

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

V.B., claiming as widow of K.B., Appellant)

and)

U.S. POSTAL SERVICE, PROCESSING &)
DISTRIBUTION CENTER, Columbus, OH,)
Employer)

**Docket No. 09-1052
Issued: January 25, 2010**

Appearances:

*James D. Viets, 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 March 12, 2009 appellant filed a timely appeal from a July 28, 2008 decision of the Office of Workers' Compensation Programs denying her claim for death benefits on the grounds that it was not timely filed. Pursuant to 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's claim for death benefits was timely under the three-year time limitation of section 8122 of the Federal Employees' Compensation Act.

FACTUAL HISTORY

On April 16, 2002 the employee, then a 51-year-old clerk was standing near the time clock preparing to clock in from lunch when he suddenly fell to the floor. He struck his head just

above the left eye on the floor.¹ An ambulance transported the employee to a hospital where surgery was performed to insert an intracranial pressure monitor. A computerized tomography (CT) scan revealed a large left frontal lobe contusion with bifrontal components, a traumatic subarachnoid hemorrhage and cerebral edema. In an April 16, 2002 report, Dr. Warren I. Leimbach, a neurosurgeon, indicated that he could not rule out an aneurysmal subarachnoid hemorrhage and planned to obtain an angiogram. He described, as the history of injury, that the employee felt dizzy and then fell from scaffolding and struck his head on a cart. The report does not indicate who provided the history of injury. The employee died on April 18, 2002. The death certificate listed the cause of death as massive cerebral edema due to head trauma. It indicated at the bottom of the form that the employee struck his head on a cart.² No claim for compensation was filed for the employee's April 16, 2002 injury or April 18, 2002 death.

On June 21, 2006 appellant filed a claim for benefits based on her husband's April 18, 2002 death. She indicated that he struck his head on a cart when he fell. The second page of the form, the attending physician's report, was blank. An employing establishment Superior's Report of Employee's Death dated July 6, 2006 was signed by Acting Manager of Claims, Sid Ricigliano, who indicated that the employee experienced a brain aneurysm and fell to the floor on April 16, 2002. The immediate cause of death was listed as "questionable." The employee's immediate superior at the time of injury was Mr. Saxon. In a separate letter, Mr. Ricigliano stated that the employing establishment controverted the claim on the grounds that it was not timely filed and causal relationship was not established. He noted that no autopsy was performed, Dr. Leimbach could not be located to verify the authenticity of the death certificate, his signature was illegible and differences in handwriting indicated that more than one individual completed the death certificate. By letter dated July 13, 2006, the Office asked appellant to provide additional evidence, including a comprehensive medical report with a rationalized explanation addressing the employee's cause of death.

By decision dated August 14, 2006, the Office denied appellant's claim for death benefits finding that the evidence did not establish that the employee's death was causally related to factors of his employment.

Appellant requested an oral hearing that was held on May 24, 2007. In an August 1, 2007 decision, an Office hearing representative vacated the August 14, 2006 decision and remanded the case for additional medical evidence and a determination of whether the claim was timely filed.

By letter dated August 7, 2007, the Office asked appellant to provide additional information, including a comprehensive medical report addressing the cause of the employee's death and an explanation as to why she did not file a claim for benefits until more than four years after the employee's death. In an August 20, 2007 affidavit, appellant stated that the employee

¹ An employing establishment Supervisor's First Notice of Injury Prep Sheet indicated that Christopher Saxon was the employee's immediate superior. The form noted that the employee fell to the floor and the cause of his fall was unknown. There were two witnesses, Harry Cogdill and Mike Munyon, but no witness statements were provided.

² The Board notes that the signature on the death certificate for Dr. Leimbach appears to differ from the signature on his April 16, 2002 hospital consultation report.

died in the hospital on April 18, 2002 after falling at work on April 16, 2002 and striking his head on a piece of equipment. She contended that he had no history of headaches, dizziness or fainting prior to the work incident. Appellant stated that on April 29, 2002 she met with Paula Tobias, an employing establishment human resources specialist, regarding survivor's benefits. She assumed that Ms. Tobias would advise the employee's supervisor of his death. Appellant stated that her delay in filing a claim for death benefits was caused by medical and personal difficulties including surgery and treatment for breast cancer, moving from her house to a condominium and then to another house and dealing with matters relating to the employee's death. She consulted an attorney on an unspecified date but discontinued his representation. Appellant stated that in October 2005 she felt strong enough mentally and physically to pursue a claim for compensation and consulted a new attorney. In a September 13, 2007 letter, Dr. Stuart Chow, a physician at the hospital where the employee died, reviewed the medical records and stated that no determination was ever made as to whether the employee's subarachnoid hemorrhage was caused by an aneurysm because he was too unstable to undergo an angiogram. The employee developed significant brain edema that progressed to brain death on April 18, 2002.

On November 26, 2007 the employing establishment advised that Mr. Munyon was unavailable for a statement regarding the April 16, 2002 work incident because he had retired. In a November 27, 2007 memorandum of a telephone call, Mr. Cogdill, a coworker present when the employee fell on April 16, 2002, stated that both he and the employee were standing on the floor in front of the time clock and talked for several minutes. He turned to face the clock and heard, but did not see, the employee fall. It sounded as if the employee fell full force on the floor because of the loud noise. In a December 7, 2007 telephone call memorandum, Mr. Saxon stated that he did not witness the employee's fall on April 16, 2002. He had no knowledge of whether the employee experienced any difficulties prior to the fall or whether he struck anything before hitting the floor.

By decision dated November 29, 2007, the Office denied appellant's claim on the grounds that it was not timely filed.

On December 26, 2007 appellant requested a telephonic hearing that was held on May 22, 2008. In a May 20, 2008 affidavit, Caitlin Barbee, a law clerk at the firm of appellant's attorney, stated that she spoke to Mr. Saxon briefly on May 14, 2008 and he asked her if he could return the call later. She attempted to contact Mr. Saxon on May 19, 2008 and left a voice message. As of May 20, 2008 Mr. Saxon had not called back to discuss the April 16, 2002 incident when the employee fell.

By decision dated July 28, 2008, an Office hearing representative affirmed the November 29, 2007 decision.

LEGAL PRECEDENT

In cases of injury on and 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.³ Even if a claim was not timely filed within the three-year time limitation, it would still be regarded as timely under section 8122(a)(1) if the immediate superior had actual knowledge of the injury within 30 days or written notice of injury or death was provided within 30 days pursuant to 5 U.S.C. § 8119.⁴ The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.⁵

ANALYSIS

Appellant did not file her claim for death benefits until June 21, 2006, more than three years after the employee's April 16, 2002 fall and April 18, 2002 death. Since she did not file a claim until June 21, 2006, her claim was filed outside the three-year time limitation period which ended April 18, 2005.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if the employee's immediate superior or another employing establishment official had actual knowledge of the injury within 30 days of the date of injury. Therefore, the employee's superior would need actual knowledge of his claimed injury by May 16, 2002, *i.e.*, within 30 days of April 16, 2002.⁶ The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.⁷ There is evidence that the employee's immediate superior or another employing establishment official had actual knowledge of the April 16, 2002 injury within 30 days of the date of injury. The evidence however does not establish that the circumstances of Mr. Saxon's knowledge of the April 16, 2002 work incident were such as to put him reasonably on notice that the employee's death might be employment related. There is no factual evidence establishing that the employee struck his head on a cart when he fell on April 16, 2002 or was standing on scaffolding. No one from the employing establishment described such a factual scenario. The only mention of the employee hitting his head on a cart is in appellant's June 21, 2006 claim form, Dr. Leimbach's April 16, 2002 consultation report and the death certificate. The source for the history of injury in these documents is not provided. None of the documents from the employing establishment mention that the employee struck a cart when he fell. The contemporaneous documents, the April 16, 2002 supervisor's first notice-of-injury prep sheet and the April 18, 2002 accident report, indicate that the employee fell directly to the floor without striking anything else. There is no evidence that Mr. Saxon had any reason to believe the employee's April 16, 2002 fall was caused by a factor of employment rather than a nonwork-related medical condition. The evidence does not establish that Mr. Saxon was reasonably on notice that the employee's death might be employment related. Additionally, appellant did not provide written notice of injury or death within 30 days pursuant to 5 U.S.C. § 8119. As noted, her claim was not filed until June 21, 2006.

³ 5 U.S.C. § 8122(a).

⁴ 5 U.S.C. §§ 8122(a)(1), 8122(a)(2).

⁵ *Kathryn A. Bernal*, 38 ECAB 470 (1987).

⁶ *Larry E. Young*, 52 ECAB 264 (2001). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (February 2000).

⁷ *Kathryn A. Bernal*, *supra* note 5.

Appellant alleged that she was unable to timely file a claim within three years of the employee's April 18, 2002 death because of personal difficulties including surgery and treatment for breast cancer, moving her residence and dealing with matters relating to the employee's death. She consulted an attorney at an unspecified date but discontinued his representation. Appellant stated that, in October 2005, she felt strong enough mentally and physically to pursue a claim for compensation and consulted a new attorney. However, the claim was not filed until one year after she consulted the attorney, in June 2006. Appellant's reasons for not filing a claim within three years of the employee's death do not constitute exceptional circumstances that would excuse a failure to timely file a claim. She has not established that she was incapable of filling out a form or otherwise providing the relatively simple information necessary for filing a claim and meeting the limitation requirements. Appellant provided no medical evidence establishing that she was incompetent to file a compensation claim until June 21, 2006, more than four years after the employee's death. There are no "exceptional circumstances" in this case within the meaning of section 8122(d)(3)⁸ which would permit the Office to excuse appellant's failure to comply with the time limitation.

CONCLUSION

The Board finds that appellant failed to establish that her claim for death benefits was timely filed under the three-year time limitation of section 8122 of the Act.

⁸ 5 U.S.C. § 8122(d)(3).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 28, 2008 is affirmed.

Issued: January 25, 2010
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