

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY J. PALUMBO and DEPARTMENT OF LABOR,
MINE SAFETY & HEALTH ADMINISTRATION, Hunker, PA

*Docket No. 02-1738; Submitted on the Record;
Issued November 5, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

On March 6, 2002 appellant, then a former federal employee, filed a claim for hearing loss.¹

On March 15, 2002 the Office notified appellant regarding the kind of evidence he needed to establish his claim.

The record includes four audiograms from December 1977 to April 1996.

In an unsigned report dated May 1990, the employing establishment noted that appellant had a mild hearing loss.

In a report dated March 6, 2002, Peter Bruce, a clinical audiologist with the Erie Veterans Administration outpatient clinic, noted that appellant had a bilateral mild to profound sensorineural hearing loss across the entire audiometric range. Word recognition was poor bilaterally and dynamic ranges were reduced. "There is probably an etiology of noise exposure for this loss."

On April 17, 2002 the Office requested appellant to forward any additional audiograms he may have had prior to March 6, 2002. Appellant responded on April 22, 2002 that he had no additional audiogram results.

¹ The record includes an Office of Workers' Compensation Programs' form noting appellant's signature date of March 6, 2002. In a Form CA-1 filed on March 20, 2002, appellant stated that he was first aware of his hearing loss and that it was attributed to his federal employment on November 28, 1990.

In a report dated May 13, 2002, the Office medical adviser noted that the audiograms from 1997, 1981, 1984 and 1990 “do not show hearing loss in the frequencies tested.”

By decision dated May 24, 2002, the Office denied appellant’s claim finding that the claim for compensation benefits was barred by the applicable time limitation provision of the Act.

The Board finds that appellant’s claim was untimely filed under the applicable time limitation provisions of the Act.

Where an employee has sustained a loss of hearing as a result of excessive noise at work over a period of time, the date of injury is determined to be the date of the last noise exposure that adversely affected his hearing.² In this case, appellant left the employing establishment in November 1990. Inasmuch as the record indicates that appellant was exposed to work-related noise at least until 1990, the Board finds that date to be his last occupational exposure. In the present case, the record notes that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment and his hearing loss as of November 1990. He noted on his claim form that he was aware of his hearing loss as of that date and of its relationship to his federal employment.

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.” Section 8122(b) provides 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. 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.³

Since appellant did not file his claim until March 6, 2002, it was not filed within the three-year limitation period found in 5 U.S.C. § 8122.

A claim may be allowed notwithstanding the time limitation if the employee’s immediate supervisor had actual knowledge of the injury within 30 days of its occurrence, or if written notice of the injury was given within 30 days pursuant to 5 U.S.C. § 8119.⁴ The knowledge must be such as to put the immediate supervisor reasonably on notice of an on-the-job injury.⁵ In the instant case, there is no indication that appellant provided written notice of injury prior to March 6, 2002.

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

² *Solomon R. Stone*, 32 ECAB 150, 151 (1980).

³ *Jose Salaz*, 41 ECAB 743, 746 (1990).

⁴ 5 U.S.C. §§ 8122(a)(1), 8122(a)(2).

⁵ *Kathryn A. Bernal*, 38 ECAB 470, 471 (1987).

constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury.⁶ The Office'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.”⁷

In this case, the record contains audiograms performed by the employing establishment. Although the employing establishment stated in a May 1990 report that appellant, who was an employee at the time, had mild hearing loss, the Office medical adviser, upon review of appellant's audiograms including the 1990 audiogram, stated that the test results “do not show hearing loss in the frequencies tested.” Accordingly, the Board finds that the employing establishment did not have constructive knowledge of a possible employment-related hearing loss in this case.

The decision dated May 24, 2002 of the Office of Workers' Compensation Programs is affirmed.⁸

Dated, Washington, DC
November 5, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁶ See *Joseph J. Sullivan*, 37 ECAB 526, 527 (1986) (constructive knowledge of possible employment-related hearing loss provided by annual employing establishment audiograms); see also Federal (FECA) Procedural Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(c) (April 1995).

⁷ *Id.*

⁸ The Board notes that appellant was initially hired by the Department of the Interior, Mining Enforcement & Safety Administration.