

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

M.H., Appellant

and

**DEPARTMENT OF LABOR, MINE SAFETY &
HEALTH ADMINISTRATION,
Morgantown, WV, Employer**

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**Docket No. 09-2147
Issued: June 22, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 25, 2009 appellant filed a timely appeal from an August 28, 2008 decision of the Office of Workers' Compensation Programs denying her claim as untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant filed a timely claim for compensation within the applicable time limitation provisions of the Federal Employees' Compensation Act.

On appeal, appellant contends that the time for filing her claim should not have begun to run at the time of the tick bite as Lyme's disease is a systemic infection creating a disease of insidious onset. She stated that the general public is not aware that large brown ticks, as opposed to deer ticks, carry Lyme's disease and that she did not know of the potential infection.

FACTUAL HISTORY

On June 26, 2007 appellant, then a 45-year-old coal mine safety and health inspector, filed an occupational disease claim (Form CA-2) alleging that she contracted Lyme's disease after she was bitten by a tick at the base of her skull while inspecting a refuse belt, which required her to travel through high grass at a sawmill preparation plant. She indicated that she first became aware of the disease on February 26, 2007 but did not immediately file a claim because she was gathering information and a witness statement. The employing establishment indicated that appellant first reported her condition on June 25, 2007.

By letters dated June 28, 2007, the Office requested that appellant and the employing establishment provide additional factual and medical information regarding the claim.

In a May 24, 2007 statement, appellant claimed that between May 28 and June 10, 2002 she was performing an inspection for a sawmill preparation plan with Dave Bartlett, a plant superintendent. She recalled experiencing something at the base of her skull while walking through tall grass. Mr. Bartlett inspected her neck and removed a tick that was attached to her head. Appellant stated that the tick appeared to be a brown dog tick and she had thought only the smaller deer ticks carried Lyme's disease. She stated that she was certain that she had discussed the occurrence with her coworkers and supervisors as it was an unusual occurrence. Appellant further claimed that she had experienced symptoms consistent with Lyme's disease, including a lack of concentration and memory, which were attributed by her health care providers to stress, normal aging and menopause.

On May 22, 2007 Mr. Bartlett stated that, during the summer or spring of 2002, he accompanied appellant to an inspection of an overland refuse belt and other areas of a plant facility. Late in the day, appellant requested that he look at the back of her neck because she felt something there. Upon looking, Mr. Bartlett found an attached tick, which he removed and found it to be intact.

In a July 18, 2007 letter, appellant claimed that she was unaware of any exposure to Lyme's disease other than the tick bite and that this was confirmed by her friends and family. She stated that she would provide additional medical evidence as soon as it was available.

On July 10, 2007 the employing establishment stated that to the best of its knowledge, the statements and information provided by appellant were correct and that it did not have any reason to believe that she was submitting false information. It noted that no specific equipment was issued to appellant to minimize exposure to tick bites. The employing establishment further stated that appellant did not initially file a claim in this case as she was not diagnosed with Lyme's disease until recently.

By decision dated September 24, 2007, the Office denied appellant's claim on the grounds that she did not establish with sufficient evidence that she was bit by a tick carrying Lyme's disease in 2002 or that she contracted Lyme's disease causally related to her employment. It noted that, as appellant only claimed that she experienced a single tick bite during one shift, her claim should be adjudicated as a traumatic injury.

On October 22, 2007 appellant filed a request for an oral hearing before an Office hearing representative. An oral hearing was held on June 16, 2008 where appellant testified that she did not file a claim in 2002 after she experienced the tick bite because she believed that only small brown ticks carry Lyme's disease. Appellant did not know that wood ticks could also carry the disease and was not aware that she could be infected.

By decision dated August 28, 2008, the Office hearing representative denied appellant's claim on the grounds that it was not timely filed within a three-year period. She found that appellant's condition resulted from a tick bite on one specific day, thus, her claim was for a traumatic incident of which she was immediately aware. As appellant did not file her claim until June 20, 2007, it was untimely as over three years had passed since the 2002 incident. The Office hearing representative further found that there was no evidence her supervisor had actual knowledge of the injury within 30 days as appellant's illness was not diagnosed within 30 days of the tick bite.

LEGAL PRECEDENT

Section 8122(a) of the Act¹ provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.² In cases involving a traumatic injury, the time limitation commences to run on the date of the incident even though the employee may not be aware of the seriousness or ultimate consequences of the injury or the nature of the injury is not diagnosed until sometime later.³

Even if a claim was not filed within the required three-year period, it would still be regarded as timely under section 8122(a)(1) of the Act if the claimant's immediate superior had actual knowledge of the injury within 30 days,⁴ or under section 8122(a)(2) if written notice of injury was given within 30 days as specified in section 8119.⁵ This knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.⁶

ANALYSIS

The issue is whether appellant filed a claim for compensation within the applicable time limitations provided by the Act.

Appellant claimed that around June 2002, she was bit by a tick while walking through tall grass at an inspection site. Although she initially filed an occupational disease claim, she claimed a single, identifiable incident, namely a tick bite, on a single workday. Appellant further

¹ 5 U.S.C. §§ 8101-8193.

² *Id.* at § 8122.

³ *See Paul S. Devlin*, 39 ECAB 715 (1988); *Kenneth W. Beard*, 32 ECAB 210 (1980).

⁴ 5 U.S.C. § 8122(a)(1). *See Larry Young*, 52 ECAB 284 (2001). *See also Jose Salas*, 41 ECAB 743 (1990).

⁵ *Id.* at §§ 8119, 8122(a)(2).

⁶ *Id.* at § 8122(a)(1). *See Jose Salas*, *supra* note 4 at 746.

acknowledged that she was aware that the incident occurred and submitted a witness statement to this effect. As such, her claim meets the definition of a traumatic injury.⁷ The Board has held that in cases involving a traumatic incident of which the employee is immediately aware, the time for filing a claim begins to run at the time of the traumatic incident even though all sequelae of the injury may not be known until later.⁸ Thus, the time for filing a claim for compensation began to run at the time appellant experienced the tick bite incident in 2002, despite the fact that she was not aware that the tick was potentially carrying Lyme's disease or that the Lyme's disease was not diagnosed until several years later. Appellant's claim was not filed until June 26, 2007, well over three years after the 2002 incident.

However, appellant's claim may be regarded as timely under section 8122(a)(1) of the Act if her immediate superior had actual knowledge of the injury within 30 days or under section 8122(a)(2) if written notice of injury was given within 30 days.⁹ In the August 28, 2008 decision, the Office hearing representative stated that appellant's supervisor did not have knowledge of the injury within 30 days as appellant's condition was not diagnosed within 30 days of the tick bite. However, it is not required that a supervisor had actual knowledge of the Lyme's disease, which was not diagnosed until years later. Rather, the issue is whether appellant's supervisor had actual knowledge of the tick bite itself within 30 days.¹⁰ The Board finds that this issue has not been properly developed by the Office.

Appellant submitted a written statement claiming that she was sure she notified her supervisor and other coworkers of the tick bite as it was an unusual occurrence. The employing establishment stated that, to the best of its knowledge, the statements and information provided by appellant were correct and that it did not have any reason to believe that she was submitting false information. The Office did not attempt to elicit any additional information from appellant's supervisors regarding whether they were aware of the tick bite. Moreover, appellant submitted a May 22, 2007 witness statement from Mr. Bartlett, a plant supervisor, who stated that he was aware of the tick bite and had removed the tick from appellant's neck at the time of injury. It is unclear of Mr. Bartlett's relationship to appellant or whether he was her supervisor at the time of her injury.

It is well established that proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter. While appellant has the burden to establish her claim, the Office shares responsibility in the development of the evidence, particularly when such evidence

⁷ A traumatic injury means a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. 20 C.F.R. § 10.5(ee). *See also Laura Swilley*, Docket No. 93-1769 (issued November 16, 1994) (where the Board found that although the employee filed an occupational disease claim for Lyme's disease, the tick bite itself would have occurred within a single work shift and her claim was for a traumatic injury.)

⁸ *Corey W. Davis*, 57 ECAB 674 (2006).

⁹ 5 U.S.C. § 8122(a)(1), (2). *See also David R. Morey*, 55 ECAB 642 (2004).

¹⁰ For actual knowledge of a supervisor to be regarded as timely filing, 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. *See David R. Morey, id.*; *Duet Brinson*, 52 ECAB 168 (2000).

is of the character normally obtained from the employing establishment.¹¹ Once the Office has begun investigation of a claim, it must pursue the evidence as far as reasonably possible.¹²

The Board finds that the issue of whether appellant's immediate supervisor had actual knowledge of the 2002 tick bite was not fully developed by the Office. Accordingly, the case will be remanded to the Office in order for it to secure information regarding the relationship between Mr. Bartlett and appellant at the time of the tick bite, in addition to any available statements from appellant's supervisors regarding their knowledge at the time of the claimed incident. After such further development as the Office deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds the case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development of the evidence consistent with this decision.

Issued: June 22, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹¹ See *Robert C. Fay*, 39 ECAB 163 (1987).

¹² See *Monroe Fears*, 42 ECAB 608 (1992).