

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

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**H.C., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Columbia, SC, Employer**

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**Docket No. 07-283  
Issued: April 5, 2007**

*Appearances:*  
*Delores Barber, for the appellant*  
*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 13, 2006 appellant filed a timely appeal from an October 3, 2006 decision of the Office of Workers' Compensation Programs that affirmed an August 10, 2006 Office determination that his claim was not timely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant filed a timely claim for compensation under the Federal Employees' Compensation Act.<sup>1</sup>

**FACTUAL HISTORY**

On July 26, 2006 appellant, then a 50-year-old housekeeping employee, filed a traumatic injury claim alleging that he sustained an injury in the performance of duty on

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

November 25, 1998. He stated that he felt a muscle pull in his left arm and shoulder while dismantling a piece of cleaning equipment. Appellant indicated that he also experienced numbness in his left arm as well as low back pain. He did not stop work.

The employing establishment controverted appellant's claim, stating that he did not report any injury to his left arm or back or notify his supervisor that any medical appointments were due to an employment injury. The employing establishment also noted that his health file did not reflect that he sustained an injury or sought treatment in 1998. It noted that appellant was aware of the procedures for timely filing a claim as he had filed a traumatic injury claim for a needle stick injury on April 3, 1998.

Appellant submitted treatment notes from Dr. William H. Kirkley, a Board-certified orthopedic surgeon, Dr. David B. Fulton, a Board-certified orthopedic surgeon, and Dr. William T. Felmly, a Board-certified orthopedic surgeon. The reports are dated August 25, 1999 to January 19, 2006 and reflect that appellant was treated for pain in his left arm and shoulder, as well as his cervical spine. On August 25, 1999 Dr. Felmly indicated that appellant had weakness and soreness in his left arm, but did not know if he "has had any specific injury." Appellant also submitted a September 29, 1999 operative report noting a disc excision procedure at C6-7.

By decision dated August 10, 2006, the Office denied appellant's claim on the grounds that it was untimely filed.

Appellant requested reconsideration on August 29, 2006 and, through his representative, argued that he reported the injury to his immediate supervisor but because of his "mental status" he was not aware that he was to "follow up on the injury." He submitted school progress reports and reports from both a private consulting agency and the Richland/Lexington Disabilities and Special Needs Board, indicating that he met South Carolina state criteria for mental retardation. However, the Special Needs Board noted that he had not been adjudicated incompetent, had a conservator appointed or relinquished power of attorney. In an August 30, 2006 statement, Mazelleria Reid, appellant's immediate supervisor at the time of his claimed injury, stated that, in approximately 1999, appellant underwent surgery and missed approximately three months of work. She indicated that she was unaware of his condition until he missed three days of work and she discovered that he was in the hospital. Ms. Reid stated: "I can not recall if [appellant] reported his injury to me."

By decision dated October 3, 2006, the Office denied modification of the August 10, 2006 decision.

### **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.<sup>2</sup> Section 8122 of the Act provides that an original claim for compensation for disability or death must be filed within three years after the

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<sup>2</sup> *Charles Walker*, 55 ECAB 238 (2004); see *Charles W. Bishop*, 6 ECAB 571 (1954).

injury or death.<sup>3</sup> Compensation for disability or death 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.”<sup>4</sup>

In cases involving a traumatic injury, the time limitation commences to run on the date of the incident even though the employee may not be aware of the seriousness or ultimate consequences of the injury or the nature of the injury is not diagnosed until sometime later.<sup>5</sup> 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 was injured, but also knew or reasonably should have known that it was an on-the-job injury.<sup>6</sup>

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 for and contain the address of the individual giving the notice.<sup>7</sup> Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.<sup>8</sup>

### ANALYSIS

The record establishes that appellant did not file his claim for compensation within the three-year statutory limitation. He claimed that he sustained an on-the-job injury on November 25, 1998. Appellant stated that he felt a muscle pull in his left arm and shoulder as he dismantled a piece of cleaning equipment. Pursuant to section 8122(a) of the Act, he had three years from the date of his injury to timely file a claim. However, appellant did not file a

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<sup>3</sup> 5 U.S.C. § 8122.

<sup>4</sup> 5 U.S.C. § 8122(a).

<sup>5</sup> See *Paul S. Devlin*, 39 ECAB 715 (1988); *Kenneth W. Beard*, 32 ECAB 210 (1980).

<sup>6</sup> *Duet Brinson*, 52 ECAB 168 (2000).

<sup>7</sup> *Larry E. Young*, 52 ECAB 264 (2001).

<sup>8</sup> *Laura L. Harrison*, 52 ECAB 515 (2001).

workers' compensation claim until July 25, 2006. Accordingly, the Board finds that his claim was not timely filed.

Appellant contends that he did not understand the procedures for filing a workers' compensation claim because of his "mental status." The time limitation requirements of the Act may toll for a claimant if he can establish that he was incompetent and had no duly appointed legal representative during the relevant period.<sup>9</sup> Appellant submitted evidence concerning the South Carolina state criteria for mental retardation. However, he has not established that he was incompetent at the time of his injury or in the years since. The Board has held that it is appellant's burden to show that he is incompetent for a given period by submitting medical evidence stating that his condition was such, that he is incapable of filling out a form or of otherwise furnishing the relatively simple information necessary for filing a claim and satisfying the time limitation requirements.<sup>10</sup> The medical reports in this case do not establish that appellant's mental condition rendered him incompetent from filing his claim or reporting his injury. The Richland/Lexington Disabilities and Special Needs Board advised, in a July 13, 2006 report, that while appellant met state requirements for mental retardation he had not been adjudicated incompetent, did not have a conservator appointed or relinquished power of attorney. The employing establishment reported that appellant had sustained a "needle stick" injury on April 3, 1998 and had successfully submitted a traumatic injury claim on the same day. Accordingly, the Board finds that the evidence does not show that appellant was incompetent such that he was unable to complete a claim form within the three-year time limitation.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his 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. He has not satisfied either of these provisions. The record reflects that appellant's immediate supervisor, Ms. Reid, could not recall whether he reported his injury to her. Ms. Reid stated that she was unaware of his condition until she discovered, after he had missed several days of work, that he was hospitalized. This is insufficient to establish that appellant's supervisor had actual knowledge of a work-related injury within 30 days. The Board notes that, for actual knowledge of a supervisor to be regarded as timely filing, appellant must show not only that the immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.<sup>11</sup> Appellant has not shown that Ms. Reid was aware of his condition or that she knew or reasonably should have known that his injury was work related. While Ms. Reid noted being aware of an "injury" in November 1999, she did not indicate awareness that it was an employment injury or that she had actual knowledge within 30 days of November 25, 1998. Appellant also has not established that he submitted written notice to the employing establishment within 30 days of his claimed injury. The employing establishment indicated that appellant did not submit either a traumatic injury claim or any documentation concerning medical treatment for an on-the-job injury within 30 days of his claimed injury. Appellant has not presented any evidence indicating that he did, in fact, provide written notice to the employing

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<sup>9</sup> 5 U.S.C. § 8122(d)(2); see *Linda J. Reeves*, 48 ECAB 373 (1997).

<sup>10</sup> *Garyleane A. Williams*, 44 ECAB 441 (1993); *Paul S. Devlin*, *supra* note 5.

<sup>11</sup> *David R. Morey*, 55 ECAB 642 (2004).

establishment within 30 days of his claimed on the job injury. Accordingly, the Board finds that he has not established that his claim was timely filed by showing either that his supervisor knew or reasonably should have known that he sustained an on-the-job injury or that he provided written notice to the employing establishment within 30 days.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 3 and August 10, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 5, 2007  
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