

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM H. SELZER, JR. and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION, Dallas, Tex.

*Docket No. 97-519; Submitted on the Record;
Issued October 19, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant's claim is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act.

The Board has duly considered the case on appeal and finds that appellant's claim is barred by the applicable time limitations provisions of the Act.

Appellant filed a claim on February 16, 1989 alleging that he had developed a high frequency sensorineural hearing loss and tinnitus due to factors of his federal employment. The Office of Workers' Compensation Programs denied appellant's claim by decision dated March 9, 1990 finding it was not timely filed. A hearing representative vacated the Office's March 9, 1990 decision and remanded the case for the Office to review appellant's personnel folder to determine if he participated in an employee testing program. By decision dated January 10, 1991, the Office found appellant's claim was not timely filed. Appellant requested an oral hearing which was denied as not timely. Appellant then requested reconsideration. By decision dated June 25, 1991, the Office denied modification of its prior decision. Appellant requested review by the Board and by order dated January 7, 1992, the Board remanded the case for reassemblage.¹ By decision dated November 30, 1993, the Office found appellant's claim was not timely filed. Appellant requested review by the Board and in an order dated August 7, 1995, the Board remanded the case for inclusion of appellant's personnel file.² By decision dated September 14, 1995, the Office denied appellant's claim finding it was not timely filed.³

Section 8122(a) of the Act provides: "An original claim for compensation for disability or death must be filed within three years after the injury or death."⁴ Section 8122(b) provides

¹ Docket No. 91-1599.

² Docket No. 94-681.

³ By letter dated October 25, 1996, the Office noted that appellant had not received a copy of the September 14, 1995 decision and extended his appeal rights until October 25, 1997.

⁴ 5 U.S.C. § 8122(a).

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.⁵ The Board has held that, if an employee continues to be exposed to injurious working condition after such awareness, the time limitation begins to run on the last date of this exposure.⁶

In the present case, appellant indicates that he was aware of the causal relationship between his hearing loss and his employment in 1973. Appellant retired from the employing establishment on January 2, 1984. As noted above, 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. Therefore, the time limitation in appellant's case began to run on the date of last exposure, January 2, 1984. Since appellant did not file his claim until February 16, 1989, his claim is outside the three-year time limitation period and his claim is therefore untimely.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of appellant's injury.⁷ An employee must show not only that his immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.

The Office procedure manual provides that if an employing establishment, 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. The procedure manual states that when an employing establishment provides annual hearing tests for employees exposed to hazardous noise then hearing loss on a test as part of a program constitutes actual knowledge.⁸

In a memorandum of conference dated January 9, 1991, the Office spoke with the employing establishment and was informed that appellant's medical records were kept with his personnel file and that the employing establishment did not have a program of annual physical examinations or hearing loss awareness. A review of appellant's personnel file does not include medical records and does not support that the employing establishment had a testing program for hearing loss which would have provided actual knowledge to his immediate supervisor.

Appellant submitted a report from Dr. Humberto J. Varela, a Board-certified family practitioner, dated February 22, 1991, noting that he examined appellant in 1983 at the request of the employing establishment. Dr. Varela stated that the employing establishment specified the areas to be examined including high frequency hearing loss by audiometric examination. Dr. Varela's office submitted an audiogram dated June 1, 1983 and stated that this report was provided to the employing establishment for inclusion in appellant's personnel file. This audiogram was not included in the personnel file as submitted by the Office. Furthermore, the

⁵ 5 U.S.C. § 8122(b).

⁶ *Willis E. Bailey*, 49 ECAB ____ (Docket No. 96-1062, issued May 13, 1998).

⁷ 5 U.S.C. § 8122(a)(1).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(a)(3)(c) (March 1993).

audiogram without a medical report explaining its significance is not sufficient to have provided appellant's supervisor with actual knowledge of appellant's alleged employment-related hearing loss.

In a letter dated January 24, 1991, appellant's former senior assistant stated that appellant underwent employing establishment sanctioned physical examinations which could include audiograms. He further stated that he was aware of appellant's loss of hearing. These statements by appellant's subordinate are not sufficient to establish actual knowledge of appellant's alleged employment-related hearing loss on the part of appellant's supervisor and thus the employing establishment.

While the record suggests that the employing establishment may have been aware that appellant had a loss of hearing, there is no evidence in the record which indicates that the employing establishment knew that appellant was relating his loss of hearing to factors of his federal employment until he filed his claim on February 16, 1989. Therefore, the employing establishment did not have actual knowledge of a relationship between appellant's loss of hearing and factors of his employment within 30 days and his claim was not timely filed pursuant to the Act.

The decision of the Office of Workers' Compensation Programs dated September 14, 1995 is hereby affirmed.

Dated, Washington, D.C.
October 19, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member