

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARRY LUNDY and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 01-682; Submitted on the Record;
Issued November 13, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's compensation claim on the grounds that he did not establish that his claim was filed within the applicable time limitation provisions of the Federal Employees' Compensation Act.

On November 7, 1999 appellant, then a 49-year-old equipment cleaner, filed a notice of occupational disease and claim for compensation, alleging that he had degenerative joint disease in both knees causally related to factors of his federal employment. He indicated on his CA-2 form that he cleaned tanks for 21 years and was required to work on his knees for 75 percent of the time. He stated that he first became aware of his knee condition in 1974 but did not realize it was work related until September 2, 1999. Appellant last worked for the employing establishment in April 1995, when he was laid off from his job. He later worked in the private sector as a school bus driver.

In a narrative statement dated November 7, 1999 that was attached to his CA-2 claim form, appellant stated as follows:

"My knees first started to bother me eight years ago. In the wintertime they bothered me but I thought that it was from hitting my knees against the tanks that I was cleaning so I thought that the pain would go away. In the summer months the pain would go away sometimes, but this summer the pain stayed and wouldn't go away so I went to my [physician] a knee specialist and he diagnosed me as having degenerative joint disease in both of my knees, which I need to have surgery on both knees."

In a report dated September 2, 1999, Dr. Paul A. Marchetto, a Board-certified orthopedic surgeon, noted that appellant was seen for evaluation of bilateral posterior and medial knee pain "which has been constant for the last three months previously being intermittent." He described appellant's symptoms of knee swelling and giving away. Dr. Marchetto also reported physical findings.

In a decision dated February 28, 2000, the Office denied compensation on the grounds that appellant did not file a timely claim for compensation.

On March 12, 2000 appellant requested an oral hearing.

In a June 5, 2000 report, Dr. Marchetto advised that appellant had been under his care since September 2, 1999, for treatment of degenerative joint disease in both knees, for which appellant had undergone arthroscopic left knee surgery on December 12, 1999. Dr. Marchetto indicated that the surgery also revealed a medial meniscus tear along the chondral lesion of the medial femoral condyle; therefore, a partial medial meniscectomy was performed. He stated that appellant's bilateral knee condition was caused by extended kneeling and squatting that appellant performed for so many years as an equipment cleaner.

A hearing was held on July 18, 2000. Appellant testified that after he left his federal employment, during the period of 1995 to 1999, he continued to have knee pain that he attributed to arthritis. He stated that he had seen several physicians during that same period who told him his knee pain was related to arthritis and that there was nothing they could do for him. He testified that the pain became constant in August 2000, prompting him to see an orthopedic specialist. Appellant indicated that he inquired of Dr. Marchetto as to the etiology of his condition and whether it could be related to his history of 21 years of crawling on his knees cleaning tanks. When asked whether he had ever informed his supervisor of his knee problems, appellant stated that he had not really mentioned it.

In a decision dated October 4, 2000 and finalized on October 10, 2000, an Office hearing representative affirmed the Office's February 28, 2000 decision.

The Board has carefully reviewed the case record on appeal and finds that appellant's compensation claim for an occupational disease was not filed within the applicable time limitation provisions of the Act.

Section 8122(a) of the Act¹ provides that a claim for disability or death must be filed within three years after the injury or death. Section 8122(b) provides that the time for filing in latent disability cases such as this case 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.² 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.³

The record establishes that appellant experienced knee pain and was last exposed to the factors alleged to have caused his bilateral degenerative knee condition during April 1995. Appellant, however, did not file his claim for compensation until November 7, 1999. He alleges that he first was informed of the causal relationship between his knee symptoms and the duties of

¹ 5.U.S.C. § 8122(a); *see* 20 C.F.R. § 10.101(b) (1999).

² 5 U.S.C. § 8122(b); *see* 20 C.F.R. § 10.101(c) (1999).

³ *Willis E. Bailey*, 49 ECAB 511 (1998).

his job as an equipment cleaner by Dr. Marchetto on September 2, 1999. The Board notes that there is no medical documentation of record to show that appellant was treated for knee symptoms while he was employed or prior to November 7, 1999. Although appellant testified that he was told by several doctors he had arthritis during the period from 1995 to 1999, he did not provide corroborating medical evidence to address the nature of his treatment during that time frame. It is appellant's contention that he always thought his knee problems were related to arthritis and did not become aware that his symptoms were due to his work duties until September 2, 1999.

The Board has held that when an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his employment, such awareness is competent to start the running of the time limitations period even though he does not know the precise nature of the impairment or whether the ultimate result of such adverse effect would be temporary or permanent.⁴ 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 his knee symptoms as early as 1994. He stated in his narrative statement dated November 7, 1999 that on or about 1994 he first developed the onset of knee pain he attributed to either a work injury or arthritis. If appellant sought medical treatment during 1994, he did not inform the physician of the nature of his work or that he was required to spend so much time on his knees. Yet he knew to ask about causal relationship when he went to his first medical appointment with Dr. Marchetto. Appellant even testified that he came to suspect over the course of the months leading up to the September 2, 1999 evaluation that his knee problems were not just due to arthritis. The Board concludes that given appellant's continuing knee problems and his acknowledgment during 1994 to 1995 that he considered whether or not his knee pain was due to a work injury, appellant with the exercise of due diligence should have known of the causal connection between his diagnosed condition and factors of his employment.⁵ Accordingly, the Board concludes that appellant's claim for compensation on November 7, 1999 was not timely filed within the applicable time limitation provision of the Act.

Although appellant's claim for compensation was not timely filed within the three-year limitation provision, appellant's claim would be regarded as timely if appellant's "immediate superior had actual knowledge of the injury or death 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." Mere knowledge that the employee has a physical condition is not sufficient to satisfy the requirements of the statute; it must also be shown that there were other circumstances, which put the supervisor on notice that the condition was related to employment or that the employee attributed the condition to her employment.

In this case, there is no evidence in the record that indicates that appellant's supervisor had actual knowledge of the injury within 30 days or that written notice of the injury was given

⁴ See *Edward L. Maslowski*, 42 ECAB 839 (1991); *Percy E. Rouse*, 26 ECAB 214 (1974).

⁵ At the very least his statements suggest an awareness that his work duties were aggravating a preexisting condition of arthritis.

within 30 days. Appellant specifically testified at the hearing that he did not inform his supervisor of his knee symptoms.

The February 28, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 13, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member