

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

GWENDA BROWN, Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Dallas, TX,
Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-1375
Issued: November 10, 2005**

Appearances:
William T. Hughey, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On June 14, 2005 appellant filed a timely appeal of a March 30, 2005 merit decision of the Office of Workers' Compensation Programs, denying modification of a finding that appellant's claim was not timely filed. Pursuant to 20 C.F.R. §§ 501.2 (c) and 501.3, the Board has jurisdiction over merits of the case.

ISSUE

The issue is whether appellant's claim was timely filed within the applicable time limitations of the Federal Employees' Compensation Act.

FACTUAL HISTORY

The case was before the Office on a prior appeal. By decision dated April 3, 2001, the Board affirmed the Office's determination that the August 17, 1999 claim for an emotional condition was not timely filed.¹ The Board noted that appellant had acknowledged that she had

¹ Docket No. 00-1431, issued April 3, 2001.

known that her medical condition was caused or aggravated by employment as of March 26, 1996, and she did not file her claim until more than three years after this date. The facts and the circumstances of the case are discussed in the Board's prior decision and are incorporated herein by reference.²

On June 12, 2003 appellant requested reconsideration of her claim. By decision dated June 30, 2003, the Office found that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

On July 30, 2003 the Office received a notice of occupational disease and claim for compensation (Form CA-2) stating that the claim was being filed under the waiver provision of 5 U.S.C. § 8122(d)(3). Appellant submitted a statement arguing that her claim for an emotional condition should be considered as timely pursuant to section 8122(d)(3). She stated that she had filed a lawsuit alleging intentional infliction of emotional distress against the employing establishment on January 27, 1997. A March 22, 1999 motion to dismiss was filed by the U.S. Attorney's office, arguing that appellant was alleging an injury covered under the Act and an employee may not bring a tort claim suit for that injury. On July 2, 1999 the case was stayed for a determination as to whether the claim, intentional infliction of emotional distress, was covered under the Act.

Appellant indicated that a December 14, 1998 memorandum had been prepared by the Director with respect to whether appellant would be covered under the Act. According to appellant, this document "did not come to light until a point after March 22, 1999," and did not come to appellant's attention "until a point after March 26, 2000." Appellant concluded that the memorandum, "which was given to the U.S. Attorney was not given to [appellant] in a timely manner to pursue a filing within the time limitations of the appropriate Statute of limitations." The record contains a copy of the December 14, 1998 memorandum, providing an opinion from the Director that there was a "reasonable likelihood" of coverage under the Act; it was noted that to be timely the claim would have to be filed by March 26, 1999.

By decision dated September 30, 2004, the Office reviewed the case on its merits denied modification. The Office found that appellant had not established "exceptional circumstances" for waiver of the time limitation under section 8122(d)(3). Appellant requested reconsideration on October 15, 2004 and argued that there were "exceptional circumstances" in this case. Appellant argued that intentional infliction of emotional distress had not been traditionally accepted as a matter under the Act, that the December 14, 1998 memorandum underscored the questions and conflict surrounding the issue. She stated that the Director owed a duty to inform appellant of the possibility of coverage, especially since appellant had been informed earlier she could not file a claim as she had not suffered an injury.

In a decision dated March 30, 2005, the Office reviewed the case on its merits and denied modification of the finding that appellant's claim was not timely filed.

² The April 3, 2001 decision also affirmed a February 16, 2000 Office decision finding that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT

The Act provides that “an original claim for compensation for disability or death must be filed within three years after the injury or death.”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 In a case of latent disability, the time for giving notice begins to run when the employee is aware, or by the exercise of reasonable diligence should have been aware, that her condition is causally related to her employment, whether there is compensable disability.⁵

The time limitations do not begin to run “against any individual whose failure to comply is excused by the Secretary on the grounds that such notice could not be given because of exceptional circumstances.”⁶

ANALYSIS

As the Board noted in its prior decision, appellant was aware that her condition was causally related to her employment as of March 26, 1996. The period for filing a claim began to run on that date and therefore she had until March 26, 1999 to file the claim. On this appeal appellant has argued that her failure to comply with the time limitation provision should be excused because of “exceptional circumstances.”

The Board has recognized that in certain limited situations there may be “exceptional circumstances” that would excuse the failure to comply with section 8122(a) and (b). In *William E. Ostertag*, the Board noted that the Office had acknowledged that a claimant who had been a prisoner of war for the three-year period would have established “exceptional circumstances.”⁷ The Board has held, however, that unawareness of possible entitlement, lack of access to information and ignorance of one’s own rights and obligations do not constitute exceptional circumstances that would excuse a failure to timely file a claim.⁸

In this case, appellant has alleged a lack of information regarding her claim in that she was not aware of the Director’s December 14, 1998 memorandum regarding her possible entitlement to benefits under the Act until after she could timely file a claim. Appellant’s ability to file a claim is not dependent on her perception of the likelihood of her entitlement to benefits. She was aware of a relationship between her employment and her alleged medical condition as of March 26, 1996 and she had until March 26, 1999 to timely file a claim. Her lack of

³ 5 U.S.C. § 8122(a).

⁴ 5 U.S.C. § 8122(a)(1)-(2).

⁵ 5 U.S.C. § 8122(b).

⁶ 5 U.S.C. § 8122(d)(3).

⁷ 33 ECAB 1925 (1982).

⁸ *Roger W. Robinson*, 54 ECAB ____ (Docket No. 03-348, issued September 20, 2003); *see also Charlene B. Fenton*, 36 ECAB 151 (1984); *George M. Dickerson*, 34 ECAB 135 (1982).

awareness of the Director's memorandum or any other evidence related to her lawsuit against the employing establishment, or her perception that she was not entitled to benefits, do not excuse her failure to timely file an appeal. Appellant referred to a duty to inform her of possible coverage, without providing any relevant authority for such a duty.

Appellant did not submit any probative evidence that her circumstances were "exceptional" such that she could be excused from the three-year filing requirement. The Board accordingly finds that appellant's claim was not timely filed under 5 U.S.C. § 8122.

CONCLUSION

The Board finds that appellant not established that her failure to timely file a compensation claim may be excused due to "exceptional circumstances" under 5 U.S.C. § 8122(d)(3).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 30, 2005 and September 30, 2004 are affirmed.

Issued: November 10, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board