U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHYLLIS K. VALENTINE and DEPARTMENT OF THE AIR FORCE, HICKAM AIR FORCE BASE, Hawaii

Docket No. 97-927; Submitted on the Record;
Issued November 27, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant filed a timely claim for compensation.

On November 15, 1995 appellant, a payroll clerk, filed a claim asserting that she developed a severe allergic cough from air pollution (cigarette smoke) while in the performance of her duty. She indicated that she first became aware of her disease or illness on or about February or March 1973. She indicated that she first became aware that the disease or illness was caused or aggravated by her employment on August 2, 1974 when she received a doctor's report. The report stated that she was free of disease or defect except for "severe allergic cough" and recommended that she "must avoid cigarette smoke while at work." Appellant stated that she gave this report to her former supervisor but that he could not believe it and sort of laughed at it. She stated that she continued to work with smokers until 1978 or 1979, when she was transferred to a nonsmoker office. Appellant further stated that she did not file this notice and claim within 30 days of August 2, 1974 for the following reason: "Ignorance due to nonpublication of eligibility. This claim was not filed until now because I was not aware of eligibility for job-related illness other than personal injury at work."

In a decision dated April 18, 1996, the Office of Workers' Compensation Programs rejected appellant's claim on the grounds that the claim was not timely filed. In a decision dated October 28, 1996, the Office denied appellant's request for reconsideration.

The Board finds that appellant's claim was not filed within the three-year period of limitations provided by 5 U.S.C. § 8122, as amended in 1974.

In 1974 Congress amended 5 U.S.C. § 8122 to provide the following:

"(a) An original claim for compensation for disability or death must be filed within 3 years after the injury or death. Compensation for disability or death, including medical care in disability cases, may not be allowed if 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 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 of this title was given within 30 days.[1]

(b) In a case of latent disability, the time for filing 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.

(c) The timely filing of a disability claim because of injury will satisfy the time requirements for a death claim based on the same injury.

(d) The time limitations in subsections (a) and (b) of this section do not --

(1) begin to run against a minor until he reaches 21 years of age or has had a legal representative appointed; or

(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."

The amendment, however, did not change the provision of the Federal Employees' Compensation Act on when time begins to run in latent disability cases.

[1] Section 8119 provides: "An employee injured in the performance of his duty, or someone on his behalf, shall give notice thereof. Notice of a death believed to be related to the employment shall be given by an eligible beneficiary specified in section 8133 of this title, or someone on his behalf. A notice of injury or death shall - (a) be given within 30 days after the injury or death; (b) be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; (c) be in writing; (d) state the name and address of the employee; (e) state the year, month, day, and hour when and the particular locality where the injury or death occurred; (f) state the cause and nature of the injury, or, in the case of death, the employment factors believed to be the cause; and (g) be signed by and contain the address of the individual giving the notice."

Time begins to run when a claimant is aware or should have been aware of a possible relationship between her employment and her injury. If an employee continues to be exposed to injurious working conditions, time begins to run from the date she was last exposed to those conditions.[2]

In the present case, appellant indicated on her claim form that she first realized on August 2, 1974 that her disease or illness was caused or aggravated by her federal employment. She was at that time aware or should have been aware of a possible relationship between her employment and the condition for which she now claims compensation. Appellant indicated that she remained exposed to cigarette smoke at work until 1978 or 1979, when she was transferred to a nonsmoker office. The Board finds, therefore, that the statutory period for filing her claim began to run no later than the date she was last exposed to such conditions in 1979. Because she filed her claim in 1995, the claim is barred by the three-year period of limitations.[3]

Appellant's claim would nonetheless be regarded as timely under 5 U.S.C. § 8122(a)(1) if her immediate superior had actual knowledge of the injury or death within 30 days. Under the circumstances of the present case, appellant's claim would be regarded as timely if her immediate superior had actual knowledge of the injury, within 30 days of appellant's transfer to a nonsmoker office in 1979, sufficient to put him reasonably on notice of an on-the-job injury.[4] Mere knowledge that an employee has a physical condition is insufficient to satisfy the requirement of the statute. It must also be shown that there were other circumstances that put the supervisor on notice that the condition was related to the employment or that the employee attributed the condition to her employment.[5]

Appellant states that she gave a doctor's report to her former supervisor, but this report is insufficient to establish notice of an on-the-job injury. Although the August 2, 1974 medical note indicates that appellant had a severe allergic cough and recommended that she "must avoid cigarette smoke while at work," the note draws no causal connection between appellant's condition and her occupational exposure. Nor does the note indicate that its recommendation was anything more than a prophylactic measure, that is, a measure designed to guard against a possible future injury. Because this evidence does not deal in causality so as to place an immediate superior reasonably on notice that appellant had a condition attributed to her employment, the Board finds that the evidence fails to satisfy the provisions of section 8122(a)(1) and therefore cannot overcome the three-year limitation.[6]

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[2] *Teofilo Concepcion*, 31 ECAB 728 (1980).

[3] *See Eloise G. Gibson*, 37 ECAB 589 (1986) (where the claimant stated that she became aware of a work-related hearing loss as early as 1973 and that she remained exposed to noise in her employment through October 3, 1975, the date of her retirement and the date of her last possible exposure).

[4] *Richard E. Jacobson*, 33 ECAB 1517 (1982).

[5] *Kathryn A. Bernal*, 37 ECAB 672 (1986) (although the supervisor was aware of the employee's hearing difficulties, there was no indication that he was aware or reasonably should have been on notice that the employee was attributing her hearing condition to factors of her employment).

[6] *Richard E. Jacobson, supra* note 4.

Finally, it is well established that an employee's assertion that she was not aware she could file a claim is unacceptable as a sufficient cause or reason for failure to file a timely claim.[7] Appellant's assertion of ignorance will therefore not excuse her failure to comply.

The April 18, 1996 decision of the Office of Workers' Compensation Programs is affirmed.[8]

Dated, Washington, D.C.
November 27, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[7] *Albert K. Tsutsui*, 44 ECAB 1004 (1993).

[8] The Board's review of the merits of appellant's claim renders the Office's October 28, 1996 decision moot.