

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SHERMAN L. SMITH and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Memphis, TN

*Docket No. 98-1337; Submitted on the Record;  
Issued January 6, 2000*

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DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's April 6, 1997 claim for an occupational disease was untimely filed pursuant to 5 U.S.C. § 8122(a).

The Board has duly reviewed the case record in this appeal and finds that the Office properly determined that appellant's April 6, 1997 claim for an occupational disease was untimely filed pursuant to 5 U.S.C. § 8122(a).

On April 6, 1997 appellant, then a 45-year-old nursing assistant, filed a claim for an occupational disease (Form CA-2) alleging that he first became aware of his emotional condition on March 20, 1997. He also alleged that he first realized that his emotional condition was caused or aggravated by his employment on September 27, 1978. Appellant stated that a patient in his ward was dying due to a disease in his urine. He also stated that two employees became sick and one employee died. Appellant then stated that he was afraid, but that he needed to work. He explained that one day urine got into his eye and that he became scared until he lost it all. Appellant further explained that one night someone had taken the urine attachment off his patients and that he ran home. He then explained that he called in sick and became crazy. Appellant stated that the head nurse sent him to a psychiatric examination. Appellant was removed from the employing establishment effective July 30, 1979.

By decision dated May 20, 1997, the Office denied appellant's claim on the grounds that it was untimely filed. In an undated letter received by the Office on June 5, 1997, appellant requested reconsideration of the Office's decision.

By decision dated February 25, 1998, the Office denied appellant's request for modification based on a merit review of the claim.<sup>1</sup>

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<sup>1</sup> The Board notes that subsequent to the Office's February 25, 1998 decision, appellant submitted additional

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 death must be filed within three years after the injury or death."<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

In this case, appellant stated on his Form CA-2 that he became aware that his emotional condition was caused by his employment on September 27, 1978. The record reveals that appellant was terminated from the employing establishment effective July 30, 1979. As this was the date of last exposure, the three-year time limitation began to run on this date. Appellant did not file his claim until April 6, 1997, which is clearly beyond the three-year time limitation period.

In seeking to justify his delay in filing a claim, appellant, in his Form CA-2, described an incident at work where he was accused of patient abuse because he was told by Gladys Harmon, an employing establishment head nurse, to clean the patient's penis and the patient stated that he was abused by him. Appellant stated that this occurred after an examination and that he was not told anything by the physician, that he was on medication and then dismissed by the employing establishment. Further, appellant submitted a May 24, 1997 narrative statement revealing that he did not report his condition because he was never given a written report. Additionally, in his request for reconsideration, appellant stated that he was not aware of his emotional condition until March 1997 when he received his medical records from the employing establishment. The Board finds that appellant's contentions are tantamount to ignorance of the law, which provides no basis for tolling the time limitations.<sup>5</sup>

Although not filed within the three-year time limitation period, appellant's claim would be regarded as timely under section 8122 if his 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.<sup>6</sup> Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days.

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factual and medical evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision; *see* 20 C.F.R. § 501.2(c)(1).

<sup>2</sup> 5 U.S.C. § 8122(a).

<sup>3</sup> 5 U.S.C. § 8122(b).

<sup>4</sup> *Garyleane A. Williams*, 44 ECAB 441 (1993).

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

<sup>6</sup> 5 U.S.C. § 8122(a)(1).

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 his Form CA-2, appellant indicated that Betty Boyle was his immediate supervisor and that she had retired from the employing establishment. Appellant failed to provide any evidence from Ms. Boyle indicating that she had actual knowledge of his alleged employment-related emotional condition. Although appellant submitted the September 1978 medical treatment notes of an employing establishment physician, whose signature is illegible, revealing a diagnosis of low grade anxiety reaction ruling out paranoid schizophrenic and the October 3, 1978 treatment notes of an employing establishment physician, indicating appellant's failure to keep appointments for psychological testing, the Board finds that this evidence did not address whether appellant's emotional condition was employment related. Inasmuch as there is no evidence that the employing establishment had any actual or written notice of appellant's injury within 30 days, appellant has not established that he timely filed his claim for compensation within the applicable time limitations of the Act.<sup>7</sup>

The February 25, 1998 and May 20, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.  
January 6, 2000

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>7</sup> *Charlene B. Fenton, supra* note 5.