

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CALLIE KESTLER and DEPARTMENT OF THE ARMY,
RED RIVER ARMY DEPOT, Texarkana, TX

*Docket No. 98-168; Submitted on the Record;
Issued December 22, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's October 17, 1995 claim for an occupational disease was untimely filed pursuant to section 8122(a) of the Federal Employees' Compensation Act.

The Board has duly reviewed the case record in this appeal and finds that the Office properly determined that appellant's October 17, 1995 claim for an occupational disease was untimely filed pursuant to section 8122(a) of the Act.

On October 17, 1995 appellant, a material handler, filed a claim for an occupational disease alleging that she sustained an emotional condition that was caused or aggravated by her employment. Appellant alleged that she first realized that her emotional condition was caused or aggravated by her employment on March 2, 1994.

By letter dated February 23, 1996, the Office advised appellant that she had failed to file a timely claim for compensation because it was not filed within three years of the injury, the date of last exposure or when she became aware or reasonably should have been aware that her condition was related to her federal employment. The Office also advised appellant that she could establish a timely filing of a claim by obtaining a statement from her former supervisor or superior indicating that he had actual knowledge of the claimed events and that a condition/injury resulted from the alleged harassment. The Office then advised appellant to submit additional factual and medical evidence supportive of her claim. Appellant submitted a May 22, 1996 response explaining that her claim was untimely filed due to her mental condition.

By decision dated August 6, 1996, the Office denied appellant's claim for an occupational disease on the grounds that it was untimely filed. The Office also found that appellant failed to establish that her emotional condition was caused by compensable factors of her employment. In a July 2, 1997 letter, appellant requested reconsideration of the Office's decision.

In a September 29, 1997 decision, the Office denied appellant's request for modification based on a merit review of the claim.

In cases of injury on or after September 7, 1974, section 8122(a) of the Act¹ provides that a claim for disability must be filed within three years after the injury. However, section 8122(b) of the Act² provides that the time for filing a claim for latent disability, as in this case, "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 her compensable disability and her employment.³ 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.⁴ 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.⁵

Section 8122(a) of the Act further provides that a claim not filed within three years after injury may be allowed if "the immediate superior had actual knowledge of the injury or death within 30 days." This provision, if met, removes the bar of the three-year time limitation. The knowledge "must be such to put the immediate superior reasonably on notice of an on-the-job injury or death." An employee, therefore, must show not only that her immediate supervisor knew she was injured but also knew or reasonably should have known it was an "on-the-job" injury.

The evidence of record in the present case, establishes that appellant was aware or by exercise of reasonable diligence should have been aware of a causal relationship between her emotional condition and implicated factors of her employment prior to 1989 notwithstanding appellant's contention that she first realized her emotional condition was caused or aggravated by her employment on March 2, 1994. Appellant has primarily alleged that her emotional condition was caused by sexual harassment from her supervisor, Earl Hale, beginning in 1984 when she accepted a position in the depot shops until his retirement around 1988. A September 12, 1996 narrative statement of Harriette Stormfeltz, appellant's coworker, indicated that she and appellant began working in the depot shops in 1984 and that on several occasions she witnessed Mr. Hale placing his hands on appellant's shoulders and leaning very close over appellant is supportive of appellant's allegation of harassment. The May 6, 1996 medical report of Dr. Robert C. Potts, a Board-certified psychiatrist, revealed a history of appellant's emotional condition. Specifically, Dr. Potts indicated that upon her completion of a temporary assignment, appellant was transferred to supply. He further indicated that prior to this time there was no hint, sign or symptom of nervous mood or mental disorder. Dr. Potts stated that appellant was changed from supply to the depot shops in 1984 and until that time she had a perfect attendance record and had done well. He further stated that Mr. Hale began a period of sexual harassment

¹ 5 U.S.C. § 8122(a).

² 5 U.S.C. § 8122(b).

³ See section 10.105(c).

⁴ *Edward Lewis Maslowski*, 42 ECAB 839, 846 (1991).

⁵ *Linda J. Reeves*, 48 ECAB ____ (Docket No. 96-949, issued February 27, 1997).

of appellant. Dr. Potts then stated that “[i]n 1989, [appellant] had developed depressive symptoms and saw Dr. John Goodman. In 1989 she had also seen Dr. Ed Toby, both psychiatrists. She had taken medications but had a lot of side affects and inability to tolerate medications.” Appellant should have been aware of a causal relationship between her emotional condition and factors of her employment in 1989. Appellant, however, did not file her occupational disease claim for an emotional condition until October 17, 1995. Therefore, her claim was clearly filed outside the three-year time limitation period.

In seeking to justify her delay in filing a claim, appellant stated in a July 2, 1997 narrative statement that “I didn’t know about no timely filing, I could have cared less about anything at that time because I needed medication and help from somebody anybody.” The Board finds that this contention is tantamount to ignorance of the law, which provides no basis for tolling the time limitations.⁶

Appellant’s claim would still be regarded as timely under section 8122(a)(1) of the Act if her immediate supervisor had actual knowledge of the injury 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.⁷

In the present case, however, the record contains no evidence that appellant’s supervisor had actual knowledge of the injury or that written notice of the injury was given within 30 days. On the reverse of appellant’s Form CA-2 the employing establishment indicated that the date appellant reported her condition was January 1996. Since appellant did not report her injury to the employing establishment until January 1996, notice was clearly given outside the 30-day time period.

For the above reasons, the Board finds that appellant has not established that she filed her occupational disease claim for compensation within the applicable time limitations of the Act.⁸

⁶ 5 U.S.C. § 8122(d)(2); *Charlene B. Fenton*, 36 ECAB 151 (1984).

⁷ 5 U.S.C. § 8122(a)(1); *John Giovanni Carrollo*, 41 ECAB 778 (1990).

⁸ *Roseanne S. Allexenberg*, 47 ECAB 498 (1996).

The September 27, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.⁹

Dated, Washington, D.C.
December 22, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁹ In view of the Board's decision on the timeliness of the filing of appellant's occupational disease claim, the issue regarding the denial of appellant's claim is moot.