

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

D.F., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Kansas City, MO, Employer**

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**Docket No. 10-495
Issued: September 1, 2010**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 16, 2009 appellant, through his attorney, filed a timely appeal of an October 15, 2009 decision of the Office of Workers' Compensation Programs denying his emotional condition claim as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the claim.

ISSUE

The issue is whether the Office properly determined that appellant's claim for an emotional condition was not timely filed under 5 U.S.C. § 8122.

FACTUAL HISTORY

On February 22, 2009 appellant, then a 78-year-old internal revenue agent, filed an occupational disease claim alleging that he developed an adjustment disorder with mixed emotional features due to coordinating a large case and conducting appellate conferences to prepare for trial and 16-hour days. He first became aware of his condition on June 17, 1985.

Appellant retired from the employing establishment on November 14, 1985 under disability retirement. In a narrative statement dated March 16, 2009, appellant described a farmer who charged at him with a hay fork in 1960 and a death threat he received a few years later. He described his career and stated that the last audit he prepared involved a difficult taxpayer and lasted over a year. Appellant sought treatment from Dr. Kale Gentry, a family practitioner, who suggested that he stop work. He used several months of sick leave and eventually applied for disability retirement.

The employing establishment controverted appellant's claim on the grounds that it was not timely filed.

Appellant submitted a December 6, 1985 report from, Dr. W. Gerald Fowler, a Board-certified psychiatrist, who diagnosed adjustment disorder with mixed emotional features as well as compulsive personality disorder and attributed these conditions to the stresses of appellant's employment. Dr. Fowler recommended that appellant retire for medical reasons. In a report dated December 3, 1985, Dr. Stephen R. Harris, Ph.D, a clinical psychologist, noted that appellant was requesting disability retirement due to ulcers, stress and psychophysiological ailments. He diagnosed adjustment disorder and compulsive personality disorder. Dr. Harris listed job employment difficulties as psychosocial stressors.

In a letter dated April 27, 2009, the Office requested additional factual information regarding appellant's claim including the last date that he worked, the information he provided his manager and an additional description of the employment activities which he felt caused or contributed to his emotional condition. In a letter dated May 2, 2009, appellant informed the Office that he last worked on April 26, 1985. He noted that, Dr. Kale Gentry, his physician, suggested on or about June 17, 1985 that he work at a less demanding job because stress was making him sick. Appellant stated that shortly before April 26, 1985 he told his manager that he was having a difficult time with an uncooperative taxpayer and requested sick leave. He stated that his manager had not noticed his difficulties.

By decision dated June 10, 2009, the Office found that appellant's claim was not timely filed within three years of the date of last exposure and there was no evidence in the record to establish that he provided his supervisor with notice of an on-the-job injury. It found that appellant last worked on April 26, 1985, that he was aware of a possible relationship between his work and his emotional condition on June 17, 1985 and that he had until June 17, 1988 to file his claim. As appellant's claim was not filed until March 11, 2009 some 24 years later it was not timely.

On June 16, 2009 appellant requested a review of the written record. He contended that he had provided his supervisor with Dr. Gentry's June 17, 1985 letter which constituted adequate notice of his employment injury. On a form dated June 28, 1985 a labor relations specialist stated that the employer had not attempted accommodations based on a June 17, 1985 report from Dr. Gentry advising that appellant was totally disabled. There is no copy of Dr. Gentry's report in the record.

By decision dated October 15, 2009, the Branch of Hearings and Review affirmed the June 10, 2009 decision finding that appellant's claim was not timely filed within the three year

time limitation. The record did not establish that appellant's immediate superior had actual knowledge of the injury within 30 days.

LEGAL PRECEDENT

Section 8122(a) of the Act¹ states that “[a]n original claim for compensation for disability or death must be filed within three years after the injury or death.” 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 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 A claim, however, would still be regarded as timely under section 8122(a)(1) of the Act if the immediate superior had actual knowledge of the injury 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.⁴

ANALYSIS

In the present case, appellant stated that he became aware of his emotional condition and its relationship to his federal employment on July 17, 1985 a few months after he stopped work on April 26, 1985. The time limitation for filing the claim began to run on July 17, 1985 the date that appellant became aware of his emotional condition and its relationship to his employment.⁵ Appellant had three years from July 17, 1985 or until July 17, 1988 to timely file his claim. Since he did not file a claim until February 22, 2009 it was not timely filed within the three-year period of limitation.

Appellant contends that his supervisor had actual knowledge of his condition and of its relationship to his employment. He submitted a 1985 form from the employer which noted that the employing establishment had received a medical report dated June 17, 1985 from Dr. Gentry, a family practitioner. This document does not establish that appellant's supervisor had actual knowledge of his emotional condition. It is not sufficient to establish that his immediate superior had actual knowledge of the alleged work-related nature of appellant's emotional condition. The Board notes that Dr. Gentry's report is not included in the record. The record reflects that appellant sought a disability retirement from Office of Personnel Management (OPM) that was ultimately accepted. The evidence of record has not sufficient to establish that his immediate supervisor was provided with either the 1985 form or Dr. Gentry's 1985 medical report. Assuming he was generally aware of an emotional condition, the evidence is not such as to put

¹ 5 U.S.C. § 8122(a).

² *Id.* at § 8122(b).

³ *J.P.*, 59 ECAB __ (Docket No. 07-1159, issued November 15, 2007); *Linda J. Reeves*, 48 ECAB 373 (1997).

⁴ *Id.*

⁵ *See supra* note 2 at § 8122(b). *See also James w. Beavers*, 57 ECAB 254 (2005).

the supervisor reasonably on notice of an on-the-job injury.⁶ The record does not support that appellant satisfied this requirement.⁷

CONCLUSION

The Board finds that appellant's claim for an emotional condition was not timely filed under the applicable provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 1, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁶ *Roger W. Robinson*, 54 ECAB 846 (2003).

⁷ *J.P.*, 59 ECAB ____ (Docket No. 07-1159, issued November 15, 2007).