United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 08-1756**
	)	**Issued: February 11, 2009**
DEPARTMENT OF THE ARMY, PETERSON AIR FORCE BASE, Colorado Springs, CO, Employer	)	

Appearances:
John S. Evangelisti, Esq., for the appellant
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 June 11, 1008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 29, 2008 merit decision denying her claim as untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this case.

ISSUE

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

FACTUAL HISTORY

On January 24, 2007 appellant, a 61-year-old contract specialist, filed an occupational disease claim, alleging that she developed anxiety, depression and pain syndrome as a result of

discrimination in the workplace.[1] She stated that she first realized that her condition was caused or aggravated by her employment on May 1, 2004. The official supervisor's report reflects that appellant first reported the condition to the employing establishment on January 24, 2007. The record reflects that appellant last worked at the employing establishment on December 17, 2003.

In a statement dated February 21, 2007, appellant alleged that the employing establishment discriminated against her in October 2001, when it improperly refused to promote her to the position of team leader. Based on the employing establishment's action, she filed an Equal Employment Opportunity (EEO) complaint, resulting in an August 25, 2004 decision, which found that the employing establishment engaged in unlawful discrimination when it failed to promote her to lead contract specialist. Appellant stated that she experienced severe emotional distress as a result of the employing establishment's discriminatory action and the effects of the May 4, 2004 hearing and subsequent EEO decision. She alleged that she experienced stress as a result of work responsibilities, stating that she struggled to meet contract deadlines from November 2001 to 2002. Appellant noted that her heavy workload included making all changes in existing contracts and awarding new contracts. It required her to work overtime two to three days per week and that, by December 2003, she had accrued 240 hours of annual leave and 100 hours of compensatory time.

On March 15, 2007 the employing establishment controverted appellant's claim on the grounds that it was untimely, noting that it was filed more than three years after her last exposure to the alleged discrimination on December 17, 2003, the date she stopped working. The employing establishment contended that appellant and her physicians acknowledged that she had experienced anxiety, stress and reactive depression as a result of employment discrimination since at least May 30, 2002, when she was treated by Dr. J.S. Evans, a clinical psychologist.[2]

In an undated statement, appellant reiterated her claim of discrimination. She also stated that she had been overworked due to numerous contract modifications and required research from November 2001 to 2002. Appellant alleged that, from January 2002 through December 2003, she was required to work overtime and weekends, as she struggled to meet deadlines.

By decision dated June 13, 2007, the Office denied appellant's claim on the grounds that it was not timely filed. It advised appellant that the date of injury was the date of her last occupational exposure, December 17, 2003, her last day of employment and that she should have been aware of a relationship between her employment and the claimed condition by that date. As her claim was filed on January 24, 2007, more than three years after the date of injury, the Office found that it was untimely filed. It further found that there was no evidence that her supervisor had actual knowledge of her alleged condition within 30 days.

[1] Although the Form CA-2 was signed and dated on or about December 13, 2006 (the exact date is illegible), it was not delivered to appellant's supervisor until January 24, 2007. In a November 28, 2007 statement, appellant's representative acknowledged that the claim was filed on January 24, 2007.

[2] In notes dated May 30, 2002, Dr. Evans stated that appellant continued to verbalize a great deal of anger over her treatment and place of employment by her prior supervisor and that she talked openly about the possibility of obtaining a stress-related medical retirement.

In an undated statement, appellant indicated that, in June 2003, she had a telephone conversation with Matt Hass at the Office. She stated that she told Mr. Hass that she was experiencing stress related to the EEO complaint she filed on June 3, 2002 and that her doctor had informed her that the stress and depression of the work environment were aggravating her pain issues. Appellant alleged that she was told that she could have a legitimate claim for stress in the workplace, but that "it wasn't really relevant because [she] was receiving Workmen's Comp for a physical complaint."

On July 3, 2007 appellant requested an oral hearing, which was held on November 28, 2007. Appellant's representative contended that her claim was filed in a timely fashion, as the substance of the claim could be deduced from a document filed on September 18, 2006 in File No. xxxxxx084, which requested that her emotional condition be accepted in that case as a consequential condition.[3] He argued that appellant had provided actual notice to her supervisor within 30 days of the alleged discrimination. Appellant testified that, at the time she filed her EEO claim in June 2002, she told Kim Diercks, her first-line supervisor, that she had been injured due to discrimination. She also alleged that she told Sergeant Chuck Pollard and Sergeant Jenkins and Larry Ozburn, team leaders, that she experienced stress due to the employing establishment's failure to promote her and other workplace discrimination.

The record contains a September 18, 2006 letter to the Office from appellant's representative, responding to the Office's proposed notice of termination of benefits in File No. xxxxxx084. The representative asked the Office "to accept depression due to the on-the-job injury and the matters raised in her EEO complaint," contending that "where a work injury and discrimination based on national origin and race are inextricably inter-related, discrimination must be considered as a job factor."

On December 31, 2007 the employing establishment disputed appellant's contention that she had provided actual notice of her injury to her supervisors. It provided statements from individuals identified by appellant as having received such notice, which contradicted her allegations. On December 29, 2007 Mr. Pollard denied that appellant ever notified him that her medical problems were the result of discriminatory practices within the organization. On December 22, 2007 Greg Jensen, a manager, Contracts Inspection, stated that he was aware that appellant missed work due to back pain, but did not remember being told of medical appointments related to psychiatric, psychological or other medical services outside the realm of her back pain. On December 21, 2007 Ms. Diercks stated that she was not aware that appellant was experiencing perceived work-related stress until the filing of her CA-2. On December 28, 2007 Mr. Ozburn indicated that, although he occasionally signed leave slips for appellant, he did not know why she went to the doctor and was not aware of any medical problem other than the accepted back condition.

[3] Appellant sustained an October 19, 1999 injury, which was accepted for neck strain, lumbar strain and thoracic and lumbar neuritis. (File No. xxxxxx084) By decision dated October 11, 2006, the Office terminated appellant's compensation benefits effective October 28, 2006. On April 12, 2007 an Office hearing representative affirmed the Office's decision. On October 2, 2008 the Board affirmed the Office's termination of compensation benefits. (Docket No. 07-1899, issued October 2, 2008)

By decision dated May 29, 2008, the Office hearing representative affirmed the June 13, 2007 decision. The representative found that appellant's claim was untimely and that her supervisor did not have actual notice of injury within 30 days.

LEGAL PRECEDENT

In cases of injury on or after September 7, 1974, section 8122(a) of the Act[4] provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. 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 of this title was given within 30 days."[5]

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.[6] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[7]

Section 8122(b) provides that the time for filing in latent disability cases 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 the employment and the compensable disability. 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.[8] In order to establish that a supervisor had actual knowledge, an employee must show not only that the immediate superior knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.[9]

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[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8122(a).

[6] 5 U.S.C. § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

[7] *Laura L. Harrison*, 52 ECAB 515 (2001).

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

[9] 5 U.S.C. § 8122(b); *Duet Brinson*, 52 ECAB 168 (2000).

In a case of occupational disease, the time for filing a claim begins to run when the employee first becomes aware or reasonably should have been aware, of a possible relationship between her condition and her employment. When an employee becomes aware or reasonably should have been aware that she has a condition which has been adversely affected by factors of her federal employment, such awareness is competent to start the limitation period even though the employee does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[10] Where the employee continues in the same employment after she reasonably should have been aware that she has a condition which has been adversely affected by factors of federal employment,[11] the time limitation begins to run on the date of the last exposure to the implicated factors.[12] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[13]

ANALYSIS

The Board finds that appellant did not timely file a claim for compensation under the Act.

The time for filing a claim begins to run when the employee first becomes aware or reasonably should have been aware, of a possible relationship between her condition and her employment. Where the employee continues in the same employment after she reasonably should have been aware that she has a condition which has been adversely affected by factors of federal employment,[14] the time limitation begins to run on the date of the last exposure to the implicated factors.[15] Appellant stated on her CA-2 that she did not become aware that her condition was related to her employment until May 1, 2004. However, the evidence of record establishes that appellant knew or reasonably should have known, of a relationship between her alleged condition and factors of her employment as early as 2002.

Appellant alleged that the employing establishment discriminated against her in October 2001 when it improperly refused to promote her to the position of team leader. The Board notes that she filed an EEO complaint in June 2002 related to the alleged discrimination. Appellant also alleged that she had been overworked due to numerous contract modifications and required research, beginning in 2001 and experienced stress as she struggled to meet deadlines until she left the employing establishment on December 17, 2003. On May 30, 2002 Dr. Evans stated that appellant continued to verbalize a great deal of anger over discriminatory treatment at her place of employment and that she talked openly about the possibility of obtaining a stress-related medical retirement. In an undated statement, appellant reported that, in June 2003, she had

[10] *Larry E. Young*, *supra* note 6.

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993); *see James A. Sheppard*, 55 ECAB 515 (2004).

[12] *Id.*

[13] *Debra Young Bruce*, 52 ECAB 315 (2001).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993); *see James A. Sheppard*, *supra* note 11.

[15] *Id.*

informed Office that she suffered from job-related stress. This evidence is sufficient to establish that appellant was aware or by the exercise of reasonable diligence should have been aware of the causal relationship between appellant's emotional condition and her employment by June 2002.

In discussing the degree of knowledge required by the employee prior to filing a claim, the Board has emphasized that she need only be aware of a possible relationship between her condition and her employment to commence the statute of limitations. The Board has not required that appellant have definitive evidence of a condition and causal relationship on the date the claim is filed.[16] Appellant experienced and was treated for stress during her period of employment, which she attributed to discriminatory treatment and overwork. Although she may have had some doubt as to a definitive diagnosis, the Board finds that she knew or reasonably should have known, of a relationship between her condition and her employment by the date of her last exposure on December 17, 2003.

On appeal, appellant contends that counsel's September 18, 2006 letter to the Office, in appellant's 1999 traumatic injury case, constituted timely filing of her occupational disease claim. In the September 18, 2006 letter, appellant's representative asked the Office "to accept depression due to the on-the-job injury and the matters raised in her EEO complaint," contending that "where a work injury and discrimination based on national origin and race are inextricably inter-related, discrimination must be considered as a job factor." Office procedures require a claimant to show sufficient cause for the Office to proceed with processing and adjudicating a claim.[17] In occupational disease cases where the claim is not based on a specific incident, the claimant must also submit sufficient evidence to identify fully the particular work conditions alleged to have caused the disease.[18] The representative's September 18, 2006 letter does not identify any specific work conditions alleged to have cause appellant's disease. While the letter refers generally to matters rose in her EEO complaint, its contents are insufficient to establish a claim for compensation.

As noted, the evidence establishes that appellant should have known of a causal relationship between her emotional condition and her employment before she stopped working. Therefore, the time limitations began to run on December 17, 2003, appellant's last day of work and exposure to the implicated employment factors.[19] Since appellant did not file a claim until January 24, 2007, her claim was filed outside the three-year limitation period.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if her immediate supervisor had actual knowledge of the injury within 30 days of her last exposure to the implicated employment factors on December 17, 2003.[20] Additionally, the claim would be

[16] *See Edward Lewis Maslowski*, 42 ECAB 839 (1991). *See also William A. West*, 36 ECAB 525 (1985).

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Responsibilities*, Chapter 2.800.3(a) (April, 1993).

[18] *Id.*

[19] *See supra* note 14.

[20] *Larry E. Young*, *supra* note 6. *See* Federal (FECA) Procedure manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

deemed timely if written notice of injury had been provided within 30 days pursuant to 5 U.S.C. § 8119.[21] The employing establishment disputed appellant's claim that appellant provided actual notice of her condition to her supervisors, and provided statements from individuals identified by appellant as having received such notice which contradicted her allegations. There is no other evidence of record supporting appellant's allegation that she provided written notice of injury prior to January 24, 2007, the date she filed her claim or that her immediate supervisor had actual knowledge of her alleged emotional condition.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 29, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 11, 2009
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

[21] 5 U.S.C. §§ 8122(a).