United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
	)	**Docket No. 08-1756**
and	)	**Issued: September 23, 2009**
DEPARTMENT OF THE ARMY, PETERSON AIR FORCE BASE, Colorado Springs, CO, Employer	)	

Appearances:
John S. Evangelisti, Esq., for the appellant
Miriam D. Ozur, for the Director

Case Submitted on the Record

ORDER GRANTING PETITION FOR RECONSIDERATION AND REAFFIRMING PRIOR DECISION

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

On June 11, 2008 appellant filed an application seeking review of a May 29, 2008 merit decision of the Office of Workers' Compensation Programs denying her emotional condition claim as untimely filed. The appeal was docketed as No. 08-1756. On February 11, 2009 the Board issued a decision and order in the above-entitled matter, affirming the Office's May 29, 2008 decision.[1] The Board found that the statute of limitations on appellant's claim of depression began to run on December 17, 2003, the date of her last exposure to employment, As she did not file her claim until January 24, 2007, it was outside the three-year limitation period.

On March 11, 2009 appellant, through her representative, filed a petition for reconsideration. The Director of the Office was served with a copy of appellant's petition. On April 30, 2009 the Director submitted a response to appellant's petition.

The Board has duly considered the matter and finds that appellant's petition for reconsideration should be granted; however, the February 11, 2009 decision is reaffirmed.

[1] Docket No. 08-1756 (issued February 11, 2009).

The Board found that appellant had not filed a claim for depression resulting from conditions of her employment as described in her Equal Employment Opportunity (EEO) claim within three years of December 17, 2003. Therefore, it was untimely filed. Appellant's representative contends that his September 18, 2006 letter to the Office in appellant's traumatic injury claim (File No. xxxxxx084) contained "words of claim," which tolled the statute of limitations. The Board is not persuaded by counsel's argument on reconsideration.

The Board has long addressed the requirements for filing a "claim" under the Federal Employees' Compensation Act. It is well established that the Office may not purport to adjudicate and deny a claim before any claim has been filed. Communications from an employee which do not amount to a claim or seek present or past due compensation may not be treated as a claim and rejected on that basis.[2] However, a claim for compensation need not be filed on any particular form. A claim may be made by filing any paper containing words which reasonably may be construed or accepted as a claim. Notice without words of claim cannot, by any permissible construction, toll the running of the statutory period for filing a written claim for disability benefits.[3] Whether a particular document contains words of claim and other essential information for a valid claim depends upon the circumstances under which the document is presented. The Office's procedures provide that, while certain forms constitute claims for compensation for disability, the Office should accept as a claim, for the purpose of determining timeliness, any written instrument from the person claiming benefits, or someone acting on the person's behalf from which the substance of a claim can be reasonably deduced.[4]

Counsel relies on his September 18, 2006 letter to the Office in File No. xxxxxx084, which was a response to the Office's proposed notice of termination of benefits in that claim. The September 18, 2006 letter states, in relevant part:

> "Where these psychological stressors are compounded by the accepted injury, they are compensable as a consequential injury. Dr. Tobey notes that [appellant's] 'current pain complaints are significantly related to her ongoing psychological stressors which are not related to the work injury of October 19, 1999.' Please accept chronic pain syndrome as a consequential injury.
>
> "Where the work injury and discrimination based on national origin and race are inextricably inter-related discrimination must be considered as a job factor.

[2] *John Berestecki*, 2 ECAB 36 (1948); *Charlie Denman*, 1 ECAB 105 (1948).

[3] The Board has held that notices, such as narrative statements, forms other than CA-1 and CA-2 forms, or memoranda, which are submitted within the applicable time period but do not contain words of claim are insufficient forms of notice. *Robert E. Kimsey*, 40 ECAB 762 (1989). *See also Gary W. Hudiburgh, Jr.*, 37 ECAB 423 (1986) (where the Board found a letter from appellant to the employing establishment, which described his injury and medical treatment and requested administrative discharge, did not contain any words of claim under the Act); *Richard C. Cruson*, 34 ECAB 1714 (1983) (where the Board found that an employing establishment form which provided notice of injury to the employing establishment on the date of injury did not contain words of claim).

[4] *See William F. Dotson*, 47 ECAB 253 (1995). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.4(b) (March 1993).

> Clearly the Second Opinion and Referee opinions relate to the belief that [appellant's] work problems, which gave rise to her EEO Complaint, are aggravating factors. [She] received a favorable decision from Administrative Law Judge Meyers on May 24, 2004 (copy enclosed). Judge Meyers found that [appellant's] on the job injuries 'are exacerbated by emotional distress caused by the Agency's illegal discrimination in 2001.... The stress and pain continued for about 2½ years, from the non-selection to the Hearing on May 4, 2004.' at. p. 10.
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> "Please accept depression due to the on the job injury and the matters raised in her EEO Complaint. Please accept discrimination as a causal factor in [appellant's] pain syndrome."

The Board finds that the contents of the September 18, 2006 letter do not constitute words of claim for a new injury.

The Board is unable to conclude that the Office should have reasonably deduced the substance of a claim from the contents of the September 18, 2006 letter. The representative's request that the Office accept depression as a consequence of appellant's traumatic injury is, by definition, not a claim for a new injury.[5] Further, his reference to "matters raised in [appellant's] EEO complaint" is vague and uninformative and insufficient to state a claim. As the EEO complaint is not included in the record, the Board can only speculate as to the allegations contained therein. Appellant has not shown sufficient cause for the Office to proceed with processing and adjudicating a claim, as required by Office procedures.[6] Moreover, the EEO claim was not a claim for benefits under the Act.[7]

Appellant's representative cites *William F. Dotson*,[8] as support for his contention that the September 18, 2006 letter satisfied the filing requirement. However, the facts in *Dotson* are distinguishable from the facts of this case. In *Dotson*, where CA-7 and CA-8 forms were signed and completed by the claimant's attorney prior to the expiration of the statute of limitations, the Board found that the employee timely filed a claim. In the instant case, appellant did not submit

[5] *See, e.g., Charles W. Downey*, 54 ECAB 421 (2003).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

[7] 5 U.S.C. § 8121 provides that compensation may be allowed only if an individual or someone on her behalf makes a claim therefore. The claim shall: (1) be made in writing within the time specified by section 8122 of this title; (2) be delivered to the office of the Secretary of Labor or to an individual whom the Secretary may designate by regulation, or deposited in the mail properly stamped and addressed to the Secretary or her designee; (3) be on a form approved by the Secretary; (4) contain all information required by the Secretary; (5) be sworn to by the individual entitled to compensation or someone on her behalf; and (6) except in case of death, be accompanied by a certificate of the physician of the employee stating the nature of the injury and the nature and probable extent of the disability. *See also* 20 C.F.R. § 10.101(a), which provides in pertinent part that an employee who has a disease which she believes to be work related, or a representative, must give notice of the condition in writing to the employer. The Board notes that the record does not reflect that appellant or her representative submitted a copy of the September 18, 1006 letter to the employing establishment as required.

[8] *Supra* note 4.

any form to the Office within the required period establishing her intent to file a claim. The September 18, 2006 letter of counsel is distinguishable from the Office forms in *Dotson*.

Counsel compares the instant case to *Dale M. Newbigging*,[9] in which the Board found that the Office improperly rejected the employee's claim without considering whether certain relevant letters contained words of claim. However, the facts of *Newbigging* are inapposite to the facts at hand. In *Newbigging*, the employee's father wrote to the Office regarding the disability of his son, a former postmaster. The Office responded, advising him to complete and submit an enclosed claim form. Upon submission of a claim for occupational disease, it was denied as untimely filed. The Board found that the case was not in posture for decision. It noted that the Office had limited consideration to the CA-2 form without any analysis of whether the letters from the employee's father could reasonably be construed as a claim. In this case, the May 29, 2008 decision of the Office hearing representative considered the September 18, 2006 letter and determined that appellant had failed to provide actual written notice of her emotional condition injury within three years of her last exposure.

Similarly, the facts of *Marion L. Shafer*,[10] cited by counsel, shed little light on the instant case. In *Shafer*, the employee submitted a document alleging work-related noise exposure and correspondence which reflected intent to file a claim. Under the circumstances of that case, the Board found that a claim was timely filed. In this case, appellant did not make specific allegations, but rather referred generally to her EEO complaint, which is not of record. Moreover, there is no correspondence corroborating an intent to file a separate emotional condition claim within the statutory period.

Whether a particular document contains words of claim or other essential information for a valid claim depends upon the circumstances under which the document is presented. In this case, the September 18, 2006 letter was submitted in response to a pretermination notice in appellant's traumatic injury case. The context of the submission of the letter, including counsel's reference to matters raised in the EEO complaint, was a clear attempt to persuade the Office from terminating her compensation benefits under that claim. Appellant's representative recognized that he was advised by the Office in an October 11, 2006 decision to file a Form CA-2 claim form in order to address any issues contained in his client's EEO complaint. Therefore, he was made aware that the Office did not consider the contents of the September 18, 2006 letter sufficient to state a new occupational disease claim. Counsel did not follow the Office's advice in a timely manner.

Appellant argues that the August 25, 2004 EEO decision, which determined that she had established a *prima facie* case of discrimination against the employing establishment, established a compensable employment factor. However, the underlying issue is not whether the claimant established harassment or discrimination under EEO standards. Rather, the issue is whether appellant, under the Act, has submitted sufficient words of claim to toll of the statute of limitations. The Board finds that she has not done so. The Board finds that appellant's claim for compensation is barred by the applicable time limitation provisions of the Act.

[9] 44 ECAB 551 (1993).

[10] 27 ECAB 130 (1975).

IT IS HEREBY ORDERED THAT the petition for reconsideration be granted. The Board's February 11, 2009 decision is reaffirmed for the reasons stated.

Issued: September 23, 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
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