

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

TAMMY L. MILDENSTEIN, Appellant)	
)	
and)	Docket No. 06-914
)	Issued: July 5, 2006
)	
PEACE CORPS, VOLUNTEER SERVICES,)	
Washington, DC, Employer)	

Appearances:
Tammy L. Mildenstein, 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 February 24, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' November 23, 2005 merit decision denying her traumatic injury claim because it was untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that appellant's claim for compensation is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act.

FACTUAL HISTORY

On November 5, 2003 appellant, then a 35-year-old former Peace Corps volunteer, filed a traumatic injury claim alleging that she sustained neck and right upper extremity injuries on November 6, 1998 while backpacking up a mountain between villages in Benguet Province, Philippines. Appellant stated, "I reached to pick up my backpack and had a shooting pain from my neck down my right arm into my fingers. After that, I couldn't move my neck and my right

arm was stiff.” She indicated that she sustained a herniated C7 disc which pinched her nerve and caused weakness and tingling in her right arm and fingers.¹

In an accompanying statement, appellant indicated that she experienced various medical problems associated with her claimed injury during her tenure with the employing establishment, including pain, cramping and stiffness in her neck, right breast area and right shoulder. She asserted that on June 4, 2003 she experienced pain and stiffness in her neck, back and right arm while working on her computer.

By letter dated December 23, 2003, the Office advised appellant that it did not appear that her claim was timely filed. The Office requested that she submit additional factual and medical evidence in support of her claim.

Appellant submitted numerous records detailing her medical treatment during her service with the employing establishment as well as after the end of her service on April 30, 2001. The records described treatment for a wide variety of complaints relating to such conditions as gastrointestinal upset incidents, headaches, hearing loss, abnormal facial sensations, and bacterial and viral infections. The only medical report contemporaneous of the claimed November 6, 1998 injury is a November 4, 1998 report which indicates that appellant sustained a skin condition on her trunk and arms, probably related to contact with plants, while mountain climbing.² A June 2000 medical note indicated that appellant complained of subscapular pain for two months and a November 2000 medical note stated that appellant reported “musculoskeletal pain probably due to carrying a backpack.” In June 2001 appellant reported that she had sustained a right shoulder injury during her service three years prior and in June 2003 she began to complain to medical providers of neck and right arm problems due to lifting a backpack in November 1998.

On June 21, 2003 appellant underwent a right posterior microdiscectomy at C6-7.

By decision dated February 2, 2004, the Office determined that appellant’s claim for compensation was barred by the applicable time limitation provisions of the Act. The Office found that appellant should have been aware of the relationship between her claimed injury and employment factors on November 6, 1998, the date of the claimed injury, and that she had three years from that date to file her claim. It indicated that there was no evidence that appellant’s immediate supervisor had actual knowledge of the claimed injury within 30 days.

Appellant submitted documents alleging that she was advised that she had three years from April 30, 2001, the date she ended her service with the employing establishment, to report any claimed injuries. She alleged that she advised her medical officer, who she characterized as

¹ The claim form contained a witness statement of Sam C. Stier, a coworker, who noted, “When [appellant] picked up her backpack again, she gave a cry and dropped it. She said she felt a lot of pain in her neck and right arm, and couldn’t carry her backpack (I carried her backpack for the rest of the trip). She couldn’t carry anything or move her neck much, and seemed to be in a lot of pain the rest of the trip. In the employer portion of the form, Linda J. Donnelly, a post-service nurse, indicated that appellant last worked on April 30, 2001.

² A summary record of conditions acquired in service between June 1997 and April 2001 does not list the claimed November 6, 1998 injury.

“her immediate supervisor with regard to medical issues,” about her claimed injury within two weeks of November 6, 1998. Appellant also submitted a February 2, 2005 statement in which Mr. Stier asserted that she reported her claimed injury to her immediate supervisor, Eloi Gonzalez, about two weeks after November 6, 1998.

By decision dated November 23, 2005, the Office affirmed its February 2, 2004 decision.

LEGAL PRECEDENT

Section 8122(a) of the Act states, “An original claim for compensation for disability or death must be filed within three years after the injury or death.”³ 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 her employment and the compensable disability.⁴ When a traumatic injury definite in time, place and circumstances is involved, the time for giving notice of injury and filing for compensation begins to run at the time of the incident, even though the employee may not have been aware of the seriousness or ultimate consequences of her injury.⁵

Appellant’s claim would still be regarded as timely under section 8122(a)(1) of the Act if her immediate superior had actual knowledge of the injury within 30 days⁶ or under section 8122(a)(2) if written notice of injury was given within 30 days as specified in section 8119.⁷ The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.⁸

ANALYSIS

The evidence establishes that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between her employment and the compensable disability on November 6, 1998, the date of her claimed traumatic injury. As noted above, when a traumatic injury definite in time, place and circumstances is involved, the time for giving notice of injury and filing for compensation begins to run at the time of the incident, even though the employee may not have been aware of the seriousness or ultimate consequences of his injury.⁹ Appellant clearly reported on her claim form that she experienced pain and stiffness in her

³ 5 U.S.C. § 8122(a).

⁴ 5 U.S.C. § 8122(b). 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. *Charlene B. Fenton*, 36 ECAB 151, 157 (1984); *Gladys E. Olney*, 32 ECAB 1643, 1645 (1982).

⁵ *Emma L. Brooks*, 37 ECAB 407, 411 (1986).

⁶ 5 U.S.C. § 8122(a)(1); see *Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

⁷ 5 U.S.C. §§ 8119, 8122(a)(2).

⁸ 5 U.S.C. § 8122(a)(1); see *Jose Salaz*, *supra* note 6; *Kathryn A. Bernal*, *supra* note 6.

⁹ See *supra* note 5 and accompanying text.

neck and right arm after lifting a backpack on November 6, 1998. While she might not have realized the full effects of the events of the November 6, 1998 incident she certainly realized that she had sustained an injury on that date. The totality of the factual circumstances of record establishes that appellant was aware on November 6, 1998 that her claimed injury was due to employment factors. However, appellant did not file her claim until November 5, 2003, a period of more than three years after November 6, 1998.¹⁰

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if her immediate superior had actual knowledge of the injury within 30 days or under section 8122(a)(2) if written notice of injury was given within 30 days as specified in section 8119.¹¹ The evidence of record does not reveal that appellant has not satisfied either of these provisions. Appellant submitted a February 2, 2005 statement in which Mr. Stier, a coworker, asserted that she reported her claimed injury to her immediate supervisor, Ms. Gonzalez, about two weeks after November 6, 1998. However, the record does not contain a statement from Ms. Gonzalez or any statement more contemporaneous with the alleged November 6, 1998 injury showing that appellant reported the injury to an immediate supervisor.¹² In addition the extensive medical records of appellant's service do not contain any indication that she reported her claimed injury to her immediate supervisor within 30 days of November 6, 1998.

CONCLUSION

The Board finds that the Office properly determined that appellant's claim for compensation is barred by the applicable time limitation provisions of the Act.

¹⁰ Appellant alleged that she was advised that she had three years from April 30, 2001, the date she ended her service with the employing establishment, to report any claimed injuries. While this theory might apply to some occupational disease claims with continuing exposure, appellant's claim was for a traumatic injury. *See supra* note 4.

¹¹ *See supra* notes 6 and 7 and accompanying text.

¹² Moreover, it is not entirely clear that Ms. Gonzalez was appellant's immediate supervisor.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 23, 2005 decision is affirmed.

Issued: July 5, 2006
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