United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 09-1409**
	)	**Issued: May 5, 2010**
U.S. POSTAL SERVICE, SOUTHERN DISTRIBUTION & PROCESSING CENTER, Wallingford, CT, Employer	)	

Appearances:
Marc L. Glenn, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 18, 2009 appellant filed a timely appeal from a January 6, 2009 decision of the Office of Workers' Compensation Programs that denied his traumatic injury claim 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 filed a timely claim for compensation under the Federal Employees' Compensation Act.[1]

On appeal, appellant, through his attorney, asserts that his claim was timely because the employing establishment was aware of the September 29, 2003 incident that caused his claimed conditions.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On August 24, 2007 appellant, then a 50-year-old mail handler, filed a claim alleging that on September 29, 2003 he sustained traumatic injury to his left shoulder, irritation to his left eye and depression due to a confrontation with Ron Sacco, an employing establishment supervisor. Mr. Sacco allegedly yelled at him, grabbed and assaulted him, spit at him in the face and poked him in the left eye. Appellant did not stop work. The employing establishment controverted the claim. By letter dated September 17, 2007, the Office advised appellant of the evidence needed to support his claim.

In a September 29, 2003 statement, Claudio Scirocco, appellant's supervisor, advised that he heard Mr. Sacco talking to appellant very loudly and giving him instructions that were not in agreement with Mr. Scirocco's instructions. He then paged the managers of distribution operation (MDO) and, when they arrived, appellant stated that he had been physically assaulted by Mr. Sacco. Mr. Scirocco stated that he did not witness any physical contact. In a September 29, 2003 statement, Gary Welskopp, a coworker, advised that he heard Mr. Sacco yell and than grab appellant and violently hit him in the left chest and shoulder. In an undated statement, Sherese Harrington, a coworker, advised that she heard the supervisor from Tour 1 yelling at the mail handler and bumped him with his arm. In deposition testimony dated August 1, 2005, Ms. Harrington stated that she heard Mr. Sacco yell and point his finger at appellant's chest. When Mr. Sacco walked away, he brushed appellant's shoulder. In deposition testimony, also on August 1, 2005, Mr. Welskopp stated that Mr. Sacco struck appellant.[2]

In an October 7, 2003 statement, William E. Hylton described the September 29, 2003 incident and advised that the assault was being investigated. A November 14, 2003 letter of warning addressed to Mr. Sacco charged him with conduct unbecoming a postal supervisor during the September 29, 2003 incident. It noted that the witness statements regarding physical contact were conflicting; but after reviewing the investigation, it was determined that, if contact occurred, it was inadvertent and not intentional. Appellant's actions were also unacceptable and not within expectations because Mr. Sacco did not communicate properly with him.

In a December 4, 2003 report, Dr. Gilbert, an ophthalmologist, reported a history that appellant was poked in the left eye on September 29, 2003.[3] He noted appellant's complaint of pain and itching in the corner of his left eye, provided findings or examination findings including no sign of trauma to the left eye. Dr. Gilbert diagnosed status post blunt trauma to the left eye, no sign now; pseudophakia of the left eye; right eye cataract and ocular allergy by history. In a July 12, 2005 report, Dr. Bollepalli Subbarao, a Board-certified psychiatrist, advised that he initially evaluated appellant on November 18, 2003. Appellant stated that he had been manhandled at work by a supervisor. Dr. Subbarao saw appellant in follow up on December 2, 2003. Appellant was seen on January 19 and February 23, 2004 by Dr. Subbarao's associate, was next seen by Dr. Subbarao on April 11, 2005 and last treated on June 28, 2005. Dr. Subbarao diagnosed major depression, recurrent moderate and post-traumatic stress disorder.

[2] The deposition testimony of Ms. Harrington and Mr. Welskopp is incomplete and was given for an Equal Employment Opportunity Commission civil action in the U.S. District Court for the District of Connecticut.

[3] Dr. Gilbert is not further identified.

In letters dated October 19, 2007, the Office requested appellant to provide a statement from Mr. Scirocco advising when he had actual knowledge that he sustained an injury on September 29, 2003. The employing establishment was asked to address whether a supervisor, agency physician or dispensary had actual knowledge of an alleged injury within 30 days of September 29, 2003.

In deposition testimony dated September 1, 2005, Mr. Scirocco stated that he heard Mr. Sacco loudly give appellant instructions on September 29, 2003, contrary to instructions he had given appellant. He heard appellant tell the MDOs that there had been physical contact but Mr. Sacco did not observe this or observe appellant and Mr. Sacco face-to-face. Mr. Scirocco recalled that later that evening appellant told him that Mr. Sacco had brushed against him.

By decision dated November 21, 2007, the Office denied the claim, finding that it was not timely filed.

On December 5, 2007 appellant, through his attorney, requested a hearing that was held on March 14, 2008. He described the September 29, 2003 incident and, the next day, he told Mr. Scirocco that he had a lot of pain in his eye. Mr. Sacco told appellant to see his personal physician.

In a January 6, 2009 decision, an Office hearing representative affirmed the November 21, 2007 decision. The hearing representative found the evidence sufficient to establish that the September 29, 2003 incident occurred between Mr. Sacco and appellant but that there is no evidence to establish that appellant reported an injury on that date or within 30 days of the incident. The circumstances were not such as to put a supervisor reasonably on notice that an injury occurred.

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.[4] In cases of injury on or after September 7, 1974, section 8122(a) of the Act provides:

> "An original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless--
>
> > (1) the immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death; or

[4] *Charles Walker*, 55 ECAB 238 (2004); *see Charles W. Bishop*, 6 ECAB 571 (1954).

(2) written notice of injury or death as specified in section 8119 was given within 30 days."[5]

Section 8119 of the Act provides that a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury or in the case of death, the employment factors believed to be the cause; and be signed by and contain the address of the individual giving the notice.[6] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[7]

Section 8122(b) provides that the time for filing in latent disability cases 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 the employment and the compensable disability and the Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.[8] 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.[9]

ANALYSIS

The Board finds that appellant's claim is barred by the applicable time limitation provisions of the Act. On August 24, 2007 appellant claimed that he sustained injuries to his left eye and shoulder and depression due to an incident that occurred on September 29, 2003.

Section 8122 provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.[10] Appellant did not file a claim for a September 29, 2003 injury until August 24, 2007, almost four years after the incident giving rise to the claimed injury.[11] His claim would still be regarded as timely under section 8122(a)(1) of the Act if his 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. Appellant has not

[5] 5 U.S.C. § 8122(a).

[6] 5 U.S.C. § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

[7] *Laura L. Harrison*, 52 ECAB 515 (2001).

[8] 5 U.S.C. § 8119(b); *Delmont L. Thompson*, 51 ECAB 155 (1999).

[9] *Id*. at § 8122(b); *Duet Brinson*, 52 ECAB 168 (2000).

[10] *Id*. at § 8122.

[11] *Supra* note 5.

satisfied either of these requirements.[12] While it is clear from the record that the incident occurred and that there was some physical contact between Mr. Sacco and appellant, the record does not establish that he sustained an injury due to this incident such that the employing establishment would be aware that his claim was timely under the provisions of section 8122.

On appeal, appellant's attorney refers to the Office procedure manual as supportive that appellant's claim was timely and cites to language found at Chapter 2.801.3(a)(3).[13] Section 2.801.3 describes statutory filing requirements and section 2.801.3(a)(3) discusses claims not filed within three years after the claimed injury. It states that the claim may be allowed if there was:

> "Knowledge by the immediate superior, another official at the employing agency, or any agency physician or dispensary that an employee has sustained an injury, alleges that an injury has been sustained or alleges that some factor of the employment has resulted in a physical condition constitutes actual knowledge. Such knowledge does not have to be firsthand or acquired as an eyewitness to the accident."[14]

The record contains a number of statements regarding the claim. Mr. Hylton did not state that he witnessed the incident. Mr. Scirocco, appellant's supervisor, advised in both his September 29, 2003 statement and the September 1, 2005 deposition testimony that he did not observe any physical contact between appellant and Mr. Sacco. Neither Mr. Welskopp nor Ms. Harrington described any contact by Mr. Sacco with appellant's eye. Their statements regarding contact with appellant's shoulder are contradictory and neither describes a specific injury. Mr. Welskopp stated that he observed Mr. Sacco grab appellant and violently hit his left chest and shoulder. In deposition testimony, he stated that he saw Mr. Sacco strike appellant. Ms. Harrington first stated that she saw appellant's supervisor bump him with his arm and, in deposition testimony, stated that she observed Mr. Sacco pointing his finger at appellant's chest and that Mr. Sacco brushed appellant's shoulder when he walked away.

The first medical evidence documenting an injury to the shoulder, chest or arm was dated two months following the incident at work. Appellant testified at the hearing that the day after the incident he told Mr. Scirocco that his eye hurt and was told to see his physician. Mr. Scirocco was not questioned about this at the September 1, 2005 deposition. Appellant did not seek treatment for an eye condition until December 4, 2003, two months later. In the December 4, 2003 report, Dr. Gilbert noted appellant's history that he was struck in the eye at work on September 29, 2003. He diagnosed status-post blunt trauma to the left eye; no sign now. As noted, however, none of the witnesses supported any contact with appellant's eye and

[12] 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. *David R. Morey*, 55 ECAB 642 (2004).

[13] The Board notes that appellant's pleading contains a typographical error, referring to the cite as Chapter 2.810.3(a)(3) rather than Chapter 2.801.3(a)(3).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statutory Filing Requirements*, Chapter 2.801.3(a)(3) (March 1993).

Dr. Gilbert found no sign of trauma on examination. There is no other evidence to support appellant's assertion or to show that he filed written notice within 30 days.

Appellant's attorney also cites to language found in section 2.803.3 of Office procedures and referenced Dr. Gilbert's diagnosis. Section 2.803.3 discusses the sources of evidence used to determine whether an injury occurred, stating that a medical report does not need to address causal relationship between the incident claimed and the medical condition diagnosed.[15] Section 2.803.5 of Office procedures, however, goes on to state that, in reviewing such a medical report, the claims examiner must then consider whether the claimed injury occurred in the performance of duty and whether the diagnosed condition is causally related to the employment incident.[16] Section 2.803.3 does not mandate acceptance of an injury without an opinion on causal relationship. Appellant's claim therefore does not satisfy the statutory requirements of section 8122(a)(1) or (a)(2) of the Act.[17]

Section 8122(b) provides that the time for filing in latent disability cases 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 the employment and the compensable disability.[18] However, in cases involving a traumatic injury, such as this, 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.[19] In this case, the medical evidence does not support that appellant sustained an injury to his eye or shoulder. Dr. Subbarao diagnosed an emotional condition in November 2003 when appellant described the employment incident. Appellant did not file his claim until August 24, 2007 and there is no evidence of record that he reported that he had sustained an emotional condition caused by the September 29, 2003 employment incident in accordance with the requirements of section 8122(b).

The Board finds that the time limitation in appellant's case began to run no later than September 29, 2003. Since appellant's claim was not filed until August 24, 2004, it was not filed within the three-year time limitation provisions of the Act.[20]

CONCLUSION

The Board finds that appellant's claim is barred by the applicable time limitation provisions of the Act.

[15] *Id*. at section 803.3d (March 1993).

[16] *Id*. at section 803.5a (March 1993).

[17] 5 U.S.C. § 8122(a)(1), (2).

[18] *Id*. at § 8122(b).

[19] *Corey W. Davis*, 57 ECAB 674 (2006).

[20] *See S.J.*, 60 ECAB ____ (Docket No. 08-2048, issued July 9, 2009).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 6, 2009 is affirmed.

Issued: May 5, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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