United States Department of Labor
Employees' Compensation Appeals Board

ALBERT A. LOFTIN, Appellant	)	
and	)	
U.S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, GEORGE WASHINGTON MEMORIAL PARKWAY, McLean, VA, Employer	)	**Docket No. 05-369** **Issued: November 14, 2005**

Appearances:
Albert A. Loftin, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 30, 2004 appellant filed a timely appeal of the November 16, 2004 decision of the Office of Workers' Compensation Programs which denied his occupational disease claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. Under 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 the Office properly denied appellant's occupational disease claim on the grounds that it was not timely filed under 5 U.S.C. § 8122.

FACTUAL HISTORY

On March 23, 2002 appellant, then a 43-year-old former supervisory community planner, filed an occupational disease claim for aggravation of his upper back, shoulders, head and neck, alleging that he first became aware of his disease or illness on July 5, 1968 and realized that his

condition was aggravated by factors of his federal employment on July 26, 1991. He also alleged that he developed a work-related aggravation of his bilateral knee and leg condition and realized that this condition was aggravated by work factors in 1984. Appellant contended that he developed hearing loss due to his exposure to hazardous noise at the workplace and realized that this condition was caused by his employment on July 10, 2001. He stopped work on October 22, 2001 and this was his last exposure to the factors of employment. Appellant's disability retirement was approved on July 16, 2002.

In support of his claim, appellant submitted a history of his employment with federal and nonfederal employers. He first became aware of the first of his three conditions, strained knees on July 5, 1968 while participating in youth sports. Appellant stated that his upper back, shoulders, neck and head condition was aggravated in July 1991, when he went on a work trip in a small military plane. He advised that he filed a notice of traumatic injury claim but it was never processed.[1] Appellant indicated that he has had five neck surgeries and physical therapy. With regard to his lower back, legs, knees and ankles, appellant indicated that since 1984 his job required him to do site investigations and field work including traveling and substantial walking. Appellant advised that his lower back problems began while at work in 1988. With regard to his hearing loss, appellant advised that he had hazardous noise exposure in the workplace from 1984 to 2002. Appellant specifically noted that from 1984 to 1987 at England Air Force Base he was exposed to aircraft noise, from 1987 to 1990 at Bolling Air Force Base appellant was exposed to aircraft noise from the helipad, from 1990 to 1992 at Andrews Air Force Base he was exposed to on base aircraft noise and noise from air to ground gunnery and bombing ranges and from 1992 to 2001 at the Pentagon he was exposed to aircraft noise from the helipad. Appellant indicated that he did not have his hearing examined during his employment and first sought medical treatment in July 2001.

On the CA-2 form, Audrey F. Calhoun, superintendent for the George Washington Memorial Parkway, noted that she had no knowledge of appellant's condition because it occurred at another agency prior to the employee reporting for his current position. She noted that appellant stopped work in October 2002. Also submitted was a job description for a supervisory community planner assistant superintendent effective January 13, 2002, which noted that the majority of appellant's job was in an office environment with some physical exertions such as hiking, walking and inspecting of proposed construction sites.

Appellant submitted various medical reports from Dr. Andrew V. Panagos, Board-certified in physical medicine and rehabilitation. He treated appellant from October 18, 1994 to May 7, 1996, for neck pain commencing when he fell off a trampoline as a child. He underwent a cervical fusion at C3-4 and C5-6 in December 1991, which was unsuccessful and a C3-6 fusion in December 1994, which relieved his arm pain. On February 27, 2002 the physician diagnosed chronic pain syndrome produced by the initial failure of the cervical fusions, secondary

[1] On September 20, 1991 appellant filed a notice of traumatic injury alleging that, between July 23 to 26, 1991, he sustained neck stress while on temporary duty in the northeastern United States. He advised that the claim form was sent back to him with a note advising him that his claim was incorrectly filed as an traumatic injury and should have been filed as an occupational disease. Appellant indicated that he did not pursue the claim further. The record reflects that his supervisor, Douglas K. Anderson, signed a Form CA-1, noting that he was aware of appellant's claim for neck stress and that it was work related.

abscesses as a result of trigger point injections. Other reports from Dr. Alexandros D. Powers, a Board-certified neurologist, dated October 18, 1994 to January 25, 2002, noted appellant's treatment for continued neck pain and diagnosed cervical disc disease with failed fusion and compensatory hypermobility at intervening C4-5 level.

Appellant submitted an authorization for treatment signed by Mr. Anderson, his supervisor, dated September 18, 1991, who noted that during the period of July 23 to 26, 1991 appellant experienced neck stress while on temporary duty, which aggravated and permanently worsened a mild neck injury condition that occurred in 1974.

By letter dated May 17, 2002, the Office requested additional information from appellant noting that the evidence submitted was insufficient to establish his claim. In a letter dated May 17, 2002, appellant advised that from 1984 to 1991 his medical problems were mild. He indicated that with regard to his upper and lower extremities his supervisors were aware after July 26, 1991 of his neck and back conditions because they impacted his ability to work. Appellant noted that his hearing problem was noticeable in 1999, when his work sites were near aircraft and contributed to his inability to work on October 23, 2001. He did not seek treatment for his hearing condition until 2001, because his condition was not severe enough.

Appellant submitted audiograms dated July 11, 2001 and March 22, 2002, which revealed hearing loss of the left ear with bilateral tinnitus. He also submitted additional reports from Dr. Powers dated June 6 and July 8, 2002, noting that he experienced a work-related cervical spine injury on July 26, 1991 during a work trip. Dr. Powers noted that in December 1991, appellant underwent an anterior cervical discectomy and fusion, which failed and opined that the events of July 1991 were causally related to the cervical spine symptoms that led to surgery. Also submitted were reports from Dr. Charles R. Ubelhart, a Board-certified internist, from November 7, 1991 to October 11, 1994, who noted a history of appellant's neck pain commencing when he was 16 years old and fell from a trampoline and noted that his symptoms worsened in the summer of 1991.

By decision dated September 30, 2002, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that his claim was timely filed in accordance with 5 U.S.C. § 8122. The Office found that the injury occurred on July 5, 1968 and that notice was given on March 23, 2002. The Office advised that appellant became aware of the relationship between the employment and the claimed condition on July 26, 2002 and there was no evidence that appellant's supervisor had knowledge of the injury within 30 days of the injury.

By a letter dated September 23, 2003, appellant requested reconsideration and submitted additional evidence. A statement from Thomas B. Kempster, Midwest division program manager and appellant's supervisor from May 1992 to October 1995, noted that appellant underwent multiple spinal surgeries while working for him. He was not aware that appellant had any permanent disability and, therefore, appellant was not informed of his rights under the Federal Employees' Compensation Act. Mr. Kempster advised that he limited appellant's travel as much as possible because it was very hard on his neck condition. He indicated that appellant frequently had to take a couple of days of sick leave after traveling to recover from the pain and inflammation. In a statement dated September 16, 2003, from Mr. Anderson, a retired

environmental engineer and appellant's immediate supervisor from late 1990 to early 1992 noted that in July 1991, appellant was assigned to a project requiring him to travel to various locations. He noted that on September 18, 1991 he signed a CA-16 form on behalf of appellant, who claimed neck stress over a period of the previous two weeks of traveling. Mr. Anderson advised that appellant informed him of a preexisting neck condition which worsened during travel. Also submitted was a statement from David M. Cannan, director of the Air Force Base Disposal Agency, dated March 7, 2003, who advised that from December 9, 1991 to May 31, 1993 appellant worked as a environmental program manager. He noted that he was aware of appellant's multiple neck surgeries; however, advised that he was not appellant's immediate supervisor and, therefore, did not advise him of his rights to file a claim for benefits.

The employing establishment submitted a statement from Ms. Calhoun, superintendent, dated May 31, 2002, who noted supervising appellant from December 7, 2000 to October 22, 2001 and advised that she was not aware that appellant's work duties were beyond his capabilities until October 2001, when he stopped working. She advised that his job duties included office/desk work, meetings and fieldwork. Ms. Calhoun noted that appellant's job location was six miles from the airport and that she was unaware of his hearing condition, had she been informed, appellant would have been enrolled in a hearing monitoring program and given hearing protection.

By decision dated October 27, 2003, the Office denied appellant's claim for compensation on or after June 5, 1968,[2] with respect to the neck, back and upper and lower extremity injuries while appellant worked at the George Washington Parkway on the grounds that the evidence of record failed to demonstrate that his claim was timely filed in accordance with 5 U.S.C. § 8122. The Office modified the prior decision and noted that this decision did not pertain to appellant's claim for hearing loss beginning September 1999 and the upper back, shoulders, neck and head condition appellant attributed to a July 1991 work-related trip and advised appellant to file separate claims for these conditions.

By letter dated August 18, 2004, appellant filed a request for reconsideration. He submitted a statement from Terry A. Yonkers, his supervisor from March 8 to July 27, 1992, who noted that appellant worked as an environmental engineer. Mr. Yonkers indicated that he was aware of appellant's neck condition when he was hired and noticed a continued degradation of his condition aggravated by the work and travel demands placed upon him. Mr. Yonkers noted that it was not unusual for many employees to be traveling 20 to 30 percent of the time. An additional statement from Mr. Anderson dated January 23, 2004, advised that he was aware of appellant's July 26, 1991 work-related condition and illness the week that it occurred. Also submitted was a statement from John P. Carr, appellant's supervisor from July 1997 to January 1999, who noted that he was aware of appellant's multiple neck surgeries. He limited appellant's travel due to his increase in neck pain symptoMs. Mr. Carr noted that he agreed to limit his travel because after a trip appellant would have increased neck pain that would result in him needing to take time off to recuperate. Appellant also submitted an opinion from the Social Security Administration granting his disability retirement.

[2] The Office noted the date of June 5, 1968; however, this appears to be typographical error as the date listed on the CA-2 form was July 5, 1968.

By decision dated November 16, 2004, the Office denied modification of the prior decision. The Office noted that appellant's claim for compensation for the injury on or after June 5, 1968[3] was untimely.

LEGAL PRECEDENT

Section 8122(a) of the Act[4] states that "[a]n original claim for compensation for disability or death must be filed within three years after the injury or death."[5] 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.[6] 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.[7]

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of appellant's injury.[8] An employee must show not only that his immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.[9]

ANALYSIS

In its November 16, 2004 decision, the Office denied appellant's claim for compensation on the grounds that the evidence of record failed to demonstrate that his claim was timely filed in accordance with 5 U.S.C. § 8122. However, the Board finds that the Office's findings under section 8122 must be reversed.

In its November 16, 2004 decision, the Office found that June 5, 1968[10] was the starting point for the three-year time limitation under section 8122. However, in a statement accompanying the CA-2 form dated March 23, 2002, appellant explained that this was the date

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[3] *Id.*

[4] 5 U.S.C. § 8122(a).

[5] *Id.*

[6] 5 U.S.C. § 8122(b).

[7] *See Larry E. Young*, 52 ECAB 264 (2001); *Garyleane A. Williams*, 44 ECAB 441 (1993); *Alicia Kelly*, 53 ECAB 244 (2001); *Mitchell Murray*, 53 ECAB 601 (2002).

[8] 5 U.S.C. § 8122(a)(1); *see also Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(a)(3) (March 1993).

[9] *Charlene B. Fenton*, 36 ECAB 151 (1984).

[10] *Supra* note 2.

he first became aware of the first of his three conditions, strained knees, while he was 10 years old and participating in youth sports. The Board finds that it is error to the extent that the Office found that the three-year limitation would commence on July 5, 1968 as appellant was 10 years old and clearly not employed by the employing establishment.

The Board also finds that appellant clearly filed a timely claim for compensation on September 20, 1991 alleging that he sustained a neck stress from July 23 to 26, 1991, while on temporary duty traveling and that the symptoms had increased until the filing of the claim. While it appears that this claim was not developed by the Office, appellant's supervisor received and signed the September 20, 1991 claim form within three years of the incidents of July 1991, which appellant alleged caused his claimed injury.[11] His claim would also be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of appellant's injury.[12] An employee must show not only that his immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.[13] In the instant case, appellant's supervisor, Mr. Anderson signed the CA-1 form on September 20, 1991, acknowledging appellant claimed neck stress over a period of two weeks of travel. Appellant's filing of the claim with the employing establishment and Mr. Anderson's signature on the CA-1 form establishes that the claim for neck stress was timely filed.

With regard to appellant's other conditions set forth in his March 23, 2002 occupational disease claim, to the extent that he is alleging that his occupational disease claim was caused or aggravated by required travel, the Board finds this claim timely. This claim relates to an aggravation of his upper back, shoulders, head and neck. The Board notes that with regard to appellant's claim for hearing loss which began in 1999 and his claim that his duties of site investigation, fieldwork and substantial walking aggravated his bilateral knee and leg condition, the Office did not issue a final decision on these claims and, therefore, the Board does not have jurisdiction over the matter.[14] The record reflects that the October 27, 2003 decision specifically limited the adjudication of his claim and noted that the decision did not pertain to his claim for hearing loss. Moreover, the decision did not mention or adjudicate appellant's claim for a bilateral knee condition. The Board further notes that, although the Office stated in its'

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.4(a) (March 1993). These procedures note that the date that a claim is filed "is the date of receipt of a claim by the Office or by the employing [establishment]." These procedures note that timely receipt of a claim by the Office or the employing establishment may be established by: (1) the entries on Form CA-1 or Form CA-2; (2) the date of receipt noted by the employing establishment or the Office; (3) the date the employing establishment transmitted it to the Office; (4) the date the official superior completed the claim form; or (5) a statement from the official superior confirming the date the claim was received by the employing establishment.

[12] *Supra* note 8.

[13] *Supra* note 9.

[14] *See* 20 C.F.R. § 501.2(c). The Office advised appellant to file separate claims for compensation for these separate injuries.

October 27, 2003 decision that the decision did not pertain to the upper back, shoulders, neck and head problems, the text of the decision ultimately denied the upper back and cervical claim, finding that the claim was untimely.

Consequently, appellant timely filed his claims pertaining to his neck condition within the three-year limitation period within the meaning of section 8122(b) of the Act. On return of the case record, the Office should further develop the claims as appropriate and issue an appropriate decision on the merits of these claims.

CONCLUSION

The Board finds that appellant's claims were timely filed. The case will be remanded to the Office to proceed to further appropriate development and adjudication of the claims.

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2004 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further action consistent with this decision.

Issued: November 14, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board