U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARCELINO DELGADO and DEPARTMENT OF AGRICULTURE, ANIMAL & PLANT HEALTH INSPECTION SERVICE, Miami, FL

Docket No. 00-1225; Submitted on the Record;
Issued October 2, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant's claim for depression was timely filed.

On May 29, 1998 appellant, then 62 years old, filed a claim for depression that he attributed to stressful working conditions in his employment as an investigator. On his claim form appellant indicated that he first became aware of his disease on June 11, 1992 and first realized that it was caused or aggravated by his employment on April 12, 1995. Appellant worked at the employing establishment from July 14, 1991 to July 13, 1992.

In response to an inquiry from the Office of Workers' Compensation Programs, appellant stated, in a September 16, 1998 statement, "I did not know that my condition was job related until I visited a physician and I told him about my employment environment and incidents with the sector supervisor."

By decision dated October 30, 1998, the Office found that appellant's claim filed on May 29, 1998 was not filed within the three-year time limitation set forth in the Federal Employees' Compensation Act. Appellant requested a hearing, which was held on May 5, 1999. Appellant testified that on April 25, 1995, he mailed a letter and a claim form to his former immediate supervisor at the employing establishment. Appellant submitted a copy of an Office Form CA-2, titled "Notice of Occupational Disease and Claim for Compensation," which was dated April 25, 1995. This was a claim for depression due to stressful working conditions as an investigator. He had previously submitted a copy of an April 25, 1995 statement describing stressful conditions of his employment.

By decision dated June 16, 1999, an Office hearing representative found "the claimant to be credible in that he completed Form CA-2 on April 25, 1995 and mailed it to his employer, however, I do not find any factual evidence which establishes the agency received the CA-2. Therefore, absent factual evidence establishing the agency received the April 25, 1995 Form CA-2, timely filing of his notice cannot be considered to have occurred…."

By letter dated November 9, 1999, appellant requested reconsideration and submitted additional evidence. By decision dated December 1, 1999, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions.

The Board finds that appellant's claim for depression was not timely filed.

Section 8122(b) of the Act provides:

> "In a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment. In such a case, the time for giving notice of injury begins to run when the employee is aware, or by the exercise of reasonable diligence should have been aware, that his condition is causally related to his employment, whether or not there is a compensable disability."

On his claim forms, appellant indicated that he first realized his disease was caused or aggravated by his employment on April 12, 1995. However, in response to an Office inquiry, appellant stated that he first became aware that his condition was related to his employment when he "visited a physician and I told him about my employment environment and incidents with the sector supervisor." A medical report from Dr. Robert A. Schamberger shows that this visit occurred on July 11, 1992. In a report of that date, Dr. Schamberger noted that appellant's epigastric discomfort and tightening across the chest occurred "primarily whenever he reflects on incidents that have been developing w[ith] his supervisor over the last several w[ee]ks; he relates incidents in which he apparently took some action which was approved by his immediate supervisor but met w[ith] the displeasure of his regional supervisor and that subsequent to that time he has been threatened w[ith] poor job reviews and job terminations." He diagnosed anxiety disorder with secondary stress gastritis, for which he prescribed medications. In a report dated August 30, 1998, Dr. Schamberger noted that appellant was diagnosed with stress-related symptoms on July 11, 1992. This evidence is sufficient to establish that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between his emotional condition and his employment by July 11, 1992. As appellant continued to be exposed to the employment factors to which he attributed his condition until July 13, 1992, when his employment was terminated, the time for filing a claim and giving notice of injury began to run on July 13, 1992.[1]

On appeal, appellant's attorney contends, as he did before the Office, that appellant's mailing of a claim form and letter to appellant's supervisor on April 25, 1995 constituted timely filing of his claim. The Board finds that the evidence does not establish that appellant mailed a claim form to his supervisor on April 25, 1995.

[1] In situations where an employee continues to be exposed to injurious working conditions after awareness of causal relationship, the time limitation begins to run on the last date of this exposure. *Garyleane A. Williams*, 44 ECAB 441 (1993).

Section 8122(a) of the Act[2] provides:

"An original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation for disability or death, including medical care in disability cases, may not be allowed if claim is not filed within that time unless --

> (1) the immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury or death; or
>
> (2) written notice of injury or death as specified in section 8119 of this title was given within 30 days."

Section 8121 of the Act[3] provides in pertinent part:

"Compensation under this subchapter may be allowed only if an individual or someone on his behalf makes claim therefor. The claim shall --

> (1) be made in writing within the time specified by section 8122 of this title;
>
> (2) be delivered to the office of the Secretary of Labor or to an individual whom the Secretary may designate by regulation, or deposited in the mail properly stamped and addressed to the Secretary or his designee…."

Section 8119 of the Act[4] provides:

"An employee injured in the performance of his duty, or someone on his behalf, shall give notice thereof. Notice of a death believed to be related to the employment shall be given by an eligible beneficiary specified in section 8133 of this title, or someone on his behalf. A notice of injury or death shall --

> (a) be given within 30 days after the injury or death;
>
> (b) be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed;
>
> (c) be in writing…."

These sections of the Act distinguish between a "claim," which must be filed with the Secretary of Labor or the Secretary's designee, pursuant to section 8122(a) and a written notice

[2] 5 U.S.C. § 8122(a).

[3] 5 U.S.C. § 8121.

[4] 5 U.S.C. § 8119.

of injury, which is delivered to the immediate supervisor pursuant to section 8119. The Office's regulations also make this distinction, with section 10.101[5] stating that a written notice of an occupational disease must be given no later than 30 days after the employee becomes aware of a possible relation between the disease and the employment and section 10.105[6] stating that a claim for compensation must be filed within 3 years after the injury, but "if written notice was given within 30 days, compensation may be allowed regardless of whether a written claim was made within 3 years after the injury."

The Office, through its procedure manual, has expanded the category of approved designees under section 8122(a) to include the employing agency. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.4 (March 1993) provides that the date of filing "is the date of receipt of a claim by the OWCP or by the employing agency, rather than the date the claim was completed."

There is no evidence that the employing establishment received a claim for compensation within three years of July 13, 1992, the date that appellant's time for filing a claim and giving notice of injury began to run. With respect to the issue of receipt, the Board has held that in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption has often worked in favor of the Office when a properly addressed copy appears in the case record and the claimant denies receipt. In such cases, it is the appearance of the properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, that raises the presumption that the original was received by the addressee. As a rule of law, the presumption of receipt under the mailbox rule must apply equally to claimants and the Office alike. Provided that the conditions which give rise to the presumption remain the same, namely, evidence of a properly addressed letter together with evidence of proper mailing, the mailbox rule may be used to establish receipt by the Office.[7]

In this case, with regard to his alleged April 15, 1995 mailing of an Office Form CA-2 to the employing establishment, appellant has not shown a mailing custom or practice. As this element is essential to give rise to the presumption that a letter mail in the ordinary course of business was received, appellant cannot take advantage of the mailbox rule to establish timely filing of his claim. Appellant does not allege and there is no evidence to show, that he gave written notice to his immediate supervisor within 30 days of July 13, 1992, or that his immediate supervisor had actual knowledge of an employment-related condition within 30 days of July 13, 1992.

[5] 20 C.F.R. § 10.101.

[6] 20 C.F.R. § 10.105.

[7] *Larry L. Hill*, 42 ECAB 596 (1991).

The December 1 and June 16, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 2, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member