

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM E. SABRE and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, CLEVELAND HOPKINS
INTERNATIONAL AIRPORT, Cleveland, Ohio

*Docket No. 96-2668; Submitted on the Record;
Issued September 15, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

The Board has duly reviewed the record on appeal and finds that appellant did not file a timely claim for compensation.

A claimant seeking compensation under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,² including that he is an "employee" within the meaning of the Act³ and that he filed his claim within the applicable time limitation.⁴

¹ 5 U.S.C. §§ 8101-8193.

² *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

³ *Kenneth W. Grant*, 39 ECAB 208 (1987); *James E. Lynch*, 32 ECAB 216 (1980); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357 (1951); see 5 U.S.C. § 8101(1).

⁴ *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 Act⁵ 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.⁶

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.⁷

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.⁸

On October 7, 1995 appellant, a retired air traffic controller, filed a claim for compensation asserting that his hypertension and left hemiplegia secondary to right intracerebral hemorrhage (stroke) were a result of his federal employment.⁹ He stated that on August 1, 1991 he was informed that he had high blood pressure.¹⁰ On August 4, 1991, he stated, he had a

⁵ 5 U.S.C. § 8122(a).

⁶ 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.

⁷ 5 U.S.C. § 8122(b).

⁸ *Id.* § 8122(d).

⁹ Nelson A. Hines, acting air traffic manager, signed appellant's claim form on August 7, 1996.

¹⁰ Appellant told his attending physician, Dr. Dennis E. Carson, that he was diagnosed with hypertension in June 1991, according to Dr. Carson's December 13, 1994 report.

stroke.¹¹ Appellant indicated that he first became aware of his disease or illness on August 4, 1991 and that on August 3, 1991 he first realized that his disease or illness was caused or aggravated by his employment. He explained that he did not file a notice and claim within 30 days of August 3, 1991 because he was hospitalized out of state from August 4 to October 19, 1991, after which time he stayed with his mother until January 9, 1992. He was then transferred to the Great Lakes Regional Rehabilitation Center, where he remained until March 12, 1992. The record indicates that appellant retired in February 1992. Appellant stated that he was just recently made aware that “this should have been filed under workmen’s compensation, as it is considered job-related disability.”

In a decision dated August 14, 1996, the Office of Workers’ Compensation Programs denied appellant’s claim on the grounds that written notice of injury was not timely.

Because this is a case of latent disability, involving hypertension attributed to a high-stress job over a lengthy period of time, the time for filing a claim did not begin to run until appellant 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. According to his October 7, 1995 claim form, appellant had a compensable disability beginning August 4, 1991, the day he had a stroke and was hospitalized. He indicated that he first realized on August 3, 1991 that his disease or illness was caused or aggravated by his federal employment. The three-year period for filing an original claim for compensation, therefore, began on August 4, 1991. As he did not file a claim for compensation until October 7, 1995, well after the three-year limitation had expired, his claim must be considered untimely unless appropriate notice was given.

In cases of latent disability, 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. Once again, appellant indicated that he first realized on August 3, 1991 that his disease or illness was caused or aggravated by his federal employment. There is no evidence in the record, however, that appellant’s immediate superior had knowledge of an on-the-job injury or that written notice was given within 30 days. Appellant did not assert and he submitted no evidence to substantiate that he was at any time incompetent with no duly appointed legal representative. He did explain that he gave no notice within 30 days because he was hospitalized out of state from August 4 to October 19, 1991, after which time he stayed with his mother until January 9, 1992, when he was then transferred to a rehabilitation center until March 12, 1992. There is no evidence, however, that appellant was unable to give notice during his hospitalization or during his stay with his mother or at the rehabilitation center. Moreover, had all of these circumstances in fact prevented him from giving notice, the 30-day period for giving notice would have begun no later than March 12, 1992 and there is no evidence of notice within this time. Because the record contains no evidence that appellant was unable to give notice within 30 days of August 4, 1991, the Board finds that timely notice was not given in this case and that appellant’s October 7, 1995 claim must, therefore, be considered untimely filed.

¹¹ Dr. Carson reported that appellant suffered his cardiovascular accident on the weekend of August 4, 1991 while in or around Pittsburgh, Pennsylvania, for a family function.

The August 14, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
September 15, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member