United States Department of Labor
Employees' Compensation Appeals Board

A.B., Appellant	)	
and	)	**Docket No. 08-1130**
	)	**Issued: September 19, 2008**
DEPARTMENT OF THE AIR FORCE, LOGISTICS MANAGEMENT DIRECTORATE, TINKER AIR FORCE BASE, OK, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 10, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 25, 2008 merit decision denying his occupational claim as 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 denied appellant's occupational disease claim on the grounds that it was untimely filed.

FACTUAL HISTORY

On November 14, 2007 appellant, then a 61-year-old packaging specialist, filed an occupational disease claim (Form CA-2) alleging that he sustained injury due to the performance of his work duties over a period of time. Regarding the nature of the injury, he stated, "Wearing down of 5th and 6th vertebrae compressed on nerves." Regarding the relationship of the claimed

illness to his work, appellant noted, "Because of the type and [du]ration of work that I was performing, aggravated with movement, lifting, pulling and general discomfort." He indicated that he first became aware of his claimed condition on July 22, 1998 and that he first realized that it was caused or aggravated by his employment on the same date.[1]

On the Form CA-2, appellant's supervisor, Joaquin P. Patlan, stated, "at the time of injury employee was assigned to WG-4602 duties as part of Kelly Air Force Base BRAC [base realignment and closure]. After injury employee returned to GS-2032 position as assigned." Mr. Patlan indicated that appellant was last exposed to the conditions alleged to have caused his claimed condition on September 28, 1998 and noted that appellant reported the claimed injury to him on August 10, 2007. Appellant did not stop work around the time he filed his claim.

In November 7 and December 12, 2007 statements, appellant indicated that he first experienced neck and right arm problems in 1997 or 1998 when he was carrying out base realignment and closure work at Kelly Air Force Base. His work required bending and lifting, pulling, stacking and carrying items to facilitate the packaging process. Appellant asserted that he had experienced continuous pain since 1997 or 1998 and stated the cause of the pain was "the cumulative effects over a period of time from the type of work I was doing which included blocking and bracing equipment and munitions on trucks for movement."

In a November 15, 2007 statement, Mr. Patlan stated that he had been appellant's supervisor since October 2003 and noted that appellant worked as a GS-2032 packaging specialist. He indicated that this position sometimes required climbing ladders to reach storage bins, reaching to lift items onto scales, balancing awkward loads while measuring with a tape measure and lifting and carrying items weighing up to 30 pounds (including awkwardly-shaped items such as plywood sheets).[2] Mr. Patlan stated that he had been appellant's coworker prior to serving as his supervisor and indicated that in the late 1990s appellant was working in a WG-4602 blocking and bracing position.[3] This position was more strenuous than the GS-2032 packaging specialist position and required appellant to lift and carry plywood sheets and power tools, load and unload trucks, climb off and on truck beds and operate pneumatic nail guns.

Appellant submitted a job description of the packaging specialist position (bearing the classification number GS-2032-11). The position required sitting for long periods of time, walking, climbing, bending, stooping and lifting and carrying light to moderate loads.[4] Appellant submitted a number of medical reports regarding the treatment of his neck problems between July 1998 and April 2004. A January 19, 2004 surgery report indicated that he underwent an anterior arthrodesis at C5-6 and C6-7 with decompression, bilateral discectomy and neural foraminotomy which was performed by Dr. Scott Robertson, an attending Board-

[1] Appellant indicated that he did not file his claim within 30 days of July 22, 1998 because he was not aware of the filing procedures.

[2] Mr. Patlan indicated that appellant had been the lead packaging designer since June 2000.

[3] Mr. Patlan indicated that this was part of the base realignment and closure work at Kelly Air Force Base.

[4] A personnel document indicates that appellant held this classification of job on March 4, 2007.

certified orthopedic surgeon. The medical records indicated that appellant had experienced neck problems for seven years and that he had a previous cervical laminectomy in 1998.[5]

In a February 25, 2008 decision, the Office denied appellant's claim on the grounds that it was untimely filed. It found that appellant should have been aware of the relationship between his employment and the claimed condition by July 22, 1998, the date he indicated on his Form CA-2 that he first realized that his claimed condition was caused or aggravated by his employment. The Office noted that there was no evidence that appellant's immediate supervisor had actual knowledge of the claimed injury within 30 days of July 22, 1998. Appellant's claim was untimely because it was filed on November 14, 2007, a date more than three years after July 22, 1998.

LEGAL PRECEDENT

A claimant seeking compensation under the Federal Employees' Compensation Act[6] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[7] including that he is an "employee" within the meaning of the Act[8] and that he filed his claim within the applicable time limitation.[9]

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.[10] 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

[5] X-rays from December 2003 and January 2004 showed degenerative disease of the cervical spine, mostly at C5-6.

[6] 5 U.S.C. §§ 8101-8193.

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

[8] *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).

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

[10] 5 U.S.C. § 8122(a).

(2) written notice of injury or death as specified in section 8119 was given within 30 days.[11]

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.[12] The Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.[13] If an employee continues to be exposed to injurious working conditions after awareness of the causal relationship of the compensable disability to his employment, the time limitation begins to run on the last date of this exposure.[14]

ANALYSIS

Appellant filed an occupational disease claim on November 14, 2007 alleging that he sustained cervical and cervical nerve root problems due to the performance of his work duties over a period of time. In a February 25, 2008 decision, the Office denied appellant's claim on the grounds that it was untimely filed. It determined that appellant should have been aware of the relationship between his employment and the claimed condition by July 22, 1998 and noted that there was no evidence that his immediate supervisor had actual knowledge of the claimed injury within 30 days of July 22, 1998. The Office found that appellant's claim was untimely because it was filed on November 14, 2007, a date more than three years after July 22, 1998.

The Board finds that appellant was aware of the possible relationship of his cervical problems as early as July 22, 1998. In his Form CA-2, appellant indicated that he first became aware of his claimed condition on July 22, 1998 and that he first realized that it was caused or aggravated by his employment on the same date. In another statement, he stated that he first experienced neck and right arm problems in 1997 or 1998 when he was carrying out base realignment and closure work at Kelly Air Force Base. The Board further notes, however, that, if an employee continues to be exposed to injurious working conditions after awareness of the

[11] 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.

[12] 5 U.S.C. § 8122(b).

[13] *Delmont L. Thompson*, 51 ECAB 155 (1999).

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

causal relationship of the compensable disability to his employment, the time limitation begins to run on the last date of this exposure.[15]

The Board finds that appellant continued to be exposed to the work factors he believed caused his claimed injury up through the time he filed his claim on November 14, 2007. The record reveals that in the late 1990s appellant worked in a WG-4602 blocking and bracing position. This position required appellant to lift and carry plywood sheets and power tools, load and unload trucks, climb off and on truck beds and operate pneumatic nail guns. It appears that in the very late 1990s or early 2000s appellant began working as a GS-2032 packaging specialist, a position which required climbing ladders to reach storage bins, reaching to lift items onto scales, balancing awkward loads while measuring with a tape measure and lifting and carrying items weighing up to 30 pounds (including plywood sheets). Appellant was still performing the GS-2032 packaging specialist position when he filed his claim on November 14, 2007.

The Board notes that the mere fact that the WG-4602 blocking and bracing position might have involved more strenuous activities than the GS-2032 packaging specialist position does not mean that appellant stopped performing the types of duties which he believed caused his claimed cervical condition.[16] Both positions involved such duties as bending, climbing, reaching and lifting and carrying heavy and awkwardly-shaped items. Therefore, appellant's date of last exposure to the claimed work exposures continued up through the time he filed his claim on November 14, 2007. Hence, appellant's claim was timely filed and the Office improperly denied his claim for failure to file a timely claim.

Because the Office denied appellant's claim for being untimely filed, it did not evaluate the medical evidence of record. The case is remanded to the Office for consideration of whether the medical evidence shows that appellant sustained an occupational condition due to the claimed employment factors. After such development as it deems necessary, the Office should issue an appropriate decision regarding appellant's occupational disease claim.

CONCLUSION

The Board finds that the Office improperly denied appellant's occupational disease claim on the grounds that it was untimely filed. The case is remanded to the Office for further development of the evidence and issuance of an appropriate decision.

[15] *See supra* note 14 and accompanying text.

[16] *See W.L.*, 59 ECAB ___ (Docket No. 07-1913, issued February 22, 2008). In this case, the Board found that the mere fact that the claimant started working in a limited duty at some point did not mean that he stopped performing the duties that he believed caused his right knee condition as both his regular work and his light-duty work required duties which engaged his knee such as walking, standing and climbing. The Board found that the claimant continued to be exposed to the claimed work factors up through the time he filed his claim and determined that he filed a timely claim for occupational disease.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' February 25, 2008 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: September 19, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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