

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLINTON E. ANTHONY, JR. and DEPARTMENT OF THE ARMY,
ARMY INFANTRY CENTER, Fort Benning, Ga.

*Docket No. 96-1286; Submitted on the Record;
Issued April 10, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly rescinded its September 9, 1995 decision on the basis that the Board previously rendered a decision on issue of whether monetary compensation was barred by the 5-year time limitation provided of the Federal Employees' Compensation Act; and (2) whether appellant's immediate supervisor had actual knowledge of the alleged injury within 48 hours of its occurrence so that appellant could be eligible for medical benefits.

On January 17, 1990 appellant, then a 47-year-old firefighter, filed a notice of traumatic injury alleging that on November 21, 1972 he injured his lower back lifting a 5-gallon bucket of water. Appellant's immediate supervisor at the time of the injury, George F. Mickle, signed the Form CA-1 on January 12, 1990. The employing establishment indicated on the form that Mr. Mickle retired approximately ten years prior signing the form and that it received the form on January 17, 1990. It further indicated in a January 19, 1990 statement, that because Mr. Mickle retired approximately 10 years prior, it could not determine the validity of his statement. Appellant stopped working on November 22, 1972 and elected disability retirement on June 3, 1973. He returned to work with the employing establishment on October 4, 1988. Appellant's claim was witnessed by James F. Sams who stated appellant told "us that he had injured his back and went into the office and sent the alarm operator out to help with the extinguishers." Mr. Sams signed his statement on December 28, 1989.

In a decision dated August 22, 1990, the Office denied the claim for the reason that the it was not timely filed.

Subsequently, appellant submitted an unnotarized affidavit from Mr. Sams indicating that he recalled appellant reporting an injury to him and Station Caption Mickle on November 21, 1972.

Pursuant to appellant's request, a hearing was held on December 18, 1990. Appellant testified that he injured his back on November 21, 1972 and that he told everybody, including his

immediate supervisors, of the incident. He also stated that he informed his station captain, Mr. Mickle, of the incident on the same day and on the next morning. He stated he told him of the incident because he could not perform his duties. He stated that he did not file his claim in 1972, because he thought it was not covered due to the employing establishment's failure to follow through. Appellant also testified that he had back and prostrate problems prior to the alleged occurrence of injury. He stated that his back problems occurred several years prior to the November 21, 1972 incident. Appellant further indicated that he did not report previous problems in a January 5, 1973 medical examination, because he did not know he was suppose to do so.

On January 14, 1991 William E. Aman signed an affidavit indicating that he recalled appellant reporting an injury to him and Station Caption Mickle on November 21, 1972.

In a decision dated April 26, 1991, the Office hearing representative found that appellant filed an untimely claim for monetary benefits, but remanded the case to the Office to determine whether appellant's immediate supervisor had actual knowledge of the November 21, 1972 work injury within 48 hours of its occurrence so that appellant could be eligible for medical benefits.

On appeal, the Board found that appellant's claim for monetary compensation was barred by the five-year time limitation provision of the Act.¹ The Board, however, remanded the case to the Office to determine whether appellant's immediate supervisor had actual knowledge of the November 21, 1972 work injury within 48 hours of its occurrence so that appellant could be eligible for medical benefits.

On June 8, 1992 the Office requested that appellant provide an affidavit from his immediate supervisor indicating that he had actual knowledge of the alleged injury within 48 hours of its occurrence. The Office also requested a detailed medical report from appellant's treating physician which provided an accurate history of the injury, a diagnosis and a rationalized opinion addressing causal relationship. It also requested any other relevant medical evidence and gave appellant 60 days in which to respond.

Appellant subsequently resubmitted the affidavits of Mr. Sams and Mr. Aman and his claim form.

On October 5, 1992 Dr. J.C. Serrato, Jr., a Board-certified orthopedic surgeon, stated that appellant was a patient of his at the time of his November 21, 1972 injury. He stated appellant was admitted into St. Francis Hospital because he was involved in an accident on the job on November 21, 1972. Dr. Serrato diagnosed a herniated disc of the lumbar spine and stated it was caused by the accident on the job of November 21, 1972. Dr. Serrato also provided records of previous treatment. A report dated December 10, 1972, indicated that he treated appellant for low back syndrome and sciatica and that appellant injured hiss back, while lifting a five-gallon bucket of water. Dr. Serrato indicated on a December 17, 1972 discharge summary indicated that appellant had progressive back problems resulting in a ruptured disc at L4, 5. This was confirmed by a myelogram. Dr. Serrato, however, stated on a disability retirement form that appellant had pain in his low back and legs and that he "has no known injury to cause his

¹ *Clinton E. Anthony*, Docket No. 91-1682 (issued March 11, 1992).

problem.” Appellant also indicated on his disability application that his back problems began in October 1972. Appellant also submitted the billing and admittance records from treatment with Dr. Serrato. On January 15, 1973 Dr. Serrato diagnosed a herniated nucleus pulposus, lumbar spine.

Appellant also submitted records from chiropractic treatment from Dr. Robert Stolz, a chiropractor, which did not offer a diagnosis or specifically address his November 21, 1972 injury.

On October 14, 1992 Dr. James L. Beskin, a Board-certified orthopedic surgeon, submitted a report addressing an unrelated knee problem.

In a decision dated September 8, 1995, the Office ordered that the claim for compensation be denied for the reason that the claim was not timely filed. In an accompanying memorandum, the Office noted that it again addressed whether appellant filed a timely written notice of injury. The memorandum also indicated that appellant failed to establish that his immediate supervisor had actual knowledge of the alleged injury within 48 hours of its occurrence.

On November 20, 1995 appellant requested reconsideration. In support, appellant submitted a statement indicating that Mr. Aman was one of two lieutenants working at the station in November 1972 and he needed his approval for annual leave or to leave the work site. Appellant also resubmitted previously admitted medical evidence.

In a decision dated December 6, 1995, the Office found that the statutory requirements for timely filing a claim for medical benefits were not met because appellant’s official supervisor did not have actual knowledge of the injury within 48 hours of its occurrence. In an accompanying memorandum, the Office found that Mr. Mickle was appellant’s immediate supervisor and noted that appellant indicated the presence of a back injury prior to November 1972. The Office also noted that appellant did not indicate he was injured prior to a January 5, 1973 medical evaluation and that there was no written evidence that appellant’s immediate supervisor had actual knowledge of the alleged injury within 48 hours of its occurrence.

In a separate decision also dated December 6, 1995, the Office rescinded its September 8, 1995 decision. In an accompanying memorandum, the Office indicated that it erred in addressing whether appellant filed a timely written notice of injury as the Board resolved this issue in its March 11, 1992 decision.²

Initially, the Board finds that the Office properly rescinded its September 8, 1995 decision, which addressed the issue of whether appellant filed a timely written notice of injury. The Board resolved this issue in its March 11, 1992 decision³ and, in the absence of further review by the Office, pursuant to 5 U.S.C. § 8128, the subject matter reviewed is *res judicata*.⁴

² *Id.*

³ *Id.*

⁴ *Hugo A. Mentink*, 9 ECAB 628, 629 (1958). Appellant did not seek reconsideration of the Board’s decision

The Board further finds that appellant failed to establish that his immediate supervisor had actual knowledge of the claimed injury within 48 hours of its occurrence.

In the instant case, the record indicated that Mr. Mickle, a retired station manager, was appellant's immediate supervisor at the time of his alleged November 21, 1972 injury. Mr. Mickle did not sign appellant's claim form until January 12, 1990. The Office requested that appellant provide a signed affidavit from Mr. Mickle establishing knowledge of the claimed injury within 48 hours of its occurrence. Appellant's representative indicated at the hearing that he had talked to Mr. Mickle and requested an affidavit. Appellant, however, never submitted an affidavit from Mr. Mickle. Rather, he submitted affidavits from co-workers who indicated that Mr. Mickle had knowledge of the November 21, 1972 injury immediately after its occurrence. These affidavits and appellant's testimony, however, were contradicted by medical reports from Dr. Serrato indicating that appellant either did not mention the incident during treatment or that he had a preexisting back condition. Moreover, appellant's testimony and disability application indicated that appellant had back problems prior to the alleged November 1972 incident. Given these inconsistencies in the medical evidence, indicating either a preexisting injury or that he failed to mention the injury when seeking treatment and the failure of appellant to secure an affidavit from Mr. Mickle or explain this failure, the Board finds that appellant failed to meet his burden of establishing that his immediate supervisor had actual knowledge of the alleged injury within 48 hours of its alleged occurrence.⁵

The decisions of the Office of Workers' Compensation Programs dated December 6, 1995 are affirmed.

Dated, Washington, D.C.
April 10, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

pursuant to 20 C.F.R. § 501.7(a).

⁵ *Forrest L. Gibson*, 13 ECAB 83 (1961).