

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

12/03/01; no treatment authorization received from DOL/OWCP. Returned to work under INS 'Emergency Status 9/11' but degeneration to disks continued after first injury resulting in second serious back injury on 09/28/04."<sup>2</sup>

Appellant indicated that he first became aware of his low back condition on December 3, 2001 and first realized that his low back condition was caused or aggravated by federal employment on September 28, 2004. The attending osteopath became suspicious of a bulging or ruptured disc shortly after the December 3, 2001 injury and again suspected a lumbar disc when he saw appellant in 2004. On March 23, 2004 a computerized tomography scan showed a central disc protrusion at L5-S1. A July 7, 2004 magnetic resonance imaging scan showed a bulging disc at L3-4, a bulging disc effacing the thecal sac at L4-5, and a herniated disc effacing the thecal sac at L5-S1. The attending osteopath consulted with appellant on July 22, 2004 to discuss his chronic symptomatology and the findings on clinic studies.

Appellant then suffered his employment injury on September 28, 2004. On January 19, 2005 he was taken to the emergency room after a cough or sneeze caused a jolt of pain and an involuntary loss of bodily functions. A magnetic resonance imaging scan revealed similar findings. On September 20, 2005 a consulting neurosurgeon found evidence of failure of the discs at L3-4, L4-5 and L5-S1 requiring extensive surgery for decompression and fusion. He was of the belief that appellant's problems were work related and compensable.

In a decision dated October 19, 2009, the Office found appellant's occupational disease claim to be untimely. On February 24, 2010 an Office hearing representative affirmed.

On appeal, appellant argues that the Office granted no timely or adequate authorization for treatment for his December 2001 employment injury. He also argues that the Office caused delays relating to authorizations for the 2001 and 2004 injuries, which led to lengthy delays in the claims process, which also led to the Office's claim of a missed deadline for the Form CA-2.

### **LEGAL PRECEDENT**

A claimant seeking compensation under the Act has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,<sup>3</sup> including that he filed his claim within the applicable time limitation.<sup>4</sup>

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<sup>2</sup> On December 3, 2001 appellant injured his low back in the performance of duty when he picked up a 50-pound carton from the floor. He stopped work that day, sought medical attention the next day, returned to limited duty on December 12, 2001 and resumed full unrestricted duty on January 2, 2002. Appellant disputes the Office's account of events, but the particulars are not critical to the issue on this appeal. The Office accepted his claim for lumbar strain. OWCP File No. xxxxxx237. On September 28, 2004 appellant injured his low back in the performance of duty while changing a flat tire on a government vehicle. He stopped work that day and returned to work on October 12, 2004 but was unable to continue. The Office accepted appellant's claim for lumbar strain. Appellant has not worked in any capacity since. OWCP File No. xxxxxx830.

<sup>3</sup> *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

<sup>4</sup> *Paul S. Devlin*, 39 ECAB 715 (1988); *Emmet L. Pickens*, 33 ECAB 1807 (1982); *Kathryn A. O'Donnell*, 7 ECAB 227 (1954).

Section 8122(a) of the Act<sup>5</sup> 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.<sup>6</sup>

Section 8122(b) provides that, 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 the exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment. In such a case, the time for giving notice of injury begins to run when the employee is aware, or by the exercise of reasonable diligence should have been aware, that his condition is causally related to his employment, whether or not there is a compensable disability.<sup>7</sup> 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.<sup>8</sup>

The time limitations in section 8122(a) and (b) do not (1) begin to run against a minor until he reaches 21 years of age or has had a legal representative appointed, (2) run against an incompetent individual while he is incompetent and has no duly appointed legal representative, or (3) run 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.<sup>9</sup>

### ANALYSIS

Appellant had three years to file his occupational disease claim. The time began to run when he had a compensable disability and was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment.

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<sup>5</sup> 5 U.S.C. § 8122(a).

<sup>6</sup> Section 8119 provides that a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and 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.

<sup>7</sup> 5 U.S.C. § 8122(b).

<sup>8</sup> *William D. Goldsberry*, 32 ECAB 536, 540 (1981).

<sup>9</sup> 5 U.S.C. § 8122(d).

Appellant had a compensable disability beginning December 3, 2001, continued to suffer low back problems, was diagnosed with bulging and herniated discs in 2004, and had another compensable disability beginning September 28, 2004. He first realized that his low back condition was caused or aggravated by federal employment on September 28, 2004. The medical evidence tends to support this. Appellant's last exposure to the implicated employment factors was no later than October 12, 2004. By September 20, 2005, a consulting neurosurgeon was reporting that appellant's low back problems were work related.

The time for filing an occupational disease claim began to run on October 12, 2004, the date of appellant's last exposure. Appellant had a compensable disability and was aware that it was causally related to his federal employment. The time limitation therefore expired on October 12, 2007, rendering her August 18, 2009 occupational disease claim untimely.<sup>10</sup>

There is no evidence appellant's immediate superior had actual knowledge or was reasonably put on notice within 30 days of October 12, 2004 that she had developed an occupational low back disease from performing the duties of his position over time. There is no evidence that written notice of injury was given within 30 days. The time limitation was not tolled by reason of appellant's age or competency. There are no exceptional circumstances within the meaning of section 8122(d)(3) that would permit the Office to excuse appellant's failure to comply with the time limitation.<sup>11</sup> Because the time limitation for filing an occupational disease claim expired on October 12, 2007, the Board will affirm the Office's February 24, 2010 decision affirming the denial of his claim.<sup>12</sup>

Appellant argues that the Office did not give timely and adequate authorization for treatment following his December 2001 traumatic employment injury. The Board has no jurisdiction to review that injury or the matter of treatment authorization. The only issue before the Board is whether appellant's occupational disease claim is untimely. Appellant adds that Office delay led to the lateness of his occupational disease claim, but this is not an exceptional circumstance. He has not shown that the Office's management of his traumatic injury claims in any way prevented him from filing an occupational disease claim. Appellant was free to do so at any time, and should have done so within three years of October 12, 2004, when he was last exposed at work and was aware that his low back condition was causally related to the duties he performed over time. An employee's ignorance or misunderstanding as to his ability to file such a claim has never been accepted by the Board as sufficient cause to toll the time limitation.<sup>13</sup>

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<sup>10</sup> The Office indicated that appellant first submitted his occupational disease claim in March 2009 under another claim number. This earlier filing date does not bring the claim within the time limitation.

<sup>11</sup> An exceptional circumstance recognized by the Secretary of Labor is when an employee is a prisoner of war. *Paul S. Devlin*, 39 ECAB 715, 726 (1988). Appellant has shown no circumstance that would similarly prevent him from filing a timely claim for compensation.

<sup>12</sup> As the Office has explained, the untimeliness of appellant's occupational disease claim in no way prevents him from claiming compensation for his bulging and herniated lumbar disc condition on the grounds that his condition was causally related to either of his accepted traumatic employment injuries.

<sup>13</sup> *Marcelo Crisostomo*, 42 ECAB 339 (1991).

**CONCLUSION**

The Board finds that appellant's occupational disease claim is untimely.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 24, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 12, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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