

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

_____)
A.H., Appellant)

and)

DEPARTMENT OF THE NAVY, NAVAL)
FACILITY, Cherry Point, NC, Employer)

_____)

Docket No. 09-1763
Issued: March 19, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 29, 2009 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated May 20, 2009, denying his claim for compensation as untimely. 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 compensation was timely filed.

FACTUAL HISTORY

In a Form CA-1 (claim for traumatic injury) dated November 5, 2008 and received by the Office on December 23, 2008, appellant claimed compensation for a back injury from lifting on November 2, 1977. In a December 19, 2008 letter, the employing establishment challenged the claim on the grounds it was not timely filed. The employing establishment indicated that appellant had retired from federal employment on September 30, 2004.

Appellant submitted a statement indicating that he had injured his back, neck, right arm, shoulder and leg a “number of times” during his federal employment. He identified an injury on November 2, 1977, a back and leg injury on January 19, 1988 for which he was “put on compensation” and an August 29, 1988 back injury. Appellant also identified a June 14, 1990 employment incident where he injured his back lifting a pallet “and that pains me to this day.”

The record indicates that appellant had filed a traumatic injury claim on November 14, 1977 for a back injury on November 2, 1977. In a letter dated March 23, 2009, the Office noted that appellant had previously filed a claim for a November 2, 1977 injury. It indicated that appellant was now claiming ongoing back problems since June 14, 1990, and indicated the evidence did not establish the claim was timely filed. The Office requested additional information regarding the claim.

In response appellant submitted medical evidence regarding his prior treatment.¹ The record indicates that appellant received treatment on January 19, 1988 for back complaints following a lifting incident, and received treatment on June 5, 1990 when he reported lifting moderately heavy boxes the previous day. A June 14, 1990 note reported that appellant injured his back lifting a pallet at the employing establishment. A February 10, 1997 treatment note indicated that appellant was treated for back pain, which appellant stated was from a June 1990 employment injury. By decision dated May 20, 2009, the Office found appellant’s claim for compensation was not timely filed.

LEGAL PRECEDENT

Section 8122(a) of the Federal Employees’ Compensation Act states, “An original claim for compensation or death must be filed within three years after the injury or death.”² This section also indicates that a claim not filed within three years will not be allowed unless the immediate supervisor had actual knowledge of the injury or death within 30 days or written notice of injury was given within 30 days.³ Section 8122(b) provides that in latent disability cases, the time limitation 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 his employment and the compensable disability.⁴

ANALYSIS

The claim form dated November 5, 2008 was for a traumatic injury on November 2, 1977. The Board notes that appellant had previously filed a timely claim for an injury on this date. It appeared, however, that the November 5, 2008 claim was not for a

¹ It appears the treatment notes were from the employing establishment health unit.

² 5 U.S.C. § 8122(a).

³ *Id.*

⁴ *Id.* at § 8122(b).

traumatic injury but an occupational disease or illness claim.⁵ Appellant did not provide a detailed explanation, but his statement indicated that he felt a continuing back condition was causally related to incidents of his federal employment on November 2, 1977, January 19 and August 29, 1988 and June 14, 1990. The Office considered the claim to be an occupational claim and determined that it was untimely filed.

As noted above, the claim for compensation must be filed within three years of the injury. The initial question is when the time limitation period begins to run in this case. The Office indicated that appellant would have three years from each of the specific dates of injury noted by him. This would be true if appellant was filing traumatic injury claims for each of these incidents, but since appellant is claiming a back condition resulting from the cumulative effect of these incidents, the question is when he knew or should have known of causal relationship between the claimed injury and the employment incidents. The Board notes that the medical evidence from February 1997 indicated that appellant was aware, or reasonably should have been aware, that his continuing back problems were related to prior employment incidents. The February 1997 treatment note from the employing establishment health unit indicated that appellant himself related his current back pain to a prior June 1990 employment incident.

Based on the evidence of record relating to the claim for injury filed on November 5, 2008, the three-year time period began to run as of February 1997.⁶ Appellant's claim therefore was not filed within the three-year time limitation of 5 U.S.C. § 8122. In addition, there was no evidence presented that the immediate supervisor had actual knowledge within 30 days or evidence of written notice of injury within 30 days. While a supervisor may be held to have constructive knowledge based on treatment at the employing establishment, the evidence must establish that the supervisor knew or reasonably should have known of an injury causally related to employment.⁷ The treatment notes do not provide a medical opinion regarding an employment injury. Moreover, appellant's claim in this case is not for a specific traumatic injury. It is an occupational claim based on several alleged incidents. The medical evidence from the employing establishment is not sufficient to establish constructive knowledge within 30 days of the alleged employment injury in this case. The Board accordingly finds that the November 5, 2008 claim for compensation was not timely filed in this case based on the current evidence of record.

CONCLUSION

The Board finds that the November 5, 2008 occupational claim for compensation was not timely filed pursuant to 5 U.S.C. § 8122.

⁵ A traumatic injury is an injury caused by incidents occurring within one workday or shift. 20 C.F.R. § 10.5(ee). An occupational disease or illness is a condition produced by incidents occurring over more than one workday or shift. 20 C.F.R. § 10.5(q).

⁶ The Board notes that, even if appellant implicated continuing job duties until his retirement, he did not file a claim within three years of September 2004.

⁷ *David R. Morey*, 55 ECAB 642 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 20, 2009 is affirmed.

Issued: March 19, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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