

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

J.J., Appellant

and

**DEPARTMENT OF THE NAVY, NORFOLK
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 10-2368
Issued: June 14, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 27, 2010 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated April 15 and August 16, 2010. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether the Office properly denied appellant's compensation claim on the grounds that his claim was not filed within the applicable time limitation provisions of the Act; and (2) whether it properly found that appellant abandoned his request for a hearing.

FACTUAL HISTORY

Appellant, a 55-year-old former ship worker, filed a claim for benefits on March 5, 2010, alleging that he sustained a right-sided carpal tunnel condition causally related to factors of his

¹ 5 U.S.C. § 8101 *et seq.*

federal employment. He stated that he first became aware he had sustained carpal tunnel syndrome on August 9, 2005. Appellant was employed by the employing establishment until 1987. The record indicates that appellant became disabled and was placed on the Office's periodic rolls in 1985 due to a neck and right shoulder injury. Appellant remains on the periodic rolls.

By letter dated March 15, 2010, the Office advised appellant that he needed to submit additional factual and medical evidence in support of his claim. It stated that appellant had 30 days to submit the requested information.

Appellant submitted a 24-page summary of his medical records from Dr. Arthur W. Wardell, a Board-certified orthopedic surgeon, which documented his treatment for right-sided carpal tunnel syndrome, right elbow pain, right wrist, right arm and bilateral upper extremity pain from July 2004 to July 2009. An electromyogram (EMG) study of appellant's right upper extremity dated August 9, 2005 was interpreted by Dr. Quingyan Zhu, a Board-certified neurologist, as revealing a mild right upper extremity carpal tunnel syndrome. The progress notes first reference carpal tunnel syndrome in an August 18, 2005 note, wherein it was reported that electrodiagnostic testing showed a mild right carpal tunnel syndrome. Dr. Wardell addressed the issue of causal relationship in a report dated December 24, 2009 by stating: "Taking into consideration Mr. Jones work history, I think that the carpal tunnel that is characterized by his electrodiagnostic studies is a direct result of his work activities."

Appellant also submitted a statement indicating his work history and explaining how his right-sided carpal tunnel syndrome developed.

By decision dated April 15, 2010, the Office denied appellant's claim, finding that he failed to file a timely claim under section 8122. It noted that the date of injury was August 9, 2005 and that the claim for compensation was filed on March 5, 2010; it advised him that he should have been aware of a relationship between his employment and the claimed condition by August 9, 2005. The Office further stated that there was no evidence that his immediate supervisor had no actual knowledge within 30 days of the date of injury.

On April 20, 2010 appellant requested an oral hearing. On June 15, 2010 the Office sent a notice of hearing to appellant and provided procedural information regarding the hearing. The notice stated that a hearing would be held on August 4, 2010 at 9:30 a.m. Appellant did not appear at the hearing.

By decision dated August 16, 2010, the Office determined that appellant had abandoned his request for a hearing.

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."² Section 8122(b) provides that in latent disability cases, the time limitation does not begin to run until the claimant is aware, or

² *Id.* at § 8122(a).

by the exercise of reasonable diligence should have been aware, of the causal relationship between her employment and the compensable disability.³ The Board has stated that in a 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 been adversely affected by factors of his federal employment, such awareness is competent to start the limitation period even though the employee does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.⁴

The Board has held that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.⁵

ANALYSIS -- ISSUE 1

In the present case, as appellant had not been employed by the employing establishment since 1987, he was no longer exposed to the injurious factors of employment after 1987. He was diagnosed with mild carpal tunnel syndrome on August 9, 2005 and he stated that he became aware of his right-sided carpal tunnel syndrome and its relationship to his federal employment on August 9, 2005. The time limitation for filing the claim began to run on August 9, 2005, the date that appellant became aware of his carpal tunnel condition and its relationship to his employment.⁶ Although Dr. Wardell first commented on causal relationship in a brief note dated December 24, 2009, appellant has acknowledged that he knew of the condition and the possible relationship to his employment since August 9, 2005. This is therefore not a case wherein appellant files a claim within the time limitation, after discovering a latent condition. The Board also notes that appellant has been on the periodic rolls arising from another injury for many years. Appellant was therefore familiar with the concepts of diagnosis, causal relationship and filing of a claim.

Appellant had three years from August 9, 2005 to timely file his claim. Since he did not file a claim until March 5, 2010 it was not timely filed within the three-year period of limitation.

In addition, there is no evidence in the record indicating that his immediate supervisor had actual knowledge of the injury within 30 days, or that anything occurred to make his supervisor reasonably aware that he sustained an occupational disease or condition relating to his employment.⁷ The record therefore does not support that appellant satisfied this requirement.

³ *Id.* at § 8122(b).

⁴ *Gerald A. Preston*, 57 ECAB 270 (2005).

⁵ *J.P.*, 59 ECAB 178 (2007); *Linda J. Reeves*, 48 ECAB 373 (1997).

⁶ *See supra* note 2 at § 8122(b). *See also James W. Beavers*, 57 ECAB 254 (2005).

⁷ *Roger W. Robinson*, 54 ECAB 846 (2003).

LEGAL PRECEDENT -- ISSUE 2

With respect to abandonment of hearing requests, Chapter 2.1601.6.e of the Office's procedure manual provides in relevant part:

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

“Under these circumstances, [the Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [district Office]. In cases involving precoupment hearings, [the Branch of Hearings and Review] will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the [district Office].

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, [the Branch of Hearings and Review] should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

“This course of action is correct even if [the Branch of Hearings and Review] can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend.”⁸

ANALYSIS -- ISSUE 2

In finding that appellant abandoned his April 15, 2010 request for a hearing, the Office noted that a telephonic hearing had been scheduled on August 4, 2010, that appellant received written notification of the hearing 30 days in advance, that appellant failed to appear and that the record contained no evidence that appellant contacted the Office to explain his failure to attend the hearing. On appeal, appellant contends that he did not attend the hearing because he never received the notice. The Board has previously found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business is presumed to have arrived at the mailing address in due course.⁹ This is known as the mailbox rule. On review of the record, the Board notes that the June 15, 2010 letter was properly addressed to appellant's address of record in Portsmouth, Virginia. The record contains no evidence to rebut the presumption that appellant received the June 15, 2010 notice. The Board therefore finds that

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).

⁹ See *W.P.*, 59 ECAB 514 (2008).

appellant's contention that he did not receive notice of the proposed findings is not supported by the record.

Based on the evidence of the record, appellant did not request postponement of the hearing date, failed to appear at the scheduled hearing and failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the criteria for abandonment as specified in Chapter 2.1601.6.e of the Office's procedure manual, the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

CONCLUSION

The Board finds that the Office properly denied appellant's compensation claim on the grounds that his claim was not filed within the applicable time limitation provisions of the Act. The Board finds that the Office properly determined that appellant abandoned his request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the August 16 and April 15, 2010 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: June 14, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board