United States Department of Labor
Employees' Compensation Appeals Board

MERCEDES RAMOS DEBUSCA, Appellant	)	
and	)	**Docket No. 05-1277**
	)	**Issued: August 17, 2005**
DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Pearl Harbor, HI, Employer	)	

Appearances:
Mariano Debusca, Jr., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On May 23, 2005 appellant, through her representative, filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated August 18, 2004 and March 8, 2005 finding that her claim was not timely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant's claim was timely filed pursuant to section 8122(a) of the Federal Employees' Compensation Act.[1]

FACTUAL HISTORY

On March 12, 2004 appellant, then a 62-year-old clerk, filed an occupational disease claim, alleging that in 1975 she sustained heart attacks due to her employment and that she first became aware of her condition and attributed it to her employment in 1975. She stated that she

[1] 5 U.S.C. §§ 8101-8193, § 8122(a).

was assigned to pay roll which was a very stressful job. On the reverse of the form, the employing establishment indicated that appellant stopped work on June 3, 1976 due to disability retirement.

Appellant submitted medical reports of her condition. On December 29, 1975 she provided the employing establishment personnel office with a statement that on May 8, 1975 and September 3, 1975 she was hospitalized due to extreme chest pain. Appellant stated that her duties as a timekeeper had caused pressure and stress due to the schedule and deadlines that she had to meet.

By letter dated May 28, 2004, the Office informed appellant that she needed to establish that the employing establishment had actual knowledge of her heart attacks within 30 days of the occurrence and that the employing establishment was aware that appellant attributed her heart attacks to her employment. Appellant responded on June 5, 2004 and alleged that she informed her supervisor of her heart condition and of the pressure and stress she was experiencing at work, verbally and through leave requests.

By decision dated August 18, 2004, the Office denied appellant's claim finding that it was not timely filed as her immediate supervisor did not have actual knowledge of her condition and its alleged relationship to her employment within 30 days of December 29, 1975.

Appellant requested an oral hearing on September 6, 2004 and alleged that she was not competent to file her claim in a timely manner. Appellant submitted a report dated September 1, 2004 from Dr. Alvin S. Fuse, an internist, diagnosing depression and indicating that appellant did not follow through with medication or would connect symptoms, medications and illnesses in illogical ways due to her emotional status. He opined that it was possible for appellant to put aside painful things for long periods of time. She submitted an additional statement on December 13, 2004 alleging that she was not in her right mind as she did not accept that she was a disabled person and that this was why she did not file her claim earlier. On December 1, 2004 appellant requested a review of the written record in lieu of an oral hearing.

By decision dated March 8, 2005, the hearing representative found that there was no evidence in the record establishing that appellant's supervisor had actual knowledge of her condition and its alleged relationship to her employment within 30 days. The hearing representative further found that appellant had not established that she was incompetent such that she could not comply with the timeliness requirements. She concluded that appellant's claim was not timely filed.

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.[2] The Board may raise the issue on appeal even if the Office did not base its decision on the time limitation provisions of the Act.[3]

In cases of injury on or after September 7, 1974, section 8122(a) of the Act provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless:

> "(1) the immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death; or
>
> "(2) written notice of injury or death as specified in section 8119 was given within 30 days."[4]

The three-year time period begins to run from the time the employee is aware or by the exercise of reasonable diligence should have been aware, that his or her condition is causally related to the employment. For actual knowledge of a supervisor to be regarded as a timely filing, an employee must show not only that the immediate supervisor knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.[5]

Even if an original claim for compensation for disability or death is not filed within three years after the injury or death, compensation for disability or death may be allowed if written notice of injury or death as specified in section 8119 was given within 30 days. Section 8119 provides that a notice of injury or death shall be given within 30 days after the injury or death; be give to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped an addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury or in the case of death, the employment factors believed to be the cause, and be signed by and contain the address of the individual giving the notice.[6] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[7]

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[2] 5 U.S.C. §§ 8101-8193; *David R. Morey*, 55 ECAB ___ (Docket No. 04-967, issued August 16, 2004); *Charles Walker*, 55 ECAB ___ (Docket No. 03-1732, issued January 8, 2004).

[3] *Id.*

[4] 5 U.S.C. § 8122(a).

[5] *Duet Brinson*, 52 ECAB 168 (2000).

[6] *Larry E. Young*, 52 ECAB 264 (2001).

[7] *Aura L. Harrison*, 52 ECAB 515 (2001).

In the case of occupational disease, 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. 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 not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[8] Where the employee continues in the same employment after he or she reasonably should have been aware that he or she has a condition which has been adversely affected by factors of the federal employment awareness, the time limitation begins to run on the date of the last exposure to the implicated factors.[9] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[10]

The time limitations do not run against an incompetent individual while she is incompetent and has no duly appointed legal representative.[11] It is appellant's burden to show that she is incompetent for a given period by submitting medical evidence stating that her condition was such that she was not capable of filling out a form or of otherwise furnishing the relatively simple information necessary for filing a claim and satisfying the time limitation requirements.[12]

ANALYSIS

The evidence of record establishes that appellant did not timely file a claim for compensation under the Act. She asserted that her heart attacks and hospitalizations in 1975 were caused by stressful duties of her federal employment and filed a notice of occupational disease on March 12, 2004 indicating that she was aware of her conditions and the alleged relationship to her employment in 1975 and that she retired from the employing establishment on June 3, 1976. Pursuant to section 8122(b) of the Act,[13] in latent disability cases, the time limitation begins to run on the date of the last exposure to the implicated factors, in this case appellant's last day of employment, June 3, 1976. Thus, the three-year time limitation began to run on June 3, 1976 and appellant's March 12, 2004 claim was not timely filed within three years of June 3, 1976.

The Act further provides that a claim may be regarded as timely if an immediate superior had actual knowledge of the injury within 30 days, such that the immediate superior was reasonably on notice of an on-the-job injury.[14] Appellant asserted that she had requested leave

[8] *Larry E. Young*, *supra* note 6.

[9] *Id.*

[10] *Debra Young Bruce*, 52 ECAB 315 (2001).

[11] *Charles Walker*, 55 ECAB ___ (Docket No. 03-1732, issued January 8, 2004).

[12] *Linda J. Reeves*, 48 ECAB 373, 376 (1997).

[13] 5 U.S.C. § 8122(b).

[14] *David R. Morey*, *supra* note 2.

for treatment of her heart condition and had discussed her condition with her supervisor. However, appellant has not submitted any evidence substantiating that she informed her supervisor that she believed her heart condition was due to her employment. Appellant has repeatedly referred to the December 29, 1975 form she provided to the employing establishment personnel office which included a statement that on May 8 and September 3, 1975 she was hospitalized due to extreme chest pain and that her duties as a timekeeper had caused pressure and stress due to the schedule and deadlines that she had to meet. The Board finds that this document is not sufficient to establish that appellant's superiors had actual knowledge, sufficient to put them reasonably on notice, that appellant believed her heart condition was work related.

Appellant also contended that the time limitation requirements should not run against her because she was incompetent. She stated that she was "not in her right mind" and unable to accept her status as a disabled person. In support of her claim, appellant submitted a report dated September 1, 2004 from Dr. Fuse, an internist, who diagnosed depression and indicated that appellant acted in illogical ways due to her emotional status. He opined that it was possible for appellant to put aside painful things for long periods of time. This report does not establish that appellant was incompetent at any time within the meaning of the Act. Dr. Fuse did not opine that appellant was not capable of filling out a form or of otherwise furnishing the relatively simple information necessary for filing a claim and satisfying the time limitation requirements.[15]

CONCLUSION

The Board finds that appellant's claim was not timely filed within the applicable time limitation provisions of the Act.

[15] *Linda J. Reeves, supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2005 and August 18, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 17, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board