

**United States Department of Labor
Employees' Compensation Appeals Board**

GEORGE H. REED, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Topeka, KS, Employer**

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**Docket No. 03-419
Issued: March 24, 2005**

Appearances:
Joseph Ledbetter, for the appellant
Thomas Giblin, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On December 3, 2002 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 17, 2002 nonmerit decision and August 5, 2002 decision denying appellant's emotional disease claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly denied appellant's compensation claim on the grounds that his emotional condition claim was not filed within the applicable time limitation provisions of the Federal Employees' Compensation Act; and (2) whether the Office 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).

FACTUAL HISTORY

Appellant, a 59-year-old hospital aide, filed a claim for benefits, alleging that he had developed a stress-related condition caused by factors of his employment.¹ Appellant indicated that he first became aware that the illness was caused or aggravated by his employment on March 1, 1995. On the Form CA-2, appellant's supervisor indicated that appellant stopped work on "?/?/97." He stated on the form, "To the best of my knowledge [appellant] never returned to work. But I cannot be absolutely certain as that was over four years ago."

In a letter dated October 26, 2001, Joseph Ledbetter, appellant's representative, stated that appellant last worked with the employing establishment in 1998. He alleged that the employing establishment never informed appellant of his right to receive compensation under the Act and never offered him any accommodation to do less stressful work.

By decision dated November 2, 2001, the Office denied the claim on the grounds that it was untimely filed. The Office construed the question marks written by appellant's supervisor to be "7" s, and determined that appellant last worked on July 7, 1997. The Office further determined that the claim was filed on October 31, 2001, more than three years after the date of his last exposure, and therefore was not filed within the applicable three-year time limit under section 8122.²

By letter received December 5, 2001, Mr. Ledbetter requested an oral hearing. He stated that appellant was mentally handicapped and was not aware of his right to file a claim until 2001.

By decision dated June 6, 2002, an Office hearing representative, based on review of the written record, set aside the November 2, 2001 Office decision, finding that the date of last exposure to the implicated employment factors was uncertain based on the available evidence. The hearing representative indicated that there were several contradictory, confusing facts regarding the actual dates when appellant last worked with the employing establishment and when he actually filed his claim. He noted that on the Form CA-2, appellant's signature was dated July 21, 2000, his representative's signature was dated June 28, 2001, his supervisor's signature was dated October 23, 2001 and the front of the form had a date stamp of September 2001. The hearing representative stated that, although the supervisor clearly placed question marks on the Form CA-2 regarding the month and day of last employment, the Office had misconstrued them to signify the number "seven." Therefore, he found that the Office erred in finding that appellant last worked on July 7, 1997.

The hearing representative further stated the fact that appellant's supervisor was uncertain of the month and day suggests that he was merely relying on his recollection of when appellant last worked at the employing establishment, which raised doubts as to whether 1997 was in fact the last year in which appellant was employed there. The hearing representative also

¹ The date when the claim was actually filed was unclear. On the Form CA-2, appellant's signature was dated July 21, 2000, his representative's signature was dated June 28, 2001, his supervisor's signature was dated October 23, 2001 and the front of the form had a date stamp of September 2001.

² 5 U.S.C. § 8122.

noted that the supervisor had indicated that he could not be certain whether appellant worked at the employing establishment subsequent to 1997. Given this uncertainty, the hearing representative stated that it was possible that appellant worked well into 1998, as his representative asserted.

Accordingly, in light of this ambiguous factual record, the hearing representative found that the date of appellant's last employment and last exposure to the implicated work factors with the employing establishment was unknown and therefore it was unclear when time began to run. The hearing representative therefore remanded the case to the district office for further development in order to establish the dates of last exposure and last employment. He requested the employing establishment to submit supporting documentation which would ascertain these dates and requested appellant's representative to submit a detailed explanation as to why appellant delayed filing his claim as well as supporting documentation for his claim that appellant's mental handicap affected his ability to file a compensation claim. The hearing representative stated that, in the event the claim was found to be timely filed, the Office should undertake appropriate development of the factual and medical evidence.

By letters dated July 1, 2002, the Office reiterated the hearing representative's requests for the employing establishment to submit supporting documentation regarding the actual dates of last exposure and last employment and for appellant's representative to submit a detailed explanation as to why appellant delayed filing his claim and supporting documentation for his claim that appellant's mental handicap affected his ability to claim benefits. On July 10, 2002 the employing establishment submitted leave and payroll records indicating that appellant's last day of work was March 9, 1997 and that appellant took disability retirement effective April 30, 1998.

By letter dated July 24, 2002, Mr. Ledbetter asserted that appellant had been forced out of his job with the employing establishment. He further asserted that appellant had suffered two nervous breakdowns because the employing establishment condoned mistreatment and harassment on the part of his coworkers and had refused his requests for accommodation. Mr. Ledbetter alleged that appellant did try to return to work in 1998 but the employing establishment refused to allow him back. Finally, Mr. Ledbetter asserted that, because of the mental and emotional trauma inflicted on appellant by the employing establishment and because "he is mentally slow," appellant was not aware of his right to compensation under the Act until September 2001, at which time he immediately applied for compensation.

Accompanying Mr. Ledbetter's letter were several documents, these included: (1) a May 13, 1997 letter from appellant to the employing establishment requesting accommodation in his job due to his hospitalization; (2) a September 29, 1997 letter withdrawing appellant's Equal Employment Opportunity (EEO) complaint; and (3) a sworn affidavit dated December 8, 2000 by appellant, and a medical report dated April 30, 1997 from Drs. Leslie Neilson, a specialist in psychiatry, and Kelli L. Holloway, Board-certified in internal medicine, which discussed appellant's mental capacity. These documents were received by the Office on August 2, 2002.

In a decision dated August 5, 2002, the Office denied appellant's claim on the grounds that it was not timely filed under section 8122. The Office stated that appellant's last date of

work and last date of exposure was March 9, 1997 and that he was on leave until his formal date of retirement, July 30, 1998. Therefore, appellant should have been aware or reasonably aware of a relationship between employment factors and the claimed condition by either March 9, 1997 or July 30, 1998 at the latest. Since appellant did not file his claim until October 31, 2001, when it was received by the Office, it was not timely filed. The Office also stated that, although Mr. Ledbetter alleged that his mental handicap affected his ability to file a claim, he had failed to submit the supporting factual evidence it had requested in the July 1, 2002 letter.

By letter dated August 8, 2002, appellant's representative requested reconsideration. Appellant's representative asserted that, although he mailed the documents requested by the Office in its June 6, 2002 decision and in its July 1, 2002 letter on July 25, 2002, 11 days prior to the date the Office issued its August 5, 2002 decision, the Office stated in that decision that it had not received the accompanying factual evidence requested by the Office. By letter dated August 15, 2002, appellant's representative again stated that he was requesting reconsideration. Appellant's representative stated that he had additional evidence to submit but had been denied his day in court. He also made a number of allegations against the employing establishment regarding their treatment of appellant.

By decision dated September 17, 2002, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.³

LEGAL PRECEDENT -- ISSUE 1

Section 8122(a) of the Act states, "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 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 statute provides an exception, which states that a claim may be regarded timely if an immediate superior had actual knowledge of the injury 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.⁶

³ By letter dated October 10, 2002, appellant's representative requested reconsideration of the Office's September 17, 2002 decision. Subsequent to this request, however, appellant filed his appeal to the Board on December 3, 2002. Thus, although the Office issued a nonmerit decision on February 19, 2003, the Board acquired jurisdiction over this case by virtue of appellant's December 3, 2002 appeal, which rendered the Office's February 19, 2003 decision null and void. *See* 20 C.F.R. § 501.2(c).

⁴ 5 U.S.C. § 8122(a).

⁵ 5 U.S.C. § 8122(b).

⁶ 5 U.S.C. § 8122(a)(1); *see Eddie L. Morgan*, 45 ECAB 600 (1994); *Jose Sales*, 41 ECAB 743 (1990).

ANALYSIS

In the instant case, the Board, having reviewed the case record, notes that the Office received supporting factual evidence from appellant on August 2, 2002 in response to its June 6 and July 1, 2002 requests for additional information. The Office, however, in its August 5, 2002 decision, stated that appellant failed to submit any evidence. This was error, as consideration of the Office's August 5, 2002 decision shows the Office did not consider appellant's letter or accompanying factual evidence prior to issuing its finding that appellant did not file a timely claim.

Since the Board's jurisdiction over a case is limited by 20 C.F.R. § 501.2(c) to reviewing the evidence that was before the Office at the time of its final decision, it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to that subject matter which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.⁷

As the Office did not review all the evidence that it received prior to the issuance of its August 5, 2002 decision, the Board will set aside that decision and remand the case to the Office for a decision considering whether appellant filed a timely claim under section 8122.⁸

CONCLUSION

The Board finds that the case must be remanded to the Office for consideration of whether appellant filed a timely claim under section 8122.⁹

⁷ *Linda Johnson*, 45 ECAB 439 (1994); *see also William A. Couch*, 41 ECAB 548 (1990).

⁸ As the Board has remanded the case for the Office to reconsider the issue of whether appellant filed a timely claim pursuant to section 8122, it need not consider the issue of whether the Office properly refused to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128.

⁹ On June 18, 2004 the Director filed a motion consistent with this decision to remand the case and cancel oral argument. On June 24, 2004 appellant withdrew his request for oral argument, and the Board cancelled oral argument on the same date.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2002 decision of the Office of Workers' Compensation Programs is set aside and remanded for further action consistent with this decision of the Board.

Issued: March 24, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member