Appellant noted that he was not given earplugs. He stated that medical professionals informed him his hearing damage was caused by “repeated and prolonged gunfire without protection.” Appellant also submitted additional factual evidence<sup>2</sup> and audiograms dated February 9, 1994 and February 9, 1996.

Subsequently, appellant submitted additional factual and medical evidence, including the results of a February 9, 1994 exit audiogram and his statements. In reply to an Office query for additional information, appellant replied in an undated statement that the employing establishment did not have a hearing conservation program.

By decision dated December 9, 2002, the Office denied appellant’s claim on the grounds that the evidence of record failed to demonstrate that his claim was timely filed in accordance with 5 U.S.C. § 8122. The Office found that his last federal exposure was on May 20, 1984<sup>3</sup> and his March 10, 2001 filing was, therefore, not within the three-year time limitation period. The Office also found that the March 10, 2001 filing was not within three years of February 9, 1994, the date he first realized his hearing loss was employment related. Lastly, the Office noted that appellant stated that he informed his supervisors verbally of his hearing problems on January 1, 1980 but there was no supporting written evidence.

On September 16, 2003 the Office received a reconsideration request from appellant. In support of his request appellant submitted additional medical and factual evidence, including sworn statements from Alex Moses, Sr., Ernie L. Smith and John L. Sanwald.

In a January 9, 2003 notarized statement, Mr. Smith related “[appellant] complained to the supervisors that the noise from the firearms hurt our ears.” Mr. Smith stated that appellant’s supervisor instructed new recruits to put a cartridge in the ear. In concluding Mr. Smith stated

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<sup>1</sup> Appellant retired from the employing establishment effective May 2, 1984.

<sup>2</sup> The evidence included a position description for Border Patrol Agent, newspaper clippings regarding excessive noise, an addendum to his Form CA-2a March 10, 2001 report by Jean Ouellette, regarding a hearing loss claim for a Robert Nicholson, a November 26, 1983 earnings and leave statement, a December 23, 1991 letter from Pamela Fox to Robert Nicholson, a Civil Service Annuity statement, an August 7, 1986 report entitled “[u]se of Firearms, Course of Fire and Inspection of Firearms,” a Veterans Administration Form DD-214 and a report by Miracle ear.

<sup>3</sup> This appears to be a typographical error as appellant’s Civil Service annuity indicates May 2, 1984 as his last day.

that he recalled appellant “saying that he was getting deaf and was going to have to retire” and that to his knowledge, “no one knew that firearms noise was damaging our ears.”

In a January 21, 2003 notarized statement, Mr. Sanwald noted that he began working for the employing establishment in 1977, as a Border Patrol Agent and was required to attend routine firearms qualifications. At that time, no training was provided on the “harmful effects of extreme noise levels” the agents. He stated that he was “sure that members of management and supervision in the U.S. Border Patrol were cognizant that high levels of noise” were potential health problem for agents.

In his February 16, 2003 notarized statement, Mr. Moses stated that he “worked side by side with [appellant] and recalled his inability to hear well.” Mr. Moses indicated that appellant often “spoke extremely loud during conversation” which he attributed to appellant’s hearing loss. In concluding he opined “[t]o me it was a known fact that [appellant] was experiencing some degree of hearing loss at the time.”

By decision dated November 4, 2003, the Office denied appellant’s request for modification. The Office found that the statements of Mr. Moses, Mr. Sanwald and Mr. Smith do not show that the employing establishment had actual knowledge that appellant had a work-related hearing loss. In addition, the record contains no evidence of any audiograms performed during his period of employment showing that he suffered a noise-induced hearing loss due to work factors.

### **LEGAL PRECEDENT**

Under the Federal Employees’ Compensation Act,<sup>4</sup> as amended in 1974, a claimant has three years to file a claim for compensation.<sup>5</sup> Section 8122(a) provides that “an original claim for compensation for disability or death must be filed within three years after the injury or death.”<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.<sup>7</sup> 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 know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.<sup>8</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>9</sup> Also, a claim would be regarded as timely under

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dotson*, 47 ECAB 253 (1995); *see* 20 C.F.R. § 10.101(b).

<sup>6</sup> *See* 5 U.S.C. § 8122(a).

<sup>7</sup> *Duet Brinson*, *supra* note 5.

<sup>8</sup> *Larry E. Young*, 52 ECAB 264 (2002); *Duet Brinson*, *supra* note 5; *see also* *Leo Ferraro*, 47 ECAB 350 (1996).

<sup>9</sup> *See* *Larry E. Young*, *supra* note 8; *Garyleane A. Williams*, 44 ECAB 441 (1993); *Charlene B. Fenton*, 36 ECAB 151 (1984).

section 8122(a)(1) if the immediate supervisor had actual knowledge of the alleged employment-related injury within 30 days.<sup>10</sup> The knowledge must be such as to put the immediate supervisor reasonably on notice of appellant's injury.<sup>11</sup>

### ANALYSIS

In this case, appellant filed a claim for compensation on March 10, 2001 alleging that on February 9, 1994 he became aware that he had sustained hearing loss due to his exposure to firearm noise in his federal employment. The record establishes that appellant's last exposure to work factors was May 15, 1984, when he retired from his federal employment. Since appellant did not file his claim for occupational disease until March 10, 2001, he is clearly outside the three-year time limitation period, which began to run on February 9, 1994 the date when he realized his hearing loss was related to his federal employment. The Board further finds that while appellant contends that he informed his supervisor of his alleged work-related hearing loss, there is no evidence of record supporting appellant's allegation that his supervisor had actual knowledge of his claimed employment injury within 30 days after appellant related his hearing loss to his federal employment, *i.e.*, on February 9, 1994. The Board further finds that while the statements of Mr. Moses, Mr. Sanwald and Mr. Smith indicate that they were aware of appellant's hearing problems, there is no evidence of record, from which to conclude they supervised appellant or that appellant's supervisor had actual knowledge of his claimed employment injury within 30 days after the date appellant related his loss of hearing to his federal employment, which occurred on September 9, 1994. Thus, appellant's failure to timely file his claim within three years of February 9, 1994 precludes him from receiving compensation.

### CONCLUSION

The Board finds that appellant's compensation claim for hearing loss is barred by the applicable time limitation provisions of the Act.

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<sup>10</sup> 5 U.S.C. § 8122(a)(1).

<sup>11</sup> See *Larry E. Young*, *supra* note 8.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 4, 2003 is affirmed.

Issued: June 8, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member