

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARRIET M. JASPER and DEPARTMENT OF THE NAVY, NAVAL
LEGAL SERVICES OFFICE, LEGAL ASSISTANCE DEPARTMENT, Norfolk, VA

*Docket No. 99-1821; Submitted on the Record;
Issued August 24, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant's March 19, 1998 claim for an occupational disease was timely filed pursuant to 5 U.S.C. § 8122(a).

The Board has duly reviewed the case record in this appeal and finds that appellant's March 19, 1998 claim for an occupational disease was untimely filed pursuant to 5 U.S.C. § 8122(a).

On March 19, 1998 appellant, then a 41-year-old legal clerk (notary public), filed a claim for an occupational disease (Form CA-2) assigned number A25-524162 alleging that on September 17, 1993 she first realized that her right shoulder, arm and hand and spine conditions were caused or aggravated by her employment.¹

By decision dated June 19, 1998, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that it was untimely filed. In a July 17, 1998 letter, appellant requested reconsideration of the Office's decision.

In a decision dated July 29, 1998, the Office denied modification of its June 19, 1998 decision.²

In cases of injury on or after September 7, 1974, section 8122(a) of the Federal Employees' Compensation Act states that "an original claim for compensation for disability or

¹ The reverse of the form indicated that appellant was removed from the employing establishment on March 14, 1994 for reasons unrelated to her occupational disease and that she retired on disability effective March 14, 1994, retroactive to October 13, 1993.

² On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision; *see Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1).

death must be filed within three years after the injury or death.”³ Section 8122(b) of the Act 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 the employment and the compensable disability.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

In the present case, appellant indicated on her Form CA-2 that she first became aware that her right shoulder, arm and hand and spine conditions were caused or aggravated by her employment on September 17, 1993. She addressed her employment at the employing establishment from April 1991 until September 1993, stating:

“[M]y job duties caused my body movement (walking, standing, bending, sitting, raising from a sitting to standing position) to be contorted and my body position was always hunched while sitting which caused poor posture which put a strain on my spine and shoulders. This strain and tension on my spine and shoulder muscles caused excruciating pain while in a sedentary position.”

Appellant provided a detailed history of her right shoulder, arm and hand conditions including the dates she received medical treatment beginning on May 27, 1993 from Dr. Florideliza M. McDermott, a Board-certified psychiatrist and neurologist.

In an April 2, 1994 narrative statement, appellant indicated:

“Since my last day of employment was September 17, 1993, the pain in my neck and right shoulder subsided. In June, 1993, the magnetic resonance imaging [scan], electromyogram and blood tests that were administered were normal so I did not know whether I still had the problem with my neck and right shoulder.”

In her March 10, 1998 letter to the Office regarding her claim, appellant noted:

“Symptoms of the occupational disease occurred during the [s]pring of 1993. In April, 1993, the pain became excruciating in my neck, right shoulder and arm. There was partial paralysis in my right arm and hand. Due to the partial paralysis, I had great difficulty writing, grasping, using my right hand, raising my right arm and being in a sedentary position.”

In her request for reconsideration of the Office’s June 19, 1998 decision, appellant listed dates concerning the awareness of her “occupational disease/injury” beginning on April 22, 1993.

³ 5 U.S.C. § 8122(a).

⁴ 5 U.S.C. § 8122(b).

⁵ *Garyleane A. Williams*, 44 ECAB 441 (1993).

Appellant stopped work at the employing establishment on September 17, 1993 and thus, ceased to be exposed to the implicated employment conditions by that date. Further, appellant's statements establish that she believed that there was a relationship between her conditions and her work beginning as early as April 1991 and continuing in April 1993 until she stopped work on September 17, 1993. Therefore, the time limitations began to run on September 17, 1993, appellant's last day of work and exposure to the implicated employment factors. Since appellant did not file a claim until March 19, 1998 her claim was clearly filed outside the three-year time limitation period.

There are no "exceptional circumstances" within the meaning of section 8122(d)(3) of the Act⁶ which would permit the Office to excuse appellant's failure to comply with the time limitation. In seeking to justify her delay in filing a claim, appellant asserted that she was mentally incompetent due to her emotional condition and that her delay in filing her claim should be excused.⁷ In her April 2, 1994 narrative statement, appellant provided that from September 1993 until approximately June 1997 she was very ill and that she was on medication and hospitalized due to her depression, stress and anxiety. Appellant stated:

"During the past four years, I have not been able to compose my thoughts on paper, my thinking was distorted and the inability to focus for any period of time. I was unable to think about events that occurred on my former job at [the employing establishment], etc. due to it causing a setback for me."

* * *

"It has been very difficult for me to analyze information, compile information, compose letters, put thoughts on paper, nor was I able to communicate effectively in writing or orally from 1993 to 1996 due to many medications I was taking for different problems that I have been experiencing during the past couple of years. Also, due to the types of mental disabilities I suffer with on a daily basis, it has been extremely hard for me to concentrate and stay focused."

The medical evidence of record, however, demonstrates that appellant's failure to file her claim within the time limitations cannot be excused on the grounds of incompetence.⁸ Although there is evidence that appellant was treated for her emotional condition, there is insufficient medical evidence establishing appellant was incapacitated from filing a claim within the time limitations of the Act. She submitted a November 4, 1994 medical report of Dr. Lisa Zocco, a licensed clinical psychologist, indicating appellant's medical treatment for her depression, anxiety and stress from her workplace. Dr. Zocco, however, did not find any period of disability

⁶ 5 U.S.C. § 8122(d)(3).

⁷ The Office issued a decision on November 7, 1995 denying appellant's claim for an emotional condition assigned number A25-465002 on the grounds that the evidence of record was insufficient to establish that appellant sustained an injury in the performance of duty. By decision dated August 29, 1996, the Office denied modification of its November 7, 1995 decision.

⁸ 5 U.S.C. § 8122(d)(2).

due to mental incompetence. Thus, the medical evidence does not establish that appellant was mentally incompetent during the period September 1993 until approximately June 1997 or for any period of time prior to the filing of her claim.

Appellant also contended that her failure to file a timely claim was due to discrimination by her supervisor based on her disability and that she felt compelled by her supervisor to not file another claim. The record contains no evidence supporting this assertion.⁹

Lastly, appellant contended that in December 1997 she called the Department of Labor to inquire about filing a claim and “I was told that it was three years. I was unaware that the time frame for filing a claim for an ‘occupational disease/injury’ was three (3) years.” The Board finds that this contention is tantamount to ignorance of the law, which provides no basis for tolling the time limitations.¹⁰

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.⁵ Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days.

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. In her July 17, 1998 letter, appellant contended that her supervisor approved her request for sick leave and that she told her supervisor the reason why she was seeking medical treatment. There is no evidence of record indicating that appellant’s immediate supervisor had actual knowledge or written notice of her injury within 30 days. Thus, appellant has failed to establish that she filed a timely claim on March 19, 1998.

⁹ The Board notes that the Office in its November 7, 1995 decision found that appellant had failed to establish that she was discriminated against by her supervisor due to her injury.

¹⁰ *Charlene B. Fenton*, 36 ECAB 151 (1984); 5 U.S.C. § 8122(d)(2).

The May 11 and July 29, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
August 24, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member