U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES E. FITZROY and U.S. POSTAL SERVICE,
POST OFFICE, Harrisburg, PA

Docket No. 00-370; Submitted on the Record;
Issued April 30, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant's claim was timely filed within the applicable time limitation provisions of the Federal Employees' Compensation Act.[1]

On May 25, 1996 appellant filed an occupational disease claim alleging that his preexisting post-traumatic stress disorder was aggravated by letter sorting duties and night work. He stated that he first became aware of his post-traumatic stress disorder in August 1981 and of the possible relationship of his condition to his job at the employing establishment in July 1995.

In a statement of disability filed by appellant on January 19, 1984, appellant related that he had post-traumatic stress disorder, which made it impossible for him to sleep, concentrate, or deal with people and caused frequent absences from work. He stated:

> "All of the symptoms of the condition would apply to any position available in the [employing establishment], giving the same result -- illness and absenteeism. Through the bid system, I got a job that seemed ideal. I worked by myself, in a busy one-person section. My disability was only temporarily controlled. It came back worse."

In an application for retirement dated July 15, 1986, appellant stated that his service-related post-traumatic stress disorder was making it difficult for him to work. He stated:

> "Post-traumatic stress disorder, a combat service-connected nervous condition, gives chronic problems with sleep, concentration and 'severe' social and industrial impairment, *i.e.*, severe depression, anxiety, flashbacks, fatigue and short-term memory loss. These symptoms caused increasingly longer absences from work and eventual long-term hospitalization. With my doctor's concurrence

[1] 5 U.S.C. §§ 8101-8193.

> I decided that upon release from the hospital I should resign … an d enroll in a VA [Veterans Administration] vocational rehabilitation program in order to develop skills in a job that would be less harmful to me….
>
> "The noise level and stress producing effects of the letter sorting machines led me to bid for a lower paying manual sorting job that offered relief briefly. The ennui of hand-sorting thousands of pieces per shift and the enforced 'no talking' rules aggravated the existing flashback problems and the 'intrusive thoughts' symptoms to the point of hospitalization. My treating physician … agreed that a complete change of career was called for.
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> "Throughout my tenure with the [employing establishment] I used the bid and transfer systems to try to find a niche in which I could function without aggravating an already serious problem. I transferred to a quieter office … it helped for awhile. With seniority I was able to bid a job off the machines, it helped for awhile."

In a report dated July 16, 1986, Dr. F.A. Rescan related that appellant disliked employing establishment rules and the noisy mail sorting machines and left his job in 1983.

In a letter dated September 10, 1996, an employing establishment human resources specialist stated that appellant was employed from October 20, 1979 to March 17, 1983 and was off work numerous times because of his service-connected disability.

In a letter dated November 20, 1996, an employing establishment injury compensation specialist stated that because appellant claimed to have developed his condition in 1981, the employing establishment could not locate a supervisor, who remembered appellant. The specialist stated that appellant's work records contained no requests from treating physicians to remove him from the letter sorting machine environment and submitted three letters from physicians dated April 19, May 6 and May 21, 1982 returning appellant to duty without restrictions.

By decision dated January 27, 1997, the Office of Workers' Compensation Programs denied appellant's claim for an emotional condition on the grounds that appellant had failed to establish that his condition was causally related to compensable factors of his employment.

Appellant submitted a written statement regarding his allegations and requested an oral hearing, which was held on September 17, 1997.

At the hearing appellant testified that in July 1981 he was granted a service-related disability rating of 50 percent for his post-traumatic stress disorder, which was later increased to 100 percent. In answer to his attorney's question as to whether his job at the employing

establishment aggravated his post-traumatic stress disorder, he testified:

> "Well, yeah. The job -- would aggravate the condition…once this thing started … it's -- it took on a life of its own. It … just grew and grew and it was kind of an accomplished fact before I even realized that this was going on….
>
> "And yes, having to go back to work, even though they took me off the machines and put me in -- well, I had been off the machines and got a manual job distribution and in a lot of ways that was ideal because I worked alone and I had a lot of work to do and I just stayed busy for eight hours. But in another way it was not good because during that time nobody would bother me … and probably … because of that, I was isolated even more. It was better than being right next to that noise all the time…."
>
> * * *
>
> "One of the psychologists I was seeing while I was [hospitalized].... Well, let's try and get you off nights for awhile and work the day shift…that did not work because … there is n[o]t any work to do on the day shift and I need something to keep me constantly busy."
>
> His attorney questioned him about his retirement application:
>
> "Q: I am going to show you an application that you made … dated July 15, 1986, and the basis … at that time for your retirement disability was that you were suffering from post-traumatic stress disorder and that you could not work, is that right?
>
> "A: Yes
>
> "Q: And you indicate at paragraph six, 'The noise level and stress-producing effects of the letter sorting machine led me to bid for a lower paying manual sorting job that offered relief briefly.'… And then you indicated that you are … hand-sorting thousands of pieces of paperwork, but then the no-talking rules aggravated your existing flashback problems and intrusive thoughts. Is that a fair assessment of the circumstances you were dealing with at the time you left work from the [employing establishment]?
>
> "Yeah.…"
>
> * * *
>
> "Q: Now, this claim was not filed until more recently for compensation benefits and can you tell us why there was no connection drawn between your disability and your job prior to this claim … did any doctor tell you that they thought your job at the [employing establishment] was aggravating your [post-traumatic stress disorder]?

"A: Well, yeah. But … I would not say that they … were telling me that it was aggravating the [post-traumatic stress disorder], but I guess I would assume that that's what they meant -- you want to get out of this kind of work. You do n[o]t want to work nights, you do n[o]t want to work under these stressful conditions.…"

By decision dated April 24, 1998, the Office hearing representative found that appellant had identified two compensable factors of employment -- that he was exposed to noise from the letter sorting machine and that he worked in isolation on the night shift, which put him in a trance-like state and brought back memories of combat. He remanded the case for consideration of the medical evidence.

By decision dated August 31, 1998, the Office denied appellant's claim on the grounds that it was not timely filed under section 8122 of the Act. The Office determined that appellant was aware or reasonably should have been aware of a possible relationship between his emotional condition and his employment as early as July 1986 when he filed for disability retirement. The Office also found that there was no evidence that appellant's immediate superior had actual knowledge of his condition within 30 days of the development of the injury.

Appellant requested an oral hearing, which was held on March 24, 1999.

By decision dated July 7, 1999, the Office hearing representative affirmed the Office's August 31, 1998 decision on the grounds that appellant's claim was not timely filed. The hearing representative found that appellant became aware that his condition was caused or aggravated by his employment on January 19, 1984 when he completed his statement of disability prior to filing for disability retirement in 1986. The hearing representative stated that there was no evidence that the employing establishment received actual timely knowledge of appellant's claimed employment-related condition within 30 days of appellant's last exposure to the implicated employment factors on March 1983.[2]

The Board finds that appellant's claim was not timely filed within the applicable time limitation provisions of the Act.

Section 8122(a) of the Act provides that, "An original claim for compensation for disability or death must be filed within three years after the injury or death."[3] Section 8122(b) 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 his employment and the compensable disability.[4] The Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.[5] If an employee continues to be exposed to injurious

[2] The Office hearing representative noted that appellant had not argued that his delay in filing his claim was due to any exception to the three-year limitation period.

[3] 5 U.S.C. § 8122(a); *see also George M. Dickerson*, 34 ECAB 135 (1982).

[4] 5 U.S.C. § 8122(b).

working conditions after such awareness, the time limitation begins to run on the last date of this exposure.[6]

In this case, the evidence establishes that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment and the aggravation of his post-traumatic stress disorder prior to March 25, 1996, when he filed his compensation claim. Appellant's statements in his July 15, 1986 application for disability retirement establish this awareness. He stated then that the noise level of the LSMs caused him to bid for a lower-paying, manual sorting job that offered relief briefly. Appellant claimed that the boredom of hand-sorting thousands of pieces of mail and the no-talking rules aggravated his post-traumatic stress-disorder flashback problems to the point of hospitalization. He noted that his treating physician agreed that he needed a change of career and added that throughout his time working at the employing establishment, he tried to find a job which he could perform without aggravating his post-traumatic stress disorder.

Appellant's testimony at the September 17, 1997 hearing, that his night work and the noise from the letter sorting machine aggravated his condition, reinforces the fact that he was aware, almost ten years prior to filing his claim on March 25, 1996, that his preexisting post-traumatic stress disorder was aggravated by employment factors. While appellant indicated in his claim form that he did not know of the relationship of his condition to his employment until July 1995, his statements in his 1986 disability retirement application and his testimony at the September 17, 1997 hearing completely refute this allegation.

The Board finds that appellant should have reasonably been aware that his post-traumatic stress disorder was caused or aggravated by his employment by July 15, 1986, when he completed his retirement application. Since appellant did not file his claim until March 25, 1996, his claim is clearly outside the three-year time limitation and is, therefore, untimely.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate superior had actual knowledge of the alleged employment-related injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of appellant's injury. An employee must not only show that his immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.[7]

There is no evidence of record that appellant's immediate superior had actual knowledge of a relationship between appellant's post-traumatic stress disorder and factors of his employment within 30 days of the date of injury.

Consequently, appellant's claim was not timely filed pursuant to 5 U.S.C. § 8122.

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[5] *Edward Lewis Maslowski*, 42 ECAB 839, 846 (1991).

[6] *Garyleane A. Williams*, 44 ECAB 441, 449 (1993); *William D. Goldsberry*, 32 ECAB 536, 540 (1981).

[7] 5 U.S.C. § 8122(a)(1); *see also Wanda H. Rheal*, 46 ECAB 352, 355 (1994); *Jose Salaz*, 41 ECAB 743, 746 (1990).

Appellant contends that the Office did not timely raise the issue of whether he had filed his claim within the applicable limitations. In its April 24, 1998 decision, the Office found that appellant had identified two compensable factors of employment and remanded the case for development of the medical evidence. However, upon further review of the case, the Office determined that appellant's claim was not timely filed and denied his claim on that basis.

In *Eli Jacobs*,[8] the Board upheld the Office's authority to reopen a claim at any time under the review power granted by section 8128(a) of the Act. This section vests the Office with the discretionary authority to review a claim at any time on its own motion or on any application by a claimant. The Board held that the Office's review power under section 8128(a) was not limited to reconsideration of final decisions, which awarded, terminated, increased or decreased compensation. The Board stated, in relevant part, "whether the claim has resulted in an award of compensation or involves a final decision on a preliminary issue -- such as whether the claim was timely filed -- is irrelevant; no claim is immune from review under section 8128."[9] Therefore, appellant's contention that the Office did not timely raise the issue of whether his claim was timely filed is without merit.

[8] 32 ECAB 1147 (1981).

[9] *Id*. at 1151.

The July 7, 1999 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Dated, Washington, DC
April 30, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member