

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEVIN J. CLARK and DEPARTMENT OF THE ARMY,
MANPOWER & RESERVE AFFAIRS, Alexandria, VA

*Docket No. 98-1214; Submitted on the Record;
Issued April 5, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's compensation claim on the grounds that his claim was not filed within the applicable time limitation provisions of the Federal Employees' Compensation Act; and (2) whether the Office, in its December 17, 1997 decision, abused its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

On March 13, 1997 appellant filed a notice of occupational disease and claim for compensation, Form CA-2. He alleged that while on temporary duty in the Persian Gulf in 1991 he developed Gulf War syndrome, *i.e.*, voiding dysfunction and facial acne with pain.

On March 27, 1997 the record was supplemented to include various personnel actions, achievement award, medical records and a statement by appellant.

By letter dated April 21, 1997, the Office requested detailed factual and medical information from appellant. By another letter dated April 21, 1997, the Office requested detailed factual and medical information from the employing establishment.

On May 1, 1997 the record was supplemented with appellant's April 8, 1997 statement.

By letter dated May 5, 1997, the Office informed appellant that after further review it appeared that appellant's claim was not timely filed. Therefore, additional information was needed before a determination on timeliness could be made.

On May 19, 1997 the record was supplemented with news articles concerning Persian Gulf veterans and their illnesses.

The record was supplemented with a news article on gulf war illnesses and an exposure history on appellant.

By letter dated May 20, 1997, the Office requested from the employing establishment additional information concerning appellant's statements regarding his exposure and to provide information on pyridostigmine bromide tablets, *i.e.*, side effects, proper use, etc.

On June 26, 1997 the record was supplemented with a June 25, 1997 employing establishment statement that no one was identified who had knowledge regarding whether a supervisor had knowledge of an employment-related injury and what caused appellant's condition.

On July 24, 1997 the record was supplemented with a July 19, 1997 report by Dr. Henderson Lane and various news articles on gulf war syndrome.

On August 1, 1997 the employing establishment notified the Office that attempts to locate anyone who knew or worked with appellant could neither support nor counter appellant's claim.

On August 13, 1997 the record was supplemented with an August 11, 1997 letter by James F. Howell who is with the employing establishment. Mr. Howell stated:

“[Appellant] discussed several times about how healthy he was before he was deployed to the Persian Gulf area and how he did not feel the same upon his return. In January 1993 I was hired as a Sports Specialist, at this time [he] and I became coworkers in the same office. [Appellant] often told me that he believed the reason for his illnesses and eventual operation were a direct result of his duty assignment in the Persian Gulf area. During this time as coworker [appellant] had several medical appointments in reference to his illnesses and eventual surgery.”

On August 25, 1997 the record was supplemented with appellant's August 21, 1997 statement regarding why he did not file his claim until March 1997. Appellant stated:

“Upon my return from the Persian Gulf area in 1991 I started to experience several of the same symptoms that the soldiers who served in the gulf experienced. Although I stated in July 1991 having problems while still in Saudi Arabia with urinating. I tried self[-]treatment by trying to make myself relax for a long time before I finally sought out medical treatment.”

He also stated:

“Between 1991 [to] July 1994 nothing was being said about anything being done to assist the civilians who served as part of the Gulf War effort. I had been seen on several occasions at Moncrief Army Hospital in reference to the different problems (hair loss, diarrhea, sleep problems, bleeding gums, acne) I was having and also referred to other treatment facilities as well for further evaluation and second opinions to my problems. This includes visits to Walter Reed Army Hospital in Washington, D.C. and Eisenhower Medical Center at Fort Gordon, GA. None of the physicians related the different problems to my service in the Gulf [War]. I thought I was just having medical problems. I also required major

surgery in February 1994 for my urinating problems after failed attempts with medication. I was diagnosed with the bladder neck dysfunction in January 1993. I did not relate this condition to my service in the [G]ulf [War] until I was diagnosed with [G]ulf [W]ar syndrome in 1994. It was in 1994 when I finally connected my symptoms to my time in the Persian [G]ulf.”

The record contains a statement of accepted facts stating what appellant was exposed to during his temporary duty in Saudi Arabia to support Desert Storm.

On August 27, 1997 the Office referred a statement of accepted facts and medical evidence of record to a district medical adviser for his opinion on the cause of appellant’s bladder neck dysfunction and acne. By statement dated September 2, 1997, the district medical adviser opined that appellant’s bladder neck dysfunction was not causally related to his exposure in the Persian Gulf War, but that his acne could be due to the exposure.

On October 2, 1997 the record was supplemented to include appellant’s statement in which he stated that his urinating problems began in July 1991 and acne problems in March 1992, in addition to hair loss and night sweats. He discussed to what he was exposed.

By decision dated October 10, 1997, the Office denied appellant’s claim as untimely filed.

On November 25, 1997 the record was supplemented with agency articles regarding illnesses and a program to provide full medical evaluations to military personnel.

On November 24, 1997 the record was supplemented with appellant’s November 17, 1997 letter requesting reconsideration of the October 10, 1997 decision. He argued that he was not aware that assistance was being offered for his problems and that he was not sure his problems were related to the Gulf War until he was diagnosed with Gulf War syndrome. In support of his request, appellant submitted a September 24, 1997 medical evaluation form by Dr. William L. Miles and three news articles regarding Gulf War illnesses.

By decision dated December 17, 1997, the Office denied appellant’s claim finding that the evidence submitted in support of the request for reconsideration was irrelevant to the issue of timeliness, cumulative in nature and insufficient to warrant review of its prior decision.

The Board finds that the Office properly denied appellant’s compensation claim for bladder neck dysfunction and acne conditions on the grounds that his claim was not filed within the applicable time limitation provisions of the Act.

Section 8122 of the Act¹ states that an original claim for compensation must be filed within three years after the injury for which compensation is claimed.² A claim may be allowed notwithstanding the time limitation if the employee’s immediate supervisor had actual

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8122(a).

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. § 8119.³

Appellant did not make a timely claim for any occupational disease. For time limitation purposes under the Act, time begins to run from the time a claimant first relates his condition to factors of his employment. If a claimant continues to work after the time he first relates his condition to his employment, then time begins to run on the date of last exposure to the factors of employment which he claims were causally related to his occupational disease.⁴ The record indicates that appellant's last exposure to the employment factors to which he attributes his injury was on August 16, 1991.

In the instant case, appellant stated that he has known since November 15, 1992 that his disease or illness was caused or aggravated by his employment. Therefore, the Board finds that he had knowledge of his condition and its possible work relatedness at least by November 15, 1992. The record does not support that appellant's immediate supervisor had actual knowledge of the injury. As his claim was not filed until March 13, 1997, over four and a half years after time began to run, his claim was untimely as it was not filed within the three-year time limitation specified by the Act.

The Board also finds that the refusal of the Office, in its December 17, 1997 decision, to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁵ When a claimant fails to meet at least one of the above standards, the Office will deny the application for review without reviewing the merits of the claim.⁶

In his request for reconsideration dated November 17, 1997, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did he advance a point of law or a fact not previously considered by the Office, nor did he submit any new factual or medical evidence to support his allegations.

As appellant's November 17, 1997 request for reconsideration does not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office did not abuse its discretion in denying that request.

³ 5 U.S.C. § 8122(a)(1)-(2).

⁴ *Garyleane A. Williams*, 44 ECAB 441 (1993).

⁵ 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128.

⁶ 20 C.F.R. § 10.138(b)(2).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated December 17 and October 10, 1997 are affirmed.

Dated, Washington, D.C.
April 5, 2000

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member