

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIS E. BAILEY and DEPARTMENT OF LABOR, OFFICE OF FEDERAL
CONTRACTS & COMPLIANCE PROGRAMS, Columbus, Ohio

*Docket No. 96-1062; Submitted on the Record;
Issued May 13, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's compensation claim on the grounds that he did not establish that his claim was filed within the applicable time limitation provisions of the Federal Employees' Compensation Act.

On August 29, 1994 appellant, then a 58-year-old retired senior equal opportunity specialist, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that a low back pain, shoulder pain and numbness in his posterior radiating down his legs came about when he worked at the employing establishment. In the portion of the form concerning the date that he first became aware of his claimed condition, appellant wrote that he first became aware of his condition on July 5, 1983 and realized that it was caused or aggravated by his employment on August 3, 1993. On the reverse side of the form, the employing establishment wrote that appellant was last exposed to conditions alleged to have caused his condition on May 4, 1990. Appellant voluntarily retired on February 11, 1991.

In a narrative statement submitted with the Form CA-2, appellant wrote "The reason for the delay in filing this claim is because I was never aware of any back injury; nor did I have any pain in that area. It was on July 31, 1993, when I experienced an excruciating sciatic nerve attack. I was later informed by Dr. Michael E. Ralston that I have deterioration of bone in some discs and spinal column. This information was only given to me on August 3, 1993." Appellant additionally wrote in the narrative statement that he had been experiencing numbness in his posterior radiating down his legs since July 5, 1983, and before. He further stated that as an equal opportunity specialist, he did considerable amounts of talking, sitting, walking, and riding in automobiles with various people.

The Office received medical records from appellant's treating physicians from the period July 7, 1983 to October 12, 1992. In a July 5, 1983 report, Dr. Vicki McCarren wrote that appellant takes medication for leg pains. She also stated that appellant continues to have pain in his legs occasionally. In a progress report dated May 7, 1984, it was documented that appellant

had pain in both shoulders and in his low back. In a progress report dated October 16, 1984, it was noted that appellant suffered from “numbness [to his] right leg off and on when walking long distances. Posterior leg from hip to right foot. Symptoms off and on since 1982.” In a medical report dated November 16, 1984, Dr. Susan Hubbell noted that appellant came in complaining of low back pain, shoulder pain and numbness radiating down his legs occasionally. Appellant indicated that “he notes no particular pattern for the numbness in his legs other than when he is walking for long distances inspecting plants. Dr. Hubbell noted that appellant worked for the federal government, covered seven states and the Ohio counties, and frequently drives the car and travels in a plane. On April 7, 1986 appellant underwent an x-ray examination of the lumbosacral spine as he had been experiencing pain for several years in both hips and low back. The report revealed spurring anteriorly and posteriorly at L4-5 and marked facet narrowing and sclerosis at L4-5 and 5-1. Lateral spurring at L3, 4 and 5 were also noted.

The Office requested additional information from the claimant and the employing establishment.

In a May 11, 1995 statement, appellant wrote that he had been experiencing numbness in his posterior, radiating down his legs, since July 5, 1983. He noted that “continuous stress of sleeping, sitting, walking and riding in automobiles for prolonged periods of time aggravates my condition ... this condition has been present since July 5, 1983.” Appellant stated that he “first became aware of my condition being caused or aggravated by my federal employment on July 5, 1983.” Appellant additionally noted that it was on August 3, 1994 that he was informed that he had some deterioration of bone in some discs and spinal column.

In a letter dated April 13, 1995, the employing establishment stated that it was not aware of appellant’s allegations or his condition other than what was in previously provided information.

By decision dated July 25, 1995, the Office denied appellant’s claim on the grounds that it was not timely filed. In an accompanying memorandum incorporated by reference, the Office stated that appellant first became aware of his condition in July 1983, but claimed that he did not associate the condition with his federal employment until August 1994. The Office noted that in appellant’s statement dated May 11, 1995, appellant stated that he first became aware of his condition being caused or aggravated by his federal employment on July 5, 1983. The Office indicated that when appellant resigned on February 11, 1991, he was aware, or should have been aware, of a possible relationship between his condition and his federal employment. Thus, the Office found that the time limitation began to run on appellant’s date of last exposure to injurious working conditions. The Office further indicated that appellant’s employing establishment knew that appellant had a back condition, but had no actual knowledge that the claimant was relating his back condition to factors of his federal employment until the claim was filed on August 29, 1994.

By letter dated August 16, 1995, appellant requested a review of the written record. He stated that there were a few errors on the CA-2 form that he had not previously noticed. Appellant stated that errors were made because item number 24 asks for the date first medical care was received and he stated that it was Dr. McCarren in July 5, 1983. Appellant asserted that he thought this question was asking for a medical history. Appellant wrote that item number 11,

which indicated the date the claimant first becomes aware of disease or illness, should have been August 3, 1993. He further wrote that item number 23, which asked for the physician first providing medical care, should have been Dr. Michael Ralston as it was through this physician that appellant first learned of his back problem. Appellant stated that Dr. McCarren treated him for numbness in his leg and Dr. Ralston treated him for his back problem.

By decision dated December 14, 1995 and finalized on December 18, 1995, the hearing representative affirmed the Office's July 25, 1995 decision on the grounds that appellant's claim was not timely filed. The hearing representative stated that appellant became aware that his condition was caused by his employment on July 5, 1983 and that the medical history of record contradicted appellant's assertion that his reason for delay in filing his claim was that he was never aware of any back injury, nor did he have any pain in that area. The Office indicated that there was no evidence that the employing establishment received actual timely knowledge of appellant's claimed employment-related condition within 30 days of appellant's last exposure to the implicated employment factors on May 4, 1990.

The Board finds that the Office properly denied appellant's compensation claim on the grounds that he did not establish that his claim was filed within the applicable time limitation provision of the Act.

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."¹ Section 8122(b) provides that, in latent disability cases, the time limitation does not begin to run until the claimant is aware, or by the exercise of reasonable diligence, should have been aware, of the causal relationship between his employment and the compensable disability.² 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.³

In the present case, the evidence establishes that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment and his degenerative process prior to August 3, 1993. The totality of the factual circumstances of record, including appellant's statements regarding his awareness that he experienced numbness in his posterior, radiating down his leg, establish that appellant was aware, or by the exercise of reasonable diligence should have been aware, prior to August 3, 1993 that his claimed condition of low back pain, shoulder pain and numbness in his posterior radiating down his legs was due to employment factors. On the Form CA-2 dated August 29, 1994, appellant indicated August 3, 1993 in the portion where he was asked to provide the date that he first realized that his claimed condition was caused or aggravated by employment factors. However, in his May 11, 1995 narrative statement, appellant stated that he first became aware that his condition was caused or aggravated by his federal employment on July 5, 1983. Appellant's date of last exposure to the factors alleged to have caused his condition was May 4,

¹ 5 U.S.C. § 8122(a).

² 5 U.S.C. § 8122(b).

³ *Garyleane A. Williams*, 44 ECAB 441 (1993).

1990. While appellant, in his August 16, 1995 letter requesting a review of the written record seemed to indicate that he did not know of the relationship of his condition to his employment until August 1993, this is not credible in view of medical reports in the record from 1984, particularly Dr. Hubbell's November 16, 1984 report which indicated that appellant had a back condition and that his symptoms usually occurred while walking at work. The Board finds that appellant should have reasonably been aware that his back condition was caused or aggravated by his employment by this time. As noted above, 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. Therefore, the time limitation in appellant's case began to run on the date of last exposure, May 4, 1990. Since appellant did not file his claim until August 29, 1994, his claim is clearly outside the three-year time limitation period and his claim is therefore untimely.

Appellant contended that his reason for delay in filing his claim was that he was never aware of any back injury, nor did he have any pain in that area. However, there is no evidence in the record to support this assertion. The medical history clearly documents that beginning at least by 1983 appellant experienced low back pain and numbness in his posterior which radiated down his legs. Eventually, degenerative disc disease was diagnosed in August 1994.⁴

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of appellant's injury.⁵ An employee must show not only that his immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.⁶ The record indicates that the employing establishment knew that appellant had a back condition based on his leave records; however, there is no evidence in the record which indicates that the employing establishment knew that appellant was relating his condition to factors of his federal employment until he filed his claim on August 29, 1994. Therefore, although the employing establishment had knowledge of appellant's problems, they did not have actual knowledge of a relationship between appellant's back condition and factors of his employment within 30 days of the date of the injury.

Consequently, the claim was not timely filed pursuant to 5 U.S.C. § 8122.

⁴ In a medical report dated August 12, 1994, Dr. Arlene M. Fedorchak noted that appellant's problem with degenerative joint disease was first documented in 1986. This is supported by an x-ray report dated April 10, 1986.

⁵ 5 U.S.C. § 8122(a)(1); *see also Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987).

⁶ *Charlene B. Fenton*, 36 ECAB 1511 (1984); *Richard E. Jacobson*, 33 ECAB 1571 (1982).

The decisions of the Office of Workers' Compensation Programs dated December 14, 1995, which was finalized on December 18, 1995, and July 25, 1995 are hereby affirmed.

Dated, Washington, D.C.
May 13, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member