United States Department of Labor
Employees' Compensation Appeals Board

DAVID R. MOREY, Appellant	)	
and	)	**Docket No. 04-967**
	)	**Issued: August 16, 2004**
DEPARTMENT OF THE ARMY, ARMY NATIONAL GUARD, Wichita, KS, Employer	)	

Appearances:
David R. Morey, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 2, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated December 3, 2003, which denied his heart disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant filed a timely claim for compensation under the Federal Employees' Compensation Act.

FACTUAL HISTORY

On September 27, 2003 appellant, then a 57-year-old retired support services specialist, filed an occupational disease claim alleging that stressful factors of his federal employment caused chest pain and arm numbness. He stated that he was first aware of the condition in 1986 and its relationship to his employment on May 26, 1993. The claim form contained the first page only. Appellant retired effective August 31, 1999.

Appellant submitted medical reports concerning a hospitalization in May 1993 and a narrative statement in which he indicated that his many heart-related problems "manifested themselves" during his period of federal employment. He stated that he was also submitting 5 CA-2a, recurrence of disability claims,[1] for events that took place on January 25, 1994, March 10, April 10, June 25 and October 9, 1998. Appellant asserted that he sustained chest pain and arm numbness while at work on May 26, 1993 and returned to work on June 3, 1996. In a separate statement, he advised that he did not get along with three of his former supervisors, Staff Sergeant Lowell Thomas Gaulding, Jr., Captain Ronald Jay Muhasky and Master Sergeant Rodney Dale Rogers.

By letter dated October 15, 2003, the Office advised appellant that the evidence submitted was insufficient to establish his claim and requested that he submit additional factual and medical evidence. In a second letter dated October 15, 2003, the Office requested that the employing establishment provide information regarding appellant's job duties and his retirement.

In an October 22, 2003 letter, the employing establishment controverted the claim and advised that at no time had appellant contacted the employing establishment or supervisors regarding his employment. The employing establishment stated that appellant initially retired on August 31, 1999 with a $25,000.00 early out incentive at which time he did not mention problems with his job or supervisors, that he wanted to file a workers' compensation claim or that his heart condition was employment related. The employing establishment indicated that, in February 2001, his retirement was changed to a disability retirement and attached an Office of Personnel Management (OPM) Form 50 regarding appellant's August 31, 1999 retirement and his job description as a support services specialist. In a response dated October 23, 2003, Colonel David J. Wheeler, administrative officer, described appellant's work history. He stated that appellant never told him he was experiencing stress or that he was having problems with his job or supervisors. Col. Wheeler opined that any stress was due to appellant's poor performance and reported that he had a repeated pattern of not getting along with supervisors.

Appellant submitted additional evidence[2] and, in a statement dated October 30, 2003, he contended that he was forced to retire and received no assistance from the employing establishment regarding a disability retirement. He reiterated that his supervisors knew each time he was hospitalized and were, therefore, aware of his condition and stated that he currently received Social Security Administration (SSA) disability and that he was seeking coverage under Public Law 106-419. Appellant reported that he had a heart attack on November 1, 2000 and again indicated that his supervisors should have filed claims for his cardiac condition.

On November 6, 2003 appellant submitted 5 CA-1 forms, traumatic injury claims for treatment and/or hospitalizations that occurred on the following dates: May 26, 1993, January 25, 1994, April 10, June 25 and October 9, 1998. The second page of these reports to be filled out by the employing establishment are blank. He also submitted the first page only of an occupational disease claim dated November 6, 2003 that was a duplicate of the claim submitted on September 27, 2003 again noting that he was first aware of the condition in 1986 and its

[1] These claim forms are not found in the record before the Board.

[2] This consisted of a number of computer-generated newspaper articles regarding the Kansas National Guard.

relationship to his employment on May 26, 1993. In attached statements, appellant stated that he wanted a "line of duty" determination for the time he was a federal employee. He reiterated his problems with Sgt. Gaulding, Capt. Muhasky and Sgt. Rogers and noted that his supervisors should have filed claims on his behalf and stated that he was "forced" to take civil service retirement. Appellant also submitted cover sheets[3] and medical evidence concerning each of these claims.

Appellant submitted a Department of the Army and Air Force, National Guard Bureau form indicating that he had been discharged effective April 8, 2000, a letter dated October 6, 2000, in which the SSA advised appellant that his disability retirement was effective January 2000 and an OPM letter indicating that his disability retirement was approved on February 27, 2001.

By decision dated December 3, 2003, the Office consolidated all of appellant's claims into this occupational disease claim. The Office found that appellant submitted no evidence to support that he was exposed to incidents described, noting that he had provided no specific dates and it was unclear if the incidents described occurred when appellant was on active military duty or as a civilian employee. The Office further found that he had submitted no medical evidence establishing that his cardiac condition was employment related.

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.[4] The Board may raise the issue on appeal even if the Office did not base its decision on the time limitation provisions of the Act.[5]

In cases of injury on or after September 7, 1974, 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. Compensation for disability or death, including medical care in disability cases, may not be allowed if a 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 as 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 was given within 30 days."[6]

[3] In each cover sheet appellant reported the date of admission, if relevant, the date he returned to work, if relevant, his military administrative officer and/or supervisor, the medical facility and physician involved with his care and diagnoses.

[4] *Charles Walker*, 55 ECAB ____ (Docket No. 03-1732, issued January 8, 2004); *see Charles W. Bishop*, 6 ECAB 571 (1954)

[5] *Id.*

[6] 5 U.S.C. § 8122(a).

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 or her condition is causally related to the employment. For actual knowledge of a supervisor to be regarded as timely filing, an employee must show not only that the immediate superior knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.[7]

Even if an original claim for compensation for disability or death is not filed within three years after the injury or death, compensation for disability or death may be allowed if written notice of injury or death as specified in section 8119 was given within 30 days. Section 8119 provides that a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury or in the case of death, the employment factors believed to be the cause; and be signed by and contain the address of the individual giving the notice.[8] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[9]

In a case of occupational disease, the time for filing a claim begins to run when the employee first becomes aware or reasonably should have been aware, of a possible relationship between his condition and his employment. 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 federal employment, such awareness is competent to start the limitation period even though he does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[10] Where the employee continues in the same employment after he or she reasonably should have been aware that he or she has a condition which has been adversely affected by factors of the federal employment awareness, the time limitation begins to run on the date of the last exposure to the implicated factors.[11] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[12]

ANALYSIS

The evidence of record establishes that appellant did not timely file a claim for compensation under the Act. He asserted that his heart condition was caused by his federal employment and submitted five traumatic injury claims for treatment and/or hospitalizations that occurred on the following dates: May 26, 1993, January 25, 1994, April 10, June 25 and

[7] *Duet Brinson*, 52 ECAB 168 (2000).

[8] *Larry E. Young*, 52 ECAB 264 (2001).

[9] *Laura L. Harrison*, 52 ECAB 515 (2001).

[10] *Larry E. Young, supra* note 8.

[11] *Id.*

[12] *Debra Young Bruce*, 52 ECAB 315 (2001).

October 9, 1998. Pursuant to section 8122(a) of the Act, appellant had three years from the date of each of these claimed traumatic incidents to timely file a claim. Thus, a claim for the May 26, 1993 incident should have been filed by May 26, 1996; for the January 25, 1994 incident by January 25, 1997; for the April 10, June 25 and October 9, 1998 incidents by April 10, June 25 and October 9, 2001 respectively. Appellant, however, did not file these claims until November 6, 2003. The Board, therefore, finds these claims were not timely filed.

However, appellant also filed an occupational disease claim on September 27, 2003 alleging that employment factors caused his heart condition. The record indicates that his retirement was effective August 31, 1999. As noted, in an occupational disease claim, the time limitation begins to run on the date of the last exposure to the implicated factors, in case appellant's last day of employment. Thus, the three-year time limitation began to run on August 31, 1999. Appellant's September 27, 2003 claim was not timely filed within three years of August 31, 1999. The evidence shows that he was aware of the relationship of his claimed condition to his employment prior to August 31, 1999, as appellant's claim form clearly indicated that he was aware of his condition in 1986 and first realized its relationship to his employment on May 26, 1993. Consequently, there is no evidence to support that the time limitation began to run any later than August 31, 1999.

The statute further provides that a claim may be regarded as timely if an immediate superior had actual knowledge of the injury within 30 days, such that the immediate superior was put reasonably on notice of an on-the-job injury.[13] Appellant asserted that employing establishment management knew of each of the claimed incidents. It is not enough; however, that appellant's supervisors knew that he suffered from a heart condition requiring treatment on those dates. Appellant must establish that his supervisors knew or reasonably should have known that his condition was caused by his employment.[14] The evidence does not establish such knowledge in this case. The employing establishment advised that at no time had appellant stated that he wanted to file a workers' compensation claim or assert that his heart condition was employment related. Col. Wheeler stated that appellant had not told him he was experiencing stress or that he was having problems with his job or supervisors. There is no probative evidence to establish that appellant's superiors had actual knowledge, sufficient to put them reasonably on notice, that his heart condition was work related within 30 days of August 31, 1999, the day he retired.[15]

[13] *Duet Brinson, supra* note 7; *Delmont L. Thompson*, 51 ECAB 155 (1999).

[14] *Id.*

[15] *Larry E. Young, supra* note 8.

CONCLUSION

The Board finds that appellant's claims are barred by the applicable time limitation provisions of the Act.[16]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 3, 2003 be modified to reflect that appellant's claims were barred by the time limitation provisions of the Act.

Issued: August 16, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[16] Regarding appellant's request for coverage under Public Law 106-419, 38 U.S.C. § 1402, the Board notes that this law concerns veterans benefits and would not be relevant to the instant claims as federal workers' compensation claims are governed by the Act.