

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

M.B., Appellant)	
)	
and)	Docket No. 09-1831
)	Issued: April 26, 2010
DEPARTMENT OF THE AIR FORCE, 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 July 13, 2009 appellant filed a timely appeal of the May 8, 2009 decision of the Office of Workers' Compensation Programs which affirmed the denial of his occupational disease claim on the grounds that it was not timely filed. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that he timely filed his occupational disease claim under 5 U.S.C. § 8122.

FACTUAL HISTORY

On April 1, 2009 appellant, then a retired 68-year-old aircraft mechanic, filed an occupational disease claim alleging that he developed bilateral knee arthritis as a result of his work duties which included climbing, standing, bending and squatting. He first related his bilateral knee condition to his employment on June 1, 1984. Appellant advised that he delayed in filing a claim for compensation because he was told he could not file a claim and should accept civil service retirement because it was better to retire than to go out on disability. He first reported his condition to a supervisor on February 1, 1999, and stopped work on June 2, 2000,

the date he retired from federal service. The supervisor's report on the CA-2 form noted that appellant first reported his condition on February 1, 1999.

By letter dated April 7, 2009, the Office requested additional information from appellant noting that the evidence submitted was insufficient to establish his claim.

Appellant submitted an employee safety health record which noted the hazards associated with his duties as an aircraft engine mechanic and a record of briefing and job safety training from 1989 to 1992. He submitted a civil service application form dated October 4, 1965, an appointment affidavit for an aircraft mechanic dated May 2, 1966, requests for personnel action dated February 19, 1967 to June 2, 2000 regarding promotions, reassignments, pay adjustment and retirement.

Appellant submitted medical notes from Dr. John R. Hunter, a Board-certified orthopedic surgeon, dated December 21, 1999 to February 9, 2000. Dr. Hunter treated appellant for bilateral knee pain. He reviewed appellant's job description and opined that prolonged work activities would aggravate his bilateral knee condition. On January 23, 2004 appellant underwent a right total knee arthroplasty which was performed by Dr. Thomas K. Tkach, a Board-certified orthopedic surgeon, who diagnosed severe degenerative arthritis of the right knee. In a January 13, 2009 report, Dr. John W. Ellis, a Board-certified family practitioner, treated appellant for his bilateral knee condition. Appellant reported working as an aircraft mechanic for 34 years where he was required to bend, squat, lift and carry heavy engine parts throughout his day. Dr. Ellis diagnosed repetitive strains and repetitive trauma to the cartilage of both knees causing severe traumatic arthritis. He opined that the injuries were caused by appellant's job and that he was totally disabled. In a patient injury form prepared by appellant, he noted working as a jet engine mechanic and developing bilateral knee injuries due to his work.

The employing establishment submitted a March 9, 2000 memorandum noting that appellant was identified as medically disqualified from his position as an aircraft mechanic. On April 2, 2009 it controverted the claim as appellant failed to timely file an occupational disease claim within three years of the onset of his condition.

By decision dated May 8, 2009, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that it was timely filed in accordance with 5 U.S.C. § 8122. It found that appellant first became aware of his condition on June 1, 1984 and was aware of the relationship between his employment and the claimed condition by that date. Appellant retired on June 2, 2000 and did not file a claim until April 1, 2009, which was over three years after he was last exposed to the implicated work factors. It further noted that there was no evidence that appellant's supervisor had knowledge of an employment-related injury within 30 days.

LEGAL PRECEDENT

Section 8122(a) of the Act states that, "[a]n original claim for compensation for disability or death must be filed within three years after the injury or death."¹ Section 8122(b) provides that, in latent disability cases, the time limitation does not begin to run until the claimant is

¹ 5 U.S.C. § 8122(a).

aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between the employment and the compensable disability.² 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.³

An employee's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of appellant's injury.⁴ An employee must show not only that his immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.⁵

ANALYSIS

The Office denied appellant's claim for compensation on the grounds that he failed to timely file it in accordance with 5 U.S.C. § 8122. Appellant filed his claim for compensation on April 1, 2009 alleging that on June 1, 1984 he first became aware that his bilateral knee arthritis was due to the work duties he performed in federal employment. The record establishes that his last exposure to the implicated work duties was June 2, 2000, when he retired from federal service. The time limitation began to run on June 2, 2000, the date appellant was last exposed to the employment conditions to which he attributed his bilateral knee arthritis. Since he did not file his claim for occupational disease until April 1, 2009, the Board finds that it was not filed within the three-year time limitation period.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor had actual knowledge of the injury within 30 days of his last exposure to the conditions alleged to have caused his condition *i.e.*, within 30 days of June 2, 2000. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.⁶ Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days.⁷ Appellant's Form CA-2 indicated that he first reported the bilateral knee condition to his supervisor on February 1, 1999. This statement is, in and of itself, insufficient to establish that his supervisor was placed on notice of an on-the-job injury. Appellant did not submit evidence to establish that his supervisor, another employing establishment official or an employing establishment physician or dispensary, had actual

² *Id.* at § 8122(b).

³ See *Larry E. Young*, 52 ECAB 264 (2001); *Garyleane A. Williams*, 44 ECAB 441 (1993); *Alicia Kelly*, 53 ECAB 244 (2001); *Mitchell Murray*, 53 ECAB 601 (2002).

⁴ 5 U.S.C. § 8122(a)(1); see also *Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(a)(3) (March 1993).

⁵ *Charlene B. Fenton*, 36 ECAB 151 (1984).

⁶ 5 U.S.C. § 8122(a)(1); see *Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

⁷ 5 U.S.C. §§ 8122(a)(1) and (2).

knowledge of his claimed employment injury within 30 days after the date of his last exposure to the implicated employment factor.⁸

Appellant submitted various documents in support of his claim including a civil service application form dated October 4, 1965, an appointment affidavit for an aircraft mechanic dated May 2, 1966, requests for personnel action for a promotion, reassignment, pay adjustment and retirement dated February 19, 1967 to June 2, 2000. However, none of this evidence establishes that his supervisor had actual knowledge of the claimed bilateral knee condition and its relationship to his federal employment. Appellant submitted medical records, including reports from Dr. Hunter, Dr. Tkach and Dr. Ellis. However, this evidence does not address whether appellant timely filed a claim for compensation and does not otherwise support that appellant's immediate supervisor had the type of knowledge to put him reasonably on notice of an on-the-job injury caused by performing repetitive aircraft mechanic duties.⁹

The Board finds that appellant has not established actual knowledge by his supervisors of his work-related condition within 30 days. Therefore, he has not established a timely claim.

Section 8122(d)(3) of the Act¹⁰ provides that, time limitations for filing a claim do not run against any individual whose failure to comply is excused by the Secretary on the grounds that such notice could not be given because of exceptional circumstances. Appellant's excuse for not filing a timely claim was that he was told he could not file a claim and should accept civil service retirement because it was better to retire than to go out on disability. However, the Board has held that unawareness of possible entitlement,¹¹ lack of access to information¹² and ignorance of the law or of one's obligations under it¹³ do not constitute exceptional circumstances that could excuse a failure to file a timely claim.¹⁴ Appellant has not established that he could not file a timely claim due to exceptional circumstances as that term is used in section 8122(d)(3) of the Act. The Board finds that appellant has not established that he timely filed a claim for compensation within three years after his retirement on June 2, 2000.

⁸ See *Ralph L. Dill*, 57 ECAB 248 (2006) (appellant's statement on his claim form that he reported his injury to his supervisor was insufficient to show that his supervisor was on notice in the absence of other evidence that his supervisor had actual knowledge of a work injury within 30 days of his last workplace exposure).

⁹ See *Linda J. Reeves*, 48 ECAB 373 (1997) (where the Board held that, while appellant submitted a statement from a former supervisor that established that he had some knowledge of appellant's complaints, this statement is not sufficient to establish that her immediate superior had actual knowledge of a work-related injury as the statement only makes a vague reference to appellant's health and does not indicate that she sustained any specific employment-related injury, rather the knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death).

¹⁰ 5 U.S.C. § 8122(d)(3).

¹¹ See *supra* note 8.

¹² *Kathryn L. Cornett (Elmer Cornett)*, 54 ECAB 812 (2003).

¹³ *George M. Dickerson*, 34 ECAB 135 (1982).

¹⁴ *Michael Thomas Plante*, 44 ECAB 510 (1993).

On appeal appellant asserts that his bilateral knee condition was a progression of degenerative arthritis of the knees due to his job. He indicated that his physician advised him that he could no longer work as an aircraft mechanic and he subsequently filed for civil service retirement. Appellant asserts that he was never advised of his options and was encouraged to retire and not file a compensation claim. As noted, the Board has held that unawareness of possible entitlement, lack of access to information and ignorance of the law or of one's rights and obligations under it do not constitute exceptional circumstances that could excuse a failure to file a timely claim.¹⁵

CONCLUSION

The Board finds that the Office properly denied appellant's compensation claim on the grounds that he did not establish that his claim was filed within the applicable time limitation provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the May 8, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2010
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

¹⁵ See *supra* notes 11-13.