

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

J.P., Appellant)
and) Docket No. 07-1159
DEPARTMENT OF THE ARMY, MATERIEL) Issued: November 15, 2007
COMMAND, Corpus Christi, TX, Employer)

)

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 26, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' November 1, 2006 merit decision denying his emotional condition claim and the Office's February 21, 2007 nonmerit decision denying his request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied appellant's request for a review of the written record by an Office hearing representative.

FACTUAL HISTORY

On July 11, 2006 appellant, then a 56-year-old retired aircraft worker, filed an occupational disease claim alleging that he sustained an emotional condition, including post-traumatic stress syndrome, in the performance of duty. He first became aware of his condition

on October 8, 1991 and of its relationship to his employment on October 8, 2002. Regarding the relationship of the claimed condition to his employment, appellant stated:

“After coming back from Southwest Asia, Persian Gulf Operation Desert Storm, Desert Shield, I became very ill with a lot of stress. I couldn’t sleep. I didn’t perform my duties at work like I used to. Always in trouble with supervisor, not going to work, [absent without leave].”¹

The record contains documents which indicate that appellant served in the Middle East in a civilian capacity for the employing establishment during the Persian Gulf War in 1990 and 1991. In a May 3, 1994 letter, an employing establishment official advised appellant that he could have a medical evaluation if he believed he had medical complications related to his service in Saudi Arabia. Appellant retired on medical disability effective March 11, 2003.

In support of his claim, appellant submitted a July 12, 1994 statement in which he indicated that he was selected to go with a support group from the Corpus Christi Army Depot to Bahrain and Dhahran, Saudi Arabia, to perform maintenance on tanks for 100 days during Operation Desert Shield and Operation Desert Storm. He stated that he went to support the troops in the field and he was exposed to missile raids every night. Appellant asserted that one of the missiles which killed 24 soldiers hit close to where he was sleeping and that smoke, which he believed was gas, came close to where he was sleeping. He indicated that he saw six or more soldiers who were wounded in the incident. Appellant indicated that he had developed numerous stress-related psychiatric and physical conditions, including post-traumatic stress disorder, depression, panic disorder, gastrointestinal problems and muscle aches.

Appellant also submitted an October 8, 2002 report in which Dr. Jose E. Pagan, an attending Board-certified psychiatrist, stated that he sustained employment-related emotional conditions, including post-traumatic stress disorder, which began after he was “exposed to traumatic events while in the Persian Gulf War.”

In a November 1, 2006 decision, the Office denied appellant’s emotional condition claim on the grounds that he did not establish any compensable employment factors. The Office noted that on October 5, 2002 appellant filed an occupational disease claim (file number 16-2048740) for depression alleged to have arisen after returning from the Persian Gulf War, but that the claim was denied on January 27, 2003.

By letter postmarked January 9, 2007, appellant requested a review of the written record by an Office hearing representative. In a February 21, 2007 decision, the Office determined that he was not entitled to an oral hearing as a matter of right because his request for an oral hearing was untimely. The Office indicated that it was exercising its discretion and had denied appellant’s hearing request on the basis that he could request reconsideration and submit additional factual and medical evidence.

¹ Appellant indicated that he filed a claim with the Office in October 2002 but the claim was denied because the employing establishment “did not report my record.”

LEGAL PRECEDENT

A claimant seeking compensation under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,³ including that he is an "employee" within the meaning of the Act⁴ and that he filed his claim within the applicable time limitation.⁵

In cases of injury on or after September 7, 1974, section 8122(a) of the Act provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.⁶ 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."⁷

Section 8122(b) provides that, in a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware, or by exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment. In such a case, the time for giving notice of injury begins to run when the employee is aware, or by the exercise of reasonable diligence should have been aware, that his condition is causally related to his employment, whether or not there is a compensable disability.⁸ 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.⁹

² 5 U.S.C. §§ 8101-8193.

³ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁴ *Kenneth W. Grant*, 39 ECAB 208 (1987); *James E. Lynch*, 32 ECAB 216 (1980); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357 (1951); see 5 U.S.C. § 8101(1).

⁵ *Paul S. Devlin*, 39 ECAB 715 (1988); *Emmet L. Pickens*, 33 ECAB 1807 (1982); *Kathryn A. O'Donnell*, 7 ECAB 227 (1954).

⁶ 5 U.S.C. § 8122(a).

⁷ 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 by and contain the address of the individual giving the notice.

⁸ 5 U.S.C. § 8122(b).

⁹ *Charlene B. Fenton*, 36 ECAB 151, 157 (1984); *Gladys E. Olney*, 32 ECAB 1643, 1645 (1982).

The time limitations in section 8122(a) and (b) do not (1) begin to run against a minor until he reaches 21 years of age or has had a legal representative appointed, (2) run against an incompetent individual while he is incompetent and has no duly appointed legal representative, or (3) run against any individual whose failure to comply is excused by the Secretary on the ground that such notice could not be given because of exceptional circumstances.¹⁰

ANALYSIS

Appellant claimed that he sustained an emotional condition due to various incidents which occurred while he worked for the employing establishment during the Persian Gulf War in 1990 and 1991. By decision dated November 1, 2006, the Office denied his emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board finds that appellant's claim should be denied on the basis that he did not file a timely claim for an employment-related emotional condition.

The evidence establishes that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment and the compensable disability as early as July 12, 1994. In his July 11, 2006 occupational disease claim form, he alleged that he sustained an emotional condition, including post-traumatic stress syndrome, while working for the employing establishment in the Middle East during the Persian Gulf War in 1990 and 1991. In a July 12, 1994 statement, appellant claimed that while working in Bahrain and Saudi Arabia he was exposed to missile raids every night. He asserted that in one incident 24 soldiers were bombed close to where he was sleeping and that he saw six or more wounded soldiers. Appellant indicated in his July 12, 1994 statement that he sustained several stress-related psychiatric conditions due to these incidents, including post-traumatic stress disorder, depression and panic disorder. His explicit linking of the above-noted employment incidents with his development of several medical conditions shows that he knew as early as July 12, 1994 of the possible relationship between these employment incidents and his claimed medical conditions.

Moreover, appellant stated on his July 11, 2006 claim form that he first became aware of the relationship of his claimed medical conditions to his employment on October 8, 2002. He also submitted an October 8, 2002 report in which Dr. Pagan, an attending Board-certified psychiatrist, stated that he sustained employment-related emotional conditions, including post-traumatic stress disorder, which began after he was "exposed to traumatic events while in the Persian Gulf War."

¹⁰ 5 U.S.C. § 8122(d).

The totality of the factual circumstances of record establish that appellant was aware or should have been aware as early as July 12, 1994 that his claimed injury was due to employment factors.¹¹ Appellant did not file his claim for an employment-related emotional condition until July 11, 2006 and therefore he did not file his claim within the requisite three years of his awareness of the possible relationship between the implicated employment incidents and the claimed medical conditions. Even if it were determined that appellant was not aware of this possible relationship until October 8, 2002, the filing of his claim on July 11, 2006 would not have been timely.

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 to his immediate superior within 30 days as specified in section 8119. He has not made any claim that he has satisfied either of these provisions, nor does the record support a finding that he has satisfied either of them.¹²

Given the Board's determination that appellant's emotional condition claim was untimely, it is not necessary to consider whether the Office properly denied his request for a review of the written record by an Office hearing representative.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty because he did not file a timely claim.

¹¹ If appellant continued to be exposed to injurious working conditions after the date he became aware of a possible employment-related cause of his claimed emotional condition, *i.e.*, July 12, 1994 in the present case, the time limitation would begin to run on the last date of this exposure. However, the employment incidents implicated by appellant occurred in 1990 and 1991 and there is no indication that he continued to be exposed to injurious working conditions after his awareness of a possible employment-related cause of his claimed emotional condition. *See supra* note 9 and accompanying text.

¹² There is no indication in the record that appellant provided the July 12, 1994 statement, or any other similar statement, to his immediate superior such that he satisfied the provision of sections 8119 and 8122(a) of the Act. *See supra* note 7 and accompanying text. The Office indicated that on October 5, 2002 appellant filed an occupational disease claim for depression which was denied on January 27, 2003, but the Office did not provide any notable discussion of this claim and it is not the subject of the present appeal.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 1, 2006 decision is affirmed as modified to reflect that appellant's emotional condition claim is denied because he did not file a timely claim.

Issued: November 15, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board