

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of S.K. SANDERS and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, Jacksonville, Fla.

*Docket No. 96-2617; Submitted on the Record;
Issued October 19, 1998*

DECISION and ORDER

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

The issue is whether appellant timely filed a claim for an April 11, 1969 back injury.

This is the third appeal before the Board in this case. The prior two appeals addressed entitlement to and a requested increase in appellant's attendant's allowance.¹ In the latter appeal, the Board found that appellant did not qualify for an attendant's award. The facts and circumstances of the case are set out in the prior Board decisions and are hereby incorporated by reference. Appellant stopped work in 1976 and remains in receipt of compensation for his accepted conditions of acquired chemical leukoderma and paranoid personality and phobic neurosis.

On November 16, 1992 appellant filed a claim for back injury occurring during his employment. On January 7, 1993 appellant filed another claim for back injury occurring in 1969. In an accompanying statement, however, appellant gave a date of April 11, 1969. He also submitted a copy of one side of an April 11, 1969 Form CA-1 alleging injury that date, but containing no evidence of supervisory or employing establishment notice. The employing establishment later responded that it had no record of such an injury claim. In support of his claim appellant submitted medical evidence dating from 1972 indicating complaints of back pain at that time.

By decision dated November 19, 1994, the Office rejected appellant's claim finding that neither the factual nor the medical evidence of record established that appellant sustained back injury in the performance of duty in 1969. On November 23, 1994 appellant requested a hearing. In support he submitted psychiatric and dermatologic reports.

By decision dated May 8, 1996, an Office hearing representative affirmed the November 10, 1994 decision finding that the factual evidence of record failed to show that

¹ Docket No. 90-762 (issued August 9, 1990) and Docket No. 91-910 (issued August 14, 1991).

appellant sustained injury on January 1, 1969. He found that the only evidence of injury in 1969 was that occurring on April 11, 1969, and he suggested that appellant pursue the matter under that date. The hearing representative did not comment on the medical evidence of record or the timeliness of appellant's back injury claim.

On June 10, 1996 the Office received a request for reconsideration without accompanying evidence.

By decision dated August 19, 1996, the Office changed the date of appellant's claimed injury to April 11, 1969 and then denied merit review finding that appellant neither submitted relevant evidence nor presented new legal contentions.

The Board finds that appellant's claim for back injury was untimely filed.

Section 8122 of the Federal Employees' Compensation Act provides that original claims for compensation for disability or death must be filed within three years after the injury or death unless the immediate superior had actual knowledge of the injury or death within 30 days or written notice of injury or death was given within 30 days. In a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware, or by exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment.² When the employee continues in the same employment, after such awareness, the time limitation begins to run on the date of his last exposure to the implicated factors.³ The time limitation does not begin to run against an incompetent individual while he or she is incompetent and has no duly appointed legal representative, or against any individual whose failure to comply is excused by the Secretary on the ground that such notice could not be given because of exceptional circumstances.⁴

In the instant case, there is no evidence that either appellant's immediate supervisor or the employing establishment had any formal notice, in accordance with sections 8119 and 8122 of the Act, of appellant's claim of April 11, 1969 traumatic back injury within 30 days of its occurrence. Merely presenting evidence 23 years later of the existence of an incomplete CA-1 containing the April 11, 1969 date of alleged injury but no other information required by sections 8119 or 8122 of the Act does not constitute evidence that the requisite notice was given to appellant's immediate supervisor within 30 days of the injury in accordance with the provisions of the Act. Moreover, in this case, the employing establishment found no evidence of receiving such notice. Therefore, the claim for traumatic injury was not timely made.

As this was a traumatic injury claim, any resulting disability should not have been latent but immediately apparent, such that the provisions of the Act pertaining to latent disability should not apply. However, *arguendo*, if appellant's back problem was of latent onset but of traumatic origin, he became aware of it and had notice in 1972 when he sought medical

² 5 U.S.C. § 8122.

³ *Richard E. Jacobsen*, 33 ECAB 1517 (1982).

⁴ *Paul S. Devlin*, 39 ECAB 715 (1988).

treatment for back problems yet he did not file a claim for 20 years. Therefore, a claim for latent disability was not timely made.

Additionally, although appellant continued in employing establishment employment into 1976, after 1976 he was no longer exposed to any conceivable implicated factors. However, since he did not file a claim for 17 years, he did not timely file his claim.

Further, although appellant's claim has been accepted for two emotional conditions, there is no evidence of record that he is or has been adjudicated as incompetent, such that the time limitation requirement is tolled. Therefore, there is no argument that incompetence barred appellant's filing of a claim for 1969 traumatic injury until 1993.

As appellant did not file his claim for traumatic injury for 24 years after it allegedly occurred, where the employing establishment and his immediate supervisor had no 30-day notice, and as he did not file it for 20 years after he sought treatment for the condition, and as he did not file it for 17 years after he left the employing establishment, and as he was or is not incompetent, appellant's claim was untimely filed, and is hereby denied on that basis.⁵

Accordingly, the decisions of the Office of Workers' Compensation Programs dated August 19 and May 8, 1996 denying compensation are hereby affirmed.

Dated, Washington, D.C.
October 19, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ As appellant's claim is being denied on the basis that it was untimely filed, the Office's August 19, 1996 nonmerit decision will not be addressed.