United States Department of Labor
Employees' Compensation Appeals Board

T.C., Appellant **and** **DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Ontario, CA, Employer**	)	**Docket No. 08-1497** **Issued: December 1, 2008**

Appearances:
Appellant, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 28, 2008 appellant filed a timely appeal from a February 5, 2008 merit decision of the Office of Workers' Compensation Programs denying his traumatic injury claim as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant filed a timely claim pursuant to 5 U.S.C. § 8122.

FACTUAL HISTORY

On August 2, 2006 appellant, then a 57-year-old baggage screener, filed a traumatic injury claim (Form CA-1) alleging that on July 27, 2003 he injured three discs in his back "while loading bags into the x-ray machine during my work shift." He used July 27, 2006 as the "date of this notice" on his claim. The employing establishment signed and dated the form on October 6, 2006, noting that appellant's employment was terminated in August 2003 and that the claim was "filed beyond [three-year] time limit."

In a letter dated November 9, 2006, the Office requested that appellant provide information to support the timeliness of his claim. On the same date, it wrote to the employing establishment requesting additional information regarding the alleged incident. The employing establishment did not respond to the Office's request for information.

On December 1, 2006 appellant provided a statement alleging that "[t]he injury was reported to DONALD SMITH, ED WHELAN, GARY BEASLEY, and CAROL BARZANO, all TSA supervisory personnel. Mr. Smith verbally responded to my report of injury while on duty." Further, appellant stated that "[t]he date the injury occurred *is the same date the injury was reported to* my supervisor, Donald Smith." (Emphasis in the original.)

Appellant additionally alleged that on July 31, 2003 he was sent to his physician, Dr. Balram Khehra, a Board-certified internist, by Mr. Whelan, his supervisor. He included progress notes dated July 31, 2003 from Dr. Khehra, who examined appellant as an "unscheduled walk-in patient." Appellant relayed to the doctor that "[two] days ago he injured himself at work while lifting heavy bags and the next day back pain was so severe when he put any [weight] on his [right] leg." He was "[having] more back pains in last [four to five] days and worse for [two] days after lifting something heavy."[1]

Appellant also submitted medical records dated February 23 and July 21, 2005 from Dr. Steven A. Lamberson, a Board-certified physiatrist, who noted that "[appellant] reportedly was injured while working as a baggage screener on July 28, 2003. He was lifting a suitcase from the floor onto a conveyor belt when he experienced significant lower back pain." Further, appellant claimed that following the injury he was placed on light duty for one week and then fired.

In a decision dated December 11, 2006, the Office denied appellant's claim on the grounds that the claim was not filed within the requisite three years after the injury and there was insufficient evidence to show that appellant's immediate supervisor had actual knowledge within 30 days. Appellant filed a request for reconsideration on October 17, 2007.

On February 5, 2008 the Office denied modification of its December 11, 2006 decision. Specifically, it found that appellant did not provide written notice of his July 27, 2003 injury within the allotted three-year time frame.

LEGAL PRECEDENT

Section 8122(a) of the Federal Employees' Compensation Act[2] provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.[3] In cases involving a traumatic injury, the time limitation begins to run on the date of the

[1] The Board notes that appellant also has a similar open case for a traumatic injury occurring on July 28, 2003 under OWCP file number xxxxxx229.

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8122.

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.[4]

Even if a claim is not filed within the required three-year period, it is still regarded as timely under section 8122(a)(1) if the claimant's immediate superior had actual knowledge of the alleged employment-related injury within 30 days.[5] The knowledge must be such as to put the immediate superior reasonably on notice of appellant's injury.[6] Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days pursuant to 5 U.S.C. § 8119.[7]

ANALYSIS

In the instant case, appellant's alleged injury involved a traumatic incident of which he was immediately aware. The three-year statute of time limitations began to run on July 27, 2003, the date on which appellant allegedly suffered his traumatic back injury while loading bags onto the x-ray machine at work.[8] The record reflects that appellant's claim was filed on August 2, 2006. The Board finds that this was over three years after the July 27, 2003 injury; therefore it is untimely filed under this aspect of the statute.

Nevertheless, an otherwise untimely claim may be considered timely where an immediate supervisor had actual knowledge of the injury, through either oral or written notice, within 30 days.[9] Here, appellant claims that he reported the injury to Mr. Smith, Mr. Whelan, Mr. Beasley and Ms. Barzano; however, he does not specify the date of this report. Appellant further claimed that on the date of the incident he reported the injury to Mr. Smith, his supervisor, who verbally responded. Moreover, appellant stated that he was sent to Dr. Khehra by Mr. Whelan, his supervisor, on July 31, 2003. Progress notes from Dr. Khehra confirm that appellant was a "walk-in patient" on July 31, 2003 and that he was there for a work-related injury occurring two days ago. The notes do not, however, specifically indicate that appellant was sent by his employer. Further, medical records from Dr. Lamberson note appellant's claims that he was put on light duty for a week following the incident due to his injury. If corroborated, appellant's statements would show that his immediate supervisors had actual knowledge of his injury within 30 days.

The Board notes that the employing establishment has neither denied nor confirmed appellant's claims that he notified his supervisors on the date of the injury, that his supervisor sent him to Dr. Khehra after the accident, nor that appellant was placed on light duty due to his

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[4] *See Paul S. Devlin*, 39 ECAB 715 (1988); *Kenneth W. Beard*, 32 ECAB 210 (1980).

[5] 5 U.S.C. § 8122(a)(1); *Larry E. Young*, 52 ECAB 168 (2001). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

[6] 5 U.S.C. § 8122(a)(1). *See Hugh Massengill*, 43 ECAB 475 (1992).

[7] 5 U.S.C. §§ 8122(a)(1), 8122(a)(2).

[8] *See* 5 U.S.C. § 8122(a); *Paul S. Devlin*, *supra* note 4.

[9] 5 U.S.C. § 8122(a)(1).

injury. Despite a November 9, 2006 request from the Office, the employing establishment did not respond to a letter for additional information regarding the alleged injury. The employing establishment merely stated on the CA-1 form that appellant's claim was filed after the three-year time limit. It has not addressed the issue of whether appellant's supervisors had actual knowledge within 30 days of the injury.

It is long established that proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter.[10] While the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government sources.[11] Once the Office has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible.[12]

The Board finds that the Office should again inquire of the employing establishment whether appellant's supervisors had actual knowledge of the injury within 30 days. The Office did not follow-up on the November 9, 2006 letter to the employing establishment. Therefore, it has not fulfilled its obligation to develop the evidence as far as reasonably possible.[13] Following this and any necessary further development, the Office shall issue a *de novo* decision on appellant's claim.

CONCLUSION

The Board finds that the case is not in posture for decision.

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[10] *Richard Kendall*, 43 ECAB 790 (1992).

[11] *Id.*

[12] *Leon C. Collier*, 37 ECAB 378, 379 (1986).

[13] In the absence of any response, the Office may accept appellant's version of events as established. *See W.M.,* Docket No. 07-1223 (issued September 10, 2007) (where the Board remanded a case, denied by the Office on the grounds that it was untimely filed, for further development despite the failure of the employing establishment to respond to the Office's two letters requesting information. The Board stated that if the employing establishment did not respond to future letters on remand appellant's version of facts must be accepted as true and the claim would be accepted as timely filed). *See also* 20 C.F.R. § 10.117(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Occupational Illness*, Chapter 2.806.4(d)(1) (October 1995).

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: December 1, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board