

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBRA YOUNG BRUCE and FEDERAL DEPOSIT INSURANCE CORPORATION, RESOLUTION TRUST CORPORATION, WESTERN REGION,
Newport Beach, CA

*Docket No. 00-710; Submitted on the Record;
Issued March 16, 2001*

DECISION and ORDER

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

The issue is whether appellant filed a timely claim for compensation under the three-year time limitation of section 8122 of the Federal Employees' Compensation Act.

This is the second time this case has been before the Board. By decision and order issued February 12, 1998,¹ the Board adopted a November 7, 1997 decision of a hearing representative of the Office of Workers' Compensation Programs, finding that appellant had not filed her claim within the Act's three-year time limitation.

The pertinent facts of the case are as follows. Appellant stopped work at the employing establishment on March 15, 1991, the last day she could have been exposed to the employment factors of driving, air travel and heavy lifting alleged to have caused a herniated cervical disc, back problems and various other musculoskeletal conditions.² The Board found that the three-year time limitation under section 8122 of the Act began on March 15, 1991, and ended on March 14, 1994. Appellant signed a notice of occupational disease and claim for compensation on February 23, 1994, which was not filed by the employing establishment until April 26, 1994. The Board found that the April 26, 1994 date was beyond the three-year period ending March 14, 1994. The law and facts of the case as set forth in the Board's decision and order are hereby incorporated by reference.

In September 30 and November 17, 1998 letters, appellant requested reconsideration. She asserted that she filed her claim before the end of February 1994 and that it was therefore timely. As proof of this assertion, she attached photocopies of a certified-mail receipt for an

¹ Docket No. 96-845.

² Appellant also alleged that she sustained an anxiety disorder, agoraphobia and gastric ulcers due to her job requirements, in particular long distance driving.

item mailed to the employing establishment on February 24, 1994, and a return receipt card showing that the same item was received by the employing establishment on February 28, 1994.³

By decision dated December 2, 1998, the Office denied modification of the prior decision on the grounds that the evidence submitted was insufficient to warrant such modification. The Office accepted that the postal receipts established that the employing establishment received her claim form on February 28, 1994, and that the requirement to file a claim within three years pertained to appellant and not the employing establishment. The Office therefore indicated that the date of filing should be construed as February 28, 1994. The Office found, however, that the March 15, 1991 date for beginning the three-year time period appeared “to be an arbitrary date, chosen because it was the last date of employment.” The Office noted the Board’s reference to appellant’s April 5, 1994 statement in which she recalled that, on approximately April 11, 1990, an emergency room physician diagnosed a left shoulder strain, which he attributed to appellant driving.⁴ The Office therefore found that appellant “should reasonably have had knowledge of the relationship of her condition to employment well in advance of either the date of her submission of the [claim form] or [March 15, 1991], having undergone surgery to correct the [herniated disc] in September 1990.” The Office therefore concluded that appellant had not filed either within three years “of knowledge of a relationship of the condition to employment factors or within three years of the last exposure.”

The Board finds that appellant has established that she filed a timely claim for compensation under the three-year time limitation of section 8122 of the Act.

Section 8122 of the Act⁵ states, in pertinent part, that an “original claim for compensation for disability or death must be filed within three years after the injury or death.”⁶ The three-year time period begins to run from the time “the employee is aware, or by the exercise of reasonable diligence should have been aware, that his condition is causally related to this employment....”⁷ It is a well-settled principle of federal workers’ compensation law that if an employee continues to be exposed to injurious working conditions, the time limitation begins to run on the last date of this exposure.⁸

The Board concurs with the Office’s finding that the employing establishment received appellant’s claim form on February 28, 1994 and that the requirement to file a claim within three

³ In a February 19, 1998 letter to her congressional representative, appellant asserted that she was “not aware that [her] condition was work related until January 1994” and that she filed a notice of occupational disease on February 23, 1994, prior to the March 14, 1994 deadline.

⁴ Appellant also sought treatment for symptoms of light-headedness and dizziness while driving in mid April 1990 and was diagnosed with a “phobia against driving” and monitored for possible heart problems.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8122(a).

⁷ 5 U.S.C. § 8122(b).

⁸ *Garyleane A. Williams*, 44 ECAB 441 (1993).

years is appellant's burden and not that of the employing establishment.⁹ The Board therefore deems the date the claim was filed as February 28, 1994.

In its December 2, 1998 decision, the Office found that the March 15, 1991 date that the Office, the Office hearing representative and the Board used as the starting point for the three-year time limitation under section 8122 was "arbitrary," as it was merely the date appellant stopped work. In an April 5, 1994 statement, appellant explained that her position as a managing agent required air travel, driving, and lifting heavy bundles of documents up until March 15, 1991, when she resigned from federal employment. Appellant was thus exposed to the factors alleged to have caused her condition up until March 15, 1991. Therefore, the March 15, 1991 date is not "arbitrary" and remains the correct date from which to calculate the three-year time period.

However, instead of relying on the March 15, 1991 date, the Office found that the proper date for beginning the three-year period was April 11, 1990 as appellant "should reasonably have had knowledge" of the possible causal relationship between her work activities and her physical condition based on treatment by an emergency room physician. Nevertheless, upon further examination, it is clear that the implicated work factors were not considered by the treating physician or raised by appellant in the course of the examination. The April 10, 1990 emergency room report indicates that appellant had left arm and chest symptoms indicative of a myocardial infarction and that she had just begun a liquid diet program. The physician diagnosed a "subacute left shoulder girdle myalgia sprain" of the left intercostal chest wall and did not specify a cause for this diagnosis. This report does not mention driving, travel or lifting either in the portion relating appellant's account of events, or in the physician's observations. Moreover, there is no mention of a herniated cervical disc. Thus, the Board finds that this evidence does not establish that appellant should have had actual knowledge of a possible causal relationship between her work activities and her claimed physical conditions.

Similarly, the Office then attempted, in its December 2, 1998 decision, to regress the tolling date for the three-year time period from March 15, 1991 to September 10, 1990, on the grounds that this was the date appellant provided on her claim form that she first became aware of her neck, shoulder and back condition. However, a careful reading of the claim form demonstrates that appellant did not indicate that she became aware of a possible causal relationship on that date.

In response to Question 12 on the claim form, "Date you first became aware of disease or illness," appellant wrote "September 10, 1990." Clearly, this indicates only that appellant was aware of the presence of the condition. In response to Question 13, "Date you first realized the disease or illness was caused or aggravated by your employment. Explain why you came to this realization," appellant responded "See attached." In an attached February 23, 1994 statement, appellant stated that at a January 3, 1994 hearing pursuant to obtaining benefits under the Social

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Date Claim is Filed*, Chapter 2.801.4(a) (March 1993) provides: "Form CA-1, CA-2, CA-5, CA-5b and CA-7 constitute claims for the purpose of considering the time requirements. The claims examiner must determine whether the claim was received by the Office or the employing agency within the time specified in paragraph 3..."

Security Act, a “vocational expert” recommended that appellant determine if her claimed disability could be related to her federal employment. Appellant explained that, following the hearing, she “researched this situation with [her] doctors and realized not only did [her] job activities aggravate [her] condition but [were] also the cause of [her] condition.” Thus, the claim form and its attachments demonstrate that appellant was not aware of a possible causal relationship between employment factors and the claimed conditions until sometime between the January 3, 1994 hearing and her filling out the claim form on February 23, 1994, prior to the end of the three-year time period on March 14, 1994.

As appellant has filed a timely claim for compensation, the case will be remanded to the Office for further review the medical record. On return of the case, the Office shall conduct appropriate development to determine whether appellant sustained the claimed conditions in the performance of duty. Following this development, the Office shall issue a *de novo* decision in the case.

The decision of the Office of Workers’ Compensation Programs dated December 2, 1998 is hereby reversed and the case remanded to the Office for further development consistent with this decision and order.

Dated, Washington, DC
March 16, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member