



problems started in the summer of 1995 and escalated to severe lower back problems which was confirmed” on February 17, 2003. Appellant indicated that he did not file his claim within 30 days because he believed that it “was not a traumatic incident.” On the reverse side of the claim form, an official with the employing establishment stated that appellant had either resigned or retired and that the dates of his employment would be forwarded when available.

In a statement accompanying his claim, appellant described his work duties at the employing establishment from April 2, 1987 until July 31, 1999. He stated:

“The history of this condition originated ([t]o the best of my knowledge) the summer of 1995. As noted on the attached letter from Dr. Daniel Rodriguez, [July 18, 1995] is the first time I sought treatment for moderate back problems [which] continued off and on since then. However, the severity of this illness was not confirmed until [February 17, 2003] when I went to the emergency room to seek treatment for severe lower back pain....”

Appellant submitted a note dated May 12, 2003 from Dr. Daniel Rodriguez, a Board-certified family practitioner, who indicated that he had treated appellant “off and on for back problems since July 18, 1995.”

In a report dated February 24, 2003, Dr. M. David Dennis, a Board-certified orthopedic surgeon, noted that appellant experienced back pain “on and off over the years, but it would always fully resolve.” He stated that appellant related the onset of severe lower back pain with “numbness and tingling down the left leg” on February 17, 2003. Dr. Dennis diagnosed a herniated nucleus pulposus at L4-5 and L5-S1 with lumbar radiculopathy.

In a progress note dated May 12, 2003, Dr. Dennis diagnosed a lumbar disc herniation and stated:

“[Appellant] reports to me today that it is his opinion that a great deal of his chronic back pain is the result of repetitive leaning over a table at work that he did for many years. He also used to do a lot of physical activity on the job and he seems to think that this was the precipitating cause of his problems. I think that is certainly likely in the fact that it is unusual for someone to spontaneously develop two herniations without some type of trauma or repetitive heavy lifting.”

By letter dated May 19, 2003, the employing establishment controverted the claim on the grounds that it was not timely filed and as appellant failed to submit sufficient medical evidence in support of his claim. The employing establishment noted that it had no record that appellant had previously reported his condition to an official.

In a decision dated May 23, 2003, the Office denied appellant’s claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. The Office found that appellant had failed to file a claim within three years of the date of injury, July 18, 1995. The Office further noted that appellant did not file his claim within three years of July 31, 1999, the date he indicated that he ceased federal employment and that there was no evidence that a supervisor had actual knowledge of his claim within 30 days of the date of injury, July 18, 1995.

On June 3, 2003 appellant requested a review of the written record. He stated:

“It appears that I am confused as to the date on items 11 and 12 of Form CA-2. I request this date be amended to read February 17, 2003 instead of July 18, 1995. February 17, 2003 is when I first became aware of a possible relationship between the injury/condition and my employment at [the employing establishment]. And this is when a definite diagnosis was made and advice given by a doctor.”

In a letter dated September 2, 2003, the hearing representative requested that appellant submit copies of his medical records from Dr. Rodriguez dated July 18, 1996 to the present and his February 17, 2003 emergency room records.<sup>1</sup>

In a response dated September 12, 2003, appellant related:

“As I expressed on [the] Form CA-2, ‘To the best of my knowledge, this was not a traumatic incident.’ For this reason when asked by Dr. Rodriguez on July 18, 1995 if this was work related I answered no. However, at that time I was not aware of a possible relationship between the injury/condition and my employment....”

Appellant submitted handwritten, unsigned office visit notes from Dr. Rodriguez.<sup>2</sup> The note dated July 18, 1995, indicates that appellant had “back pain, -- twisted, not work related.” A note dated August 12, 1996, listed a history of complaints of a “sore neck and back” for two months.

Appellant also submitted a copy of the February 17, 2003 emergency room report from Dr. Evan S. Ratner, who specializes in emergency medicine and described appellant’s history of “chronic back pain over the last several years” and noted that he had experienced a “sudden onset of pain when he straightened up this afternoon.” He diagnosed acute musculoskeletal back pain.

By decision dated January 22, 2004, the hearing representative affirmed the Office’s May 23, 2003 decision.<sup>3</sup> The hearing representative noted that appellant stated that he was first aware that his condition was related to his employment on July 18, 1995 and that the claim form question regarding the date of first awareness that his condition was caused or aggravated by employment was “straightforward and not apparently susceptible to misinterpretation.” He further found that appellant had not sufficiently explained why he was confused about the question on the claim form regarding the date of first awareness that his condition was due to his employment and had not presented probative evidence of why the Office should “now accept a later date.”

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<sup>1</sup> The hearing representative noted in his decision that he meant that appellant should submit medical records from Dr. Rodriguez beginning July 18, 1995 rather than July 18, 1996.

<sup>2</sup> The notes from Dr. Rodriguez are nearly illegible.

<sup>3</sup> The hearing representative states that he is affirming the Office’s May 12, 2003 decision; however, it is apparent that this is a typographical error.

## LEGAL PRECEDENT

Section 8122(a) of the Act<sup>4</sup> provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.<sup>5</sup> 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 the employment and the compensable disability.<sup>6</sup> 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.<sup>7</sup> Even if a claim is not timely filed within the three-year period of limitation, it would still be regarded as timely under section 8122(a)(1) if the immediate superior had actual knowledge of his alleged employment-related injury within 30 days or written notice of the injury was provided within 30 days pursuant to section 8119.<sup>8</sup> The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.<sup>9</sup> The Board has indicated that an employee need only be aware of a possible relationship between his “condition” and his employment to commence the running of the applicable statute of limitations.<sup>10</sup>

## ANALYSIS

When he filed his claim for compensation on May 14, 2003 appellant indicated that on July 18, 1995 he first realized that his claimed condition of “severe lower back problems” was caused or aggravated by his employment. Appellant, therefore, initially maintained that he was at that time aware or reasonably should have been aware, of a possible relationship between his low back condition and factors of his federal employment. However, it appears that, subsequent to July 18, 1995, appellant continued to work as a systems mechanic and continued to be exposed to the conditions to which he attributed his back problems. As discussed above, if an employee continues to be exposed to injurious working conditions the time limitation begins to run on the last date of this exposure.<sup>11</sup> Therefore, the time for filing appellant’s claim did not begin to run until the date of his last injurious exposure. Appellant stopped work, by his own statement, on July 31, 1999. Accordingly, the three-year statute of limitations expired no later than July 31, 2002. Appellant’s May 14, 2003 claim for compensation, therefore, is barred by the statute of limitations.

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 5 U.S.C. § 8122(a).

<sup>6</sup> 5 U.S.C. § 8122(b).

<sup>7</sup> See *Linda J. Reeves*, 48 ECAB 373 (1997).

<sup>8</sup> 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); see also *Larry E. Young*, 52 ECAB 264 (2001).

<sup>9</sup> *Willis E. Bailey*, 49 ECAB 509 (1998).

<sup>10</sup> *Edward C. Horner*, 43 ECAB 834, 840 (1992).

<sup>11</sup> *Debra Young Bruce*, 52 ECAB 315 (2001).

As noted above, although appellant's claim for compensation was not timely filed within the three-year limitation provision, his claim would be regarded as timely if his "immediate superior had actual knowledge of the injury or death within 30 days."<sup>12</sup> In this case, there is no evidence of record that establishes that appellant's supervisor had actual knowledge of the injury within 30 days or that written notice of the injury was given within 30 days. The employing establishment stated that it had no record of appellant previously reporting his back problems to any official.

Appellant explained that he was confused on the claim form regarding the date that he first realized that his condition was due to his employment. He requested that the date that he first became aware of his alleged employment-related condition be changed from July 18, 1995 to February 17, 2003, the date he received a diagnosis.<sup>13</sup> Appellant submitted an office visit note dated July 18, 1995 from Dr. Rodriguez which indicated that appellant was treated on that date for "back pain, - twisted, not work related." However, while Dr. Rodriguez' office visit note offers some support for appellant's contention that he was not aware of the relationship between his back pain and his employment on July 18, 1995 he has not adequately explained why the date should be changed to February 17, 2003. On his claim form appellant explained that he became aware of moderate back problems in 1995 which worsened over the years. He further indicated in a statement accompanying his claim that his condition began in the summer of 1995 and that he first sought treatment for his back problems on July 18, 1995. In requesting that the date of first awareness be changed from July 18, 1995 to February 17, 2003, appellant noted that he received a definite diagnosis of a herniated disc in 2003. However, 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.<sup>14</sup> In this case, on his claim form appellant noted that his back problems worsened in February 2003, but also related that he experienced moderate back problems beginning in 1995. The Board finds that the date appellant placed on his claim for compensation, July 18, 1995, is more probative as the date he became aware of his condition. Accordingly, appellant's claim, which is clearly outside the three-year time limitation period, is untimely.

### CONCLUSION

The Board finds that appellant has not filed a timely claim for compensation under the Act.

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<sup>12</sup> 5 U.S.C. § 8122(a)(1); *see also Duet Brinson*, 52 ECAB 168 (2000).

<sup>13</sup> It appears from the record that appellant received a diagnosis of a herniated disc on February 24, 2003 rather than February 17, 2003.

<sup>14</sup> *See Duet Brinson*, *supra* note 12.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 22, 2004 and May 23, 2003 are affirmed.

Issued: August 24, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member