

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUANITA F. NIX and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Tyler, Tex.

*Docket No. 96-1515; Submitted on the Record;
Issued April 22, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs correctly determined that appellant's claim for compensation benefits was barred by the applicable time limitation provision of the Federal Employees' Compensation Act.¹

On December 7, 1994 appellant, then a 48-year-old mail handler, filed a notice of traumatic injury, claiming that throwing heavy bundles of mail, lifting trays and pushing hampers caused severe pain, in her right shoulder and elbow. Appellant stated that she first noticed the pain in February 1991, but was also experiencing chronic back pain at that time and thought the shoulder pain would go away.

Appellant explained that the pain became worse by May 1992 and she finally sought treatment in February 1994. At first she was diagnosed with inflammation due to arthritis, but a magnetic resonance imaging (MRI) scan showed a torn rotator cuff, which was corrected by surgery in November 1994.

The employing establishment controverted the claim on the grounds that appellant had not worked since January 15, 1991 and, therefore, any injury was not sustained in the performance of duty. On February 9, 1995 the Office denied the claim on the grounds of untimely filing. The Office noted that appellant should have been aware of a relationship between the claimed condition and work factors in February 1991 and that the evidence failed to demonstrate that the employing establishment had actual knowledge of a condition caused by employment factors within 30 days of January 15, 1991, the last day appellant worked.

Appellant timely requested reconsideration and submitted medical evidence of her treatment for shoulder pain in 1992 to 1994. On July 14, 1995 the Office denied appellant's

¹ 5 U.S.C. § 8101 *et seq.* (1974).

request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant modification of the prior decision.

Appellant again requested reconsideration on the grounds that misdiagnosis by appellant's physicians, constituted an exceptional circumstance pursuant to section 8122(d)(3) of the Act.² On March 21, 1996 the Office again denied appellant's request on the grounds that the evidence submitted was irrelevant and, therefore, insufficient to warrant review of the prior decision.

The Board finds that appellant's claim is barred by the applicable time limitations of section 8122.

In cases of injury on or after September 7, 1974, section 8122(a) of the Act³ provides that a claim for disability must be filed within three years after the injury. Section 8122(b) of the Act⁴ provides that the time for filing a claim for latent disability "does not begin to run" until the employee is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between his compensable disability and his employment.⁵

The Board has held that the applicable statute of limitations commences to run even though the employee does not know the precise nature of the impairment.⁶ The statute provides an exception that a claim may be regarded as timely if an immediate superior had actual knowledge of the injury within 30 days, so as to put the superior reasonably on notice of an on-the-job injury or death.⁷

In this case, appellant claimed that the injury to her shoulder occurred in 1991, yet delayed filing a claim until December 1994. Thus, her claim is untimely on its face. Appellant has submitted no evidence of any work-related trauma or incidents that occurred in February 1991. The record contains no medical records showing treatment for a shoulder injury during that time. In treatment notes dated July 28, 1993, the physician reported that appellant denied any trauma to her shoulder. Further, there is no 1994 medical evidence showing a causal relationship between appellant's current shoulder pain and any 1991 incident. Nor has appellant submitted any evidence showing that a supervisor had knowledge of her claimed injury in 1991. In her motion for reconsideration appellant argues that she was employed by the postal service as a mail handler "at all relevant times," yet the record reveals that she last worked on January 15, 1991 and appellant does not dispute this fact. Thus, by May 1993 when appellant's shoulder

² 5 U.S.C. § 8122(d)(3).

³ 5 U.S.C. § 8122(a).

⁴ 5 U.S.C. § 8122(b).

⁵ See 20 C.F.R. § 10.105(c).

⁶ *Edward Lewis Maslowski*, 42 ECAB 839, 846 (1991).

⁷ *Wanda H. Rheal*, 46 ECAB 352, 355 (1994).

pain “became so unbearable,” according to her statement, appellant had not worked for more than two years.

Appellant argues that misdiagnoses by the three physicians, who treated her in 1992 to 1994 constitutes an exceptional circumstance pursuant to section 8122(d)(3) of the Act because she had no basis to report her alleged work injury, until the MRI scan in October 1994 revealed the torn rotator cuff.

Subsection 8122(d)(3) provides that the time limitations in subsections (a) and (b) of this section do not begin to “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.”⁸

The Board has addressed the issue of what constitutes an exceptional circumstance that would excuse the untimely filing of a claim. In *Edward C. Hornor*, the Board held that the three-year statute of limitations, did not begin to run until a correct diagnosis of asbestosis related to work exposure was made and thus found appellant’s claim timely filed.⁹ By contrast, in *Hugh Massengill*,¹⁰ the Board found that the alleged misdiagnosis was not supported by medical evidence and was thus insufficient to constitute an exceptional circumstance.

So, too, in this case. Appellant has provided no evidence that any misdiagnosis occurred. In fact, the March 1, 1995 report from Dr. Scott O. Paschal, a Board-certified orthopedic surgeon, states that appellant was diagnosed with a rotator cuff tendon tear on October 28, 1994, and had been complaining of pain in that shoulder for about a year prior to that. Thus, appellant’s complaints occurred at least two years after she last worked at the employing establishment.

Further, there is no medical evidence that the diagnosed torn rotator cuff was caused by any work factors. At the time of diagnosis, appellant had not worked for more than three years. Therefore, the Board finds that appellant has failed to establish an exceptional circumstance excusing her failure to file a claim within the three-year statute of limitations.¹¹

⁸ 5 U.S.C. § 8122(d)(3); *see generally* *William E. Ostertag*, 33 ECAB 1925, 1931 (1982).

⁹ 43 ECAB 834, 840 (1992).

¹⁰ 43 ECAB 475, 483 (1992).

¹¹ *See Ina T. B. Martin*, 12 ECAB 503, 505 (1961) (finding that the facts that appellant was not fully aware of her condition until her separation from federal employment and that she was reluctant to complain while still employed for fear of separation are insufficient to justify a waiver of the time limitation for filing a claim).

The March 22, 1996 and July 14, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
April 22, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member