

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY VENTI and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 97-1920 ; Submitted on the Record;
Issued March 16, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's compensation claim was barred on the grounds that it was not filed within the applicable time limitation provisions of the Federal Employees' Compensation Act.

This is the second appeal before the Board in this case. By decision issued August 25, 1994,¹ the Board affirmed the Office's December 15 and May 21, 1992 decisions, finding that appellant had not filed his emotional condition claim within the applicable three-year time limitation. Appellant filed a claim on August 5, 1991 alleging that he sustained an emotional condition on June 22, 1988 when he was accused of making an obscene phone call to a coworker.² He alleged that he was unaware of a relationship between his emotional condition and work factors until August 8, 1988, when he was diagnosed with depression. He also asserted that the employing establishment provided inaccurate advice regarding the time limitation for filing a claim. The Board found that appellant had not established that his supervisor had notice of the alleged injury within 30 days of June 22, 1988, that he had not substantiated that any of the exceptions to the three-year time limitation applied and that misinformation by the employing establishment was not grounds on which to find appellant's compensation claim timely. The law and facts of the case as set forth in the Board's prior decision are incorporated by reference.

In letters dated September 15, 1994, appellant, through his attorney, petitioned for reconsideration before the Board.³ Appellant asserted three circumstances which he contended

¹ Docket No. 93-1202.

² Appellant retired from the employing establishment effective April 1, 1991.

³ In an undated statement received by the Office on October 17, 1995, appellant reiterated arguments presented on the previous appeal.

tolled the three-year time limitation. He was allegedly mentally incompetent due to depression from an unspecified date in June to August 8, 1988; his condition should be considered a latent disability as it was not diagnosed until August 8, 1988 and Mr. Mazza, an employing establishment compensation specialist, misinformed appellant that he had one year from his date of retirement in which to file a claim.⁴ On November 23, 1994 the Director filed an answer to appellant's petition for reconsideration of the Board's decision, contending that appellant had not established any error of fact or law. By order issued January 9, 1995, the Board denied appellant's petition for reconsideration on the grounds that appellant had not established any error of fact or law in the Board's decision and that he merely reargued points made during the previous appeal.

In a January 10, 1996 letter, appellant, through his attorney, again requested reconsideration before the Office which was denied by decision dated January 22, 1996 on the grounds that the evidence was insufficient to warrant modification.

In an April 18, 1996 letter, appellant, through his attorney, again requested reconsideration, asserting that the government should be estopped from finding appellant's claim untimely due to his detrimental reliance on Mr. Mazza's misinformation.⁵ He submitted reports from Drs. E. Brogan and H.S. Trostle, employing establishment physicians, Dr. Jody M. Whitehouse, an attending psychiatrist, Dr. Joseph Termini, an attending Board-certified family practitioner and leave slips for intermittent work absences from August 8, 1988 to 1990. By decision dated July 12, 1996, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification.⁶

In a January 15, 1997 letter, appellant, through his attorney again requested reconsideration enclosing an August 15, 1996 statement from Mr. John Keohgan.⁷ By decision dated April 17, 1997, the Office denied modification on the grounds that insufficient evidence was submitted to warrant modification.⁸

⁴ Appellant enclosed a 1982 employing establishment labor relations agreement generally providing that an employee claiming compensation should be provided assistance in completing claim forms and that such forms should be processed without undue delay.

⁵ In February 28 and March 1, 1996 letters, appellant asserted that he fully informed Mr. Keohgan at the time of their June 28, 1988 conversation of his alleged work-related emotional condition.

⁶ The Office found that Mr. Keohgan was not specific as to when he observed appellant's emotional upset and it was therefore insufficient to find that the "employer was put on notice that appellant had sustained an on the job injury or condition within 30 days of occurrence." The Office noted that the dispensary records were also insufficient to establish notice to the employer within 30 days and that Dr. Whitehouse's reports were insufficient to establish that appellant was incompetent from June 28, 1988 for any period such that he would have been unable to timely file a claim.

⁷ Appellant also submitted a September 6, 1996 report of a counseling session written and signed by a Mr. Zoto, a social worker. There is no indication on the face of the report that it was reviewed, approved or signed by a physician. As social workers are not physicians under the Act, this report does not constitute medical evidence and is of no probative value. 5 U.S.C. § 8101(2).

⁸ The Office found that Mr. Keohgan's statements were "insufficient to show that he knew [appellant] developed

The Board finds that appellant's claim for an emotional condition is barred by the applicable time limitation provisions 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."⁹ The statute provides an exception, which states that a claim may be regarded timely if an immediate superior had actual knowledge of the injury within 30 days, such as to put the immediate superior reasonably on notice of an on-the-job injury or death.¹⁰ This provision removes the bar of the three-year time limitation if met.¹¹

In this case, appellant alleges that he sustained an emotional condition due to a June 22, 1988 incident in which he was accused of making an obscene phone call to a coworker. Thus, appellant would have had to establish that his immediate superior had actual knowledge of the alleged injury within 30 days of June 22, 1988 sufficient to give him reasonable notice of its alleged relation to employment. The Board finds that there is insufficient evidence of record indicating that appellant's immediate superior, Mr. Keohgan, had actual knowledge of the alleged June 22, 1988 injury within 30 days. Appellant submitted three statements from Mr. Keohgan.

The first, submitted pursuant to a January 10, 1996 request for reconsideration, is unsigned, undated and contains numerous alterations and deletions which initially reduce its probative value due to a lack of authentication. Mr. Keohgan stated that he was "aware of [appellant's] personal problem with C/600 personnel and Mr. Dombrowski" and noticed that appellant's mental state deteriorated until he was unable to work "from July to August due to the incident." Mr. Keohgan's remarks contain no date or description of the alleged incident and does not indicate that appellant explicitly informed him that he believed he sustained an emotional condition related to any factor of his federal employment.

In a second undated statement, submitted March 1, 1996, Mr. Keohgan asserted that he knew of appellant's "personal problem concerning the problem with C/600 personnel and upper supervision in Code 972," followed by time off work and personality changes. Again, Mr. Keohgan provides no date or description of the alleged incident. Thus, his observation that appellant later became distraught is of little value as it is unknown from the face of this statement what incident may have precipitated this mental state.

In a third statement, dated August 15, 1996, Mr. Keohgan asserted that the conversation with appellant, described in the statement received March 1, 1996, took place on June 28, 1988 and that appellant took the rest of the week off from work due to emotional distress. Again, this

an injury/condition as a result of the incident.

⁹ 5 U.S.C. § 8122(a).

¹⁰ 5 U.S.C. § 8122(a)(1); see *Eddie L. Morgan*, 45 ECAB 600 (1994); *Hugh Massengill*, 43 ECAB 475 (1992); *Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

¹¹ See cases cited *supra* note 10.

statement does not mention a June 28, 1988 incident, only a June 28, 1988 conversation. Mr. Keohgan does not describe the alleged incident in which appellant was accused of making an obscene phone call.

The record also contains an August 8, 1989 employing establishment dispensary slip signed by Mr. Keohgan, in which Dr. Brogan, an employing establishment physician, checked a box indicating that appellant's condition was again "questionably" related to work and released appellant to return to work.¹² Thus, Mr. Keohgan was advised as of August 8, 1989 that appellant had sought medical attention, which is more than a year after the alleged June 22, 1988 incident. However, Dr. Brogan did not describe appellant's symptoms or provide a diagnosis on this form. Mr. Keohgan therefore had no direct way of ascertaining the reason appellant sought treatment, or that appellant himself alleged any connection between his condition and any factor of his employment. The slip also does not mention the alleged June 22, 1988 incident. Thus, the August 8, 1989 dispensary slip does not establish that Mr. Keohgan had actual knowledge of an alleged work-related injury within 30 days of June 22, 1988.¹³

Thus, Mr. Keohgan's three statements and the August 8, 1989 dispensary slip, do not establish that appellant's immediate superior had actual knowledge of the alleged injury within 30 days of June 22, 1988 sufficient to give him reasonable notice of its alleged relation to employment.

Appellant alleges that his claim should be considered timely as he was mentally incompetent from June 22 to August 8, 1988 such that he could not file a claim during that interval. However, the medical evidence demonstrates that appellant's failure to file within the time limitations cannot be excused on the grounds of incompetence.¹⁴ Although there is evidence that appellant was treated for anxiety and depression, there is insufficient medical evidence establishing appellant was incapacitated from filing a claim within the time limitations of the Act.

Appellant submitted return-to-work slips dated August 8 and 19, 1988 from Dr. Termini, an attending Board-certified family practitioner, noting that appellant was treated for stress and depression and released to work on August 9 and 22, 1988. However, Dr. Termini did not find any period of disability due to mental incompetence.

In an August 23, 1988 note, Dr. Trostle, an employing establishment physician, noted appellant's symptoms of anxiety and depression with no history of an injury. Dr. Trostle diagnosed nonoccupational anxiety. Thus, Dr. Trostle did not find that appellant had sustained

¹² The Board had held that merely checking a box on a form report, absent supporting rationale, is of very little probative value and would thus constitute insufficient notice to Mr. Keohgan of any causal relationship. *See Lillian M. Jones*, 34 ECAB 379, 381 (1982).

¹³ Appellant also submitted July 19 and 20, 1990 leave slips signed by Mr. Barowski, an employing establishment supervisor. These slips note that appellant had requested leave to attend a doctor's appointment, but do not contain medical evidence. Also, they do not pertain to the period at issue.

¹⁴ See 5 U.S.C. § 8122(d)(2).

an occupationally-related emotional condition, or that appellant was mentally incompetent or otherwise disabled for work for any period.

Appellant also submitted June 23 and November 20, 1989 notes from Dr. Brogan, an employing establishment physician, which do not indicate any period of mental incompetence. Dr. Brogan diagnosed "emotional stress relating to interpersonal problems at work. A June 23, 1989 dispensary permit slip noted appellant felt unable to remain at work that day, but that it was "questionable" as to whether appellant's condition was work related.¹⁵ In a November 20, 1989 note, Dr. Brogan noted appellant's anxiety and his account of Equal Employment Opportunity (EEO) difficulties for the past year and a half, but did not state that appellant was mentally incompetent or had been for any period.¹⁶

In a September 26, 1990 note, Dr. Whitehouse, an attending psychiatrist, noted appellant's depression due to an unspecified "work situation." In a March 20, 1991 report, Dr. Whitehouse noted appellant's account of stress and "frustration resulting from inability to advance at work has caused depression, preoccupation with situation." Dr. Whitehouse indicated that a date of injury was "not applicable," but checked a box indicating that appellant's condition was work related. Dr. Whitehouse diagnosed major depression with "neurovegetative signs," apathy and anhedonia." Dr. Whitehouse did not find appellant mentally incompetent for any period.

Thus, the medical evidence does not establish that appellant was mentally incompetent for work from June 22 to August 8, 1988 or for any period of time.

The Board notes that appellant does not allege and the record does not establish any "exceptional circumstances" within the meaning of section 8122(d)(3),¹⁷ which would permit the Office to excuse appellant's failure to comply with the time limitation.

For the foregoing reasons, the Board finds that appellant's claim was not timely filed in accordance with the three-year time limitation provision of 5 U.S.C. § 8122.

¹⁵ The supervisor's signature on this slip is illegible.

¹⁶ Appellant submitted a copy of an August 24, 1988 discrimination complaint alleging that he sustained emotional stress from an unspecified incident regarding "harassment." The record contains an undated certificate of settlement indicating that appellant was paid \$1,300.00 in a settlement due to an unspecified civil action relating to his federal employment. It is unclear if the two documents pertain to the same incident, or if they relate to the alleged June 22, 1988 incident.

¹⁷ 5 U.S.C. § 8122(d)(3).

The decisions of the Office of Workers' Compensation Programs dated April 17, 1997 and July 12, 1996 are hereby affirmed.¹⁸

Dated, Washington, D.C.
March 16, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁸ The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on May 8, 1997, the only decisions properly before the Board are the July 12, 1996 and April 17, 1997 decisions denying modification. 20 C.F.R. §§ 501.2(c), 501.3(d)(2)