U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GWENDA BROWN and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Dallas, TX

Docket No. 00-1431; Submitted on the Record;
Issued April 3, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant's claim was filed within the applicable time limitation provisions of the Federal Employees' Compensation Act;[1] and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to open appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

On August 17, 1999 appellant, then a 42-year-old account representative, filed an occupational disease claim, alleging that her major depression and post-traumatic stress disorder were employment related. Appellant stated that she first became aware of her condition on March 26, 1996 following of a confrontation with the employing establishment's branch chief. The appellant was placed on medical disability shortly thereafter.

In support of her claim appellant submitted a July 9, 1996 medical report from Dr. Michele Lea-Stokes, a Board-certified psychiatrist and a narrative statement. Dr. Lea-Stokes diagnosed of major depression and post-traumatic stress disorder, which resulted from appellant being accused of embezzlement by the employing establishment in October 1995.[2] Although appellant was found not guilty, she still experienced chronic depressive and post-traumatic symptoms, which were exacerbated by any attempt to return to employment. Appellant indicated that she had difficulty functioning in a job environment after being charged and later acquitted of embezzlement.

In a decision dated August 24, 1999, the Office denied appellant's claim on the grounds that she did not file a claim within the three-year time limitation.

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[1] 5 U.S.C. §§ 8101-8193.

[2] The matters pertaining to the embezzlement case are not before the Board.

On December 1, 1999 appellant, through her attorney, requested reconsideration of her claim and submitted an affidavit dated November 23, 1999 as well as excerpts from a February 26, 1999 deposition of the branch chief. Appellant stated that upon her return to work on March 26, 1999, after being acquitted of embezzlement charges, she was confronted by the branch chief and as a result of the confrontation was carried from the employment establishment by emergency medical staff. Appellant did not return to work after March 26, 1996 and was placed on medical disability. Appellant asserted that her medical disability was known to her immediate supervisor within 30 days of the injury.

In his deposition, the branch chief stated that he "went to her work area to welcome her back" to work, which was "normal" policy. He indicated that he was aware that appellant was hospitalized, but did not know that the hospitalization was employment related. The branch chief also indicated that he knew that appellant retired on a medical disability.

By decision dated February 16, 2000, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support was repetitious and immaterial and thus insufficient to warrant review of the prior decision.

The Board finds that the Office properly denied appellant's compensation claim as untimely filed.

Section 8122 of the Act states that an original claim for compensation must be filed within three years after the injury for which compensation is claimed.[3] 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]

Appellant did not make a timely claim for an occupational disease. Under the Act, time begins to run when a claimant first relates her condition to factors of her employment. If a claimant continues to work, then time begins to run on the date of last exposure to the factors of employment which she claims were causally related to her occupational disease.[5] The record indicates that appellant's last possible exposure to the employment factors to which she attributes her injury was on March 26, 1996 the date her employment ceased.

Appellant admitted that she had known since March 26, 1996 that her disease or illness was caused or aggravated by her employment. Therefore, she had knowledge of her condition and its possible work relatedness at least by that date. As appellant did not file a claim until August 17, 1999, more than three years after time began to run, her claim was untimely under the Act.

[3] 5 U.S.C. § 8122(a).

[4] 5 U.S.C. § 8122(a)(1)-(2).

[5] *Garyleane A. Williams*, 44 ECAB 441 (1993).

The Board also finds that the refusal of the Office in its February 16, 2000 decision, to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

Under section 8128(a) of the Act,[6] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[7] which provide that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that the OWCP erroneously applied or interpreted a specific point of law; or
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> (ii) Advances a relevant legal argument not previously considered by the Office; or
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> (iii) Constitutes relevant and pertinent new evidence not previously considered by the OWCP."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[8]

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgement, or actions taken which are contrary to both logic and probable deductions from established facts.[9]

The Office denied appellant's claim without conducting a merit review on the grounds that the evidence submitted was repetitious and insufficient. Appellant's affidavit dated November 23, 1999, reiterated the same information already in the record. In his deposition the branch chief indicated that, while he was aware that appellant was hospitalized, he did not know that the hospitalization was employment related.

The Board has held that the knowledge required must be such to put the immediate superior reasonably on notice of an on-the-job injury or death.[10] Mere knowledge that an employee has a physical condition, however, is not sufficient to satisfy the requirements of the statute; it must also be shown that there were other circumstances which put the supervisor on

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[6] 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.606(b) (1999).

[8] 20 C.F.R. § 10.608(b).

[9] *Daniel J. Perea*, 42 ECAB 214 (1990).

[10] *See Kathryn A. Bernal*, 37 ECAB 672 (1986); *Robert K. Besley*, 35 ECAB 263 (1983); *Richard E. Jacobson*, 33 ECAB 1688 (1982); *Victor Medina*, 32 ECAB 1227 (1981).

notice that the condition was related to the employment or that the employee attributed the condition to her employment.[11]

There is no indication from deposition that the supervisor was aware or reasonably should have been on notice that appellant attributed her condition on March 26, 1999 to factors of her employment. Thus, this evidence, while new, is not relevant to the underlying timeliness issue since it does not address whether the immediate supervisor reasonably knew that there was a work-related injury.

In her request for reconsideration dated December 1, 1999, appellant did not show that the Office erroneously applied or interpreted a point of law; nor did she advance a point of law not previously considered by the Office, or did she submit relevant and pertinent evidence not previously considered by the Office.

As appellant's December 1, 1999 request for reconsideration does not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office acted within its discretion in denying that request.

Accordingly, the decisions of the Office of Workers' Compensation Programs, dated February 16, 2000 and August 24, 1999, are affirmed.

Dated, Washington, DC
April 3, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[11] *See Kathryn A. Bernal, supra* note 10*; Harold D. McFeely,* 34 ECAB 1643 (1983).