

**United States Department of Labor
Employees' Compensation Appeals Board**

BARBARA E. ROBERSON-PEREZ, Appellant

and

**DEPARTMENT OF THE AIR FORCE, DOVER
AIR FORCE BASE, DE, Employer**

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**Docket No. 04-1426
Issued: October 8, 2004**

Appearances:
Barbara E. Roberson-Perez, 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 May 5, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated December 29, 2003, which denied her claim as untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this time limitation case.

ISSUE

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

FACTUAL HISTORY

On May 1, 2003 appellant, then a 59-year-old former sheet metal mechanic, filed a Form CA-2, occupational disease claim, alleging that factors of her federal employment caused a hand

and wrist condition.¹ She stated that she was first aware of the condition and its relationship to her employment on July 9, 1984. Appellant also attached a Form CA-2, signed on August 18, 1999, in which she alleged that her left thumb, wrist condition and stress were caused by falls sustained due to an employment-related knee injury. She stated that she was first aware of the conditions on August 1, 1982 and the relationship to employment on August 1, 1995. Appellant indicated that the Office had returned this claim to her and a date stamp indicates it was received by the Office on March 20, 2000.² She also submitted a number of medical reports.³

By letter dated October 6, 2003, the Office informed appellant of the type evidence needed to develop her claim. The Office specifically inquired if she was claiming that her hand and wrist conditions were a consequence of her accepted knee injury or due to the use of tools at the employing establishment. In response, appellant submitted additional medical evidence. In letters dated October 6 and November 17, 2003, the Office requested information from the employing establishment. In a second letter dated November 17, 2003, the Office advised appellant that it appeared that the claimed conditions could be considered latent injuries, but noted her statement on the claim form that she was aware of the relatedness on July 9, 1984 and requested that she submit additional factual and medical evidence. Appellant did not respond. In a decision dated December 29, 2003, the Office found that her claim was not timely filed.

LEGAL PRECEDENT

In cases of injury on or after September 7, 1974, section 8122(a) of the Act⁴ 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.”⁵

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

¹ The record indicates that appellant had not worked at the employing establishment for 17 or 18 years and has been receiving wage-loss compensation for a knee injury under Office file number 030083934. The instant claim was adjudicated by the Office under file number 112018461.

² It is unclear from the record whether this claim had been adjudicated previously.

³ She also submitted a traumatic injury claim dated June 27, 1980 for a skin rash on both hands and wrists.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8122(a).

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.⁶ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.⁷

Section 8122(b) provides that the time for filing in latent disability cases 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. The Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.⁸ 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.⁹

When an employee becomes aware or reasonably should have been aware that he or she has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitation.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 federal employment, 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 Board finds that the evidence of record establishes that appellant did not timely file a claim for compensation under the Act. She asserted that her hand and wrist conditions were caused by her federal employment on May 1, 2003, she stated that she was first aware of their relationship to her employment July 9, 1984. On the attached claim form signed by appellant on August 18, 1999 she indicated that she was first aware of the relationship of her conditions to employment on August 1, 1995. She retired in January 1985 and the three-year time limitation began to run on that date. Appellant did not file any claim until, at the earliest, August 31, 1999, 14 years later.

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

⁶ *Larry E. Young*, 52 ECAB 264 (2001).

⁷ *Laura L. Harrison*, 52 ECAB 515 (2001).

⁸ *Delmont L. Thompson*, 51 ECAB 155 (1999).

⁹ *Duet Brinson*, 52 ECAB 168 (2000).

¹⁰ *Larry E. Young*, *supra* note 6.

¹¹ *Id.*

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

put reasonably on notice of an on-the-job injury.¹³ Appellant submitted no such evidence in this case. There is, therefore, no probative evidence to establish that her superiors had actual knowledge, sufficient to put them reasonably on notice, that her hand and wrist conditions were work related within 30 days of her retirement in January 1985.¹⁴ Appellant's claim was, therefore, not timely filed pursuant to section 8122(a).¹⁵

Similarly, the evidence does not show that pursuant to section 8122(b), appellant was unaware of the relationship between her federal employment and her hand and wrist conditions at a time later than her retirement, as on the May 1, 2003 claim form she stated that she was first aware of the condition and its relationship to her employment on July 9, 1984. Her August 1999 claim form clearly states that she became aware of the condition and its relationship to her employment no later August 1, 1995, four years prior to her filing of that claim. Consequently, there is no evidence to support that the time limitation began to run any later than that date.

CONCLUSION

The Board finds that appellant's claim is barred by the applicable time limitation provisions of the Act.¹⁶

¹³ *Duet Brinson, supra* note 9; *Delmont L. Thompson, supra* note 8.

¹⁴ *Larry E. Young, supra* note 6.

¹⁵ *Id.*

¹⁶ The Board notes that concurrently with her appeal to the Board, appellant requested a review of the written record before the Office. It is well established that the Board and the Office may not have concurrent jurisdiction over the same issue in the same case. *Cathy B. Millin*, 51 ECAB 331 (2000). The record also contains evidence submitted subsequent to the December 29, 2003 Office decision. The Board cannot consider this evidence as its review of the record is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Appellant retains the right to submit this evidence with an appropriate reconsideration request to the Office.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 29, 2003 be affirmed.

Issued: October 8, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member