United States Department of Labor
Employees' Compensation Appeals Board

D.F., Appellant	)	
and	)	**Docket No. 12-755**
	)	**Issued: March 5, 2013**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Garden City, KS, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 21, 2012 appellant, through his attorney, filed a timely appeal of a January 9, 2012 Office of Workers' Compensation Programs (OWCP) merit decision denying his emotional condition claim as untimely. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on appeal. On February 22, 2009 appellant, then a 78-year-old retired internal revenue agent, filed an occupational disease claim alleging that he developed an adjustment disorder with mixed emotional features due to coordinating large cases, conducting appellate conferences to prepare for trial and working 16 hours a day. He first became aware of his condition on June 17, 1985. Appellant retired from the employing establishment on November 14, 1985 under disability retirement. The employing establishment challenged his claim on the grounds that it was not timely filed as he was aware of his condition in 1985.

By decision dated June 10, 2009, OWCP found that appellant's claim was not timely filed as it was not filed within three years of the date of last exposure and there was no evidence in the record establishing that he provided his supervisor with reasonable notice of an on-the-job injury. It found that he 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 therefore had until June 17, 1988 to file his claim. OWCP concluded that as appellant's claim was not filed until March 11, 2009, 24 years later, it was not timely.

Appellant requested a review of the written record by an OWCP hearing representative on June 16, 2009 and asserted that he had provided his supervisor with a June 17, 1985 letter from Dr. Kale Gentry, a family practitioner, who alleged that this letter constituted adequate notice of appellant's employment injury.

By decision dated October 15, 2009, OWCP's hearing representative affirmed the June 10, 2009 decision of OWCP finding that appellant's claim was not timely filed within the three-year time limitation and that the record did not establish that appellant's immediate superior had actual knowledge of the injury within 30 days as Dr. Gentry's June 17, 1985 letter was not included in the record.

Appellant appealed this decision to the Board and in a decision dated September 1, 2010[2] the Board found that the time limitation for filing this claim began to run on July 17, 1985 the date that he became aware of his emotional condition and its relationship to his employment. He had three years from July 17, 1985 or until July 17, 1988 to timely file his claim. Since appellant did not file a claim until February 22, 2009, it was not timely filed within the three-year period of limitation. The Board further found while knowledge of his emotional condition could be established by the employing establishment's receipt of the June 17, 1985 report from Dr. Gentry, the mere receipt of a medical report was not sufficient to establish that his immediate superior had actual knowledge of the alleged work-related nature of appellant's emotional condition. The Board concluded that as Dr. Gentry's report was not included in the record the Board had no way of determining what this report contained. The Board could not ascertain whether this report was sufficient to put appellant's immediate supervisor reasonably on notice of an on-the-job injury. Additional facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

[2] Docket No. 10-495 (issued September 1, 2010).

Counsel requested reconsideration on January 10, 2011 and submitted new evidence. In a statement dated September 16, 2010, Lloyd Churchman, appellant's supervisor, stated that he and Ralph Robinson, appellant's manager, were the two large case managers at the employing establishment in 1985. He stated that appellant's work consisted of large cases. Mr. Churchman stated that on or about April 26, 1985 appellant sought treatment from Dr. Gentry because of illness. Dr. Gentry diagnosed job stress. Appellant discussed this condition with Mr. Robinson, who contacted the personnel department at the employing establishment. Mr. Churchman stated, "Both [Mr.] Robinson and I were involved with these events. [Appellant] coordinated large cases for both of us." Mr. Churchman further stated, "[Appellant] returned from sick leave in June 1985 with a letter from [Dr.] Gentry stating that [appellant] could no longer work because of job stress." He completed a second statement on September 28, 2010 and related that appellant worked for both Mr. Robinson and himself. Mr. Churchman stated that Mr. Robinson was currently unable to communicate due to an Alzheimer's type of dementia. He noted that he and Mr. Robinson worked in a common office area at the employing establishment and were both involved with personnel matters for large case management. Mr. Churchman stated, "Both [Mr.] Robinson and I were involved in these events…." He stated that appellant related the results of his appointment with Dr. Gentry and his job stressors to Mr. Robinson on the date after his appointment and that the personnel department recommended a few months of sick leave and disability retirement.

Appellant also submitted a November 8, 2010 statement from Michael McCarthy, the Labor Relations Specialist and the Employee Assistance Coordinator for the employing establishment, who stated that he had no recollection of the specifics of appellant's claim.

Appellant completed a statement on May 24, 2010 and stated that he first became aware of the nature of the relationship between his condition and his employment on April 26, 1985. He stated that he called to report the work conditions on that date and left work to see Dr. Gentry, who attributed appellant's condition to work stress. Appellant applied for disability retirement based on Mr. McCarthy's suggestion and received approval on November 14, 1985.

Marie L. Robinson, Ralph Robinson's wife, completed two statements on May 13, 2010 and stated that Mr. Robinson was appellant's manager in June 1985. She stated that it was common knowledge in the workplace that appellant had been granted disability retirement in June 1985. Mrs. Robinson stated that she worked in the audit division in 1985 and recalled these events.

Appellant submitted a document dated May 13, 1982 which indicated that Mr. Churchman was appellant's supervisor and recommended a within grade increase.

In a note dated May 22, 2010, Dr. Gentry stated that on June 17, 1985 he wrote a statement for appellant that he was 100 percent disabled due to severe anxiety.

By decision dated January 9, 2012, OWCP reviewed the merits of appellant's claim and denied modification of the prior decision. It found that he had not submitted the necessary evidence to establish that his immediate supervisor, Mr. Robinson, was notified that his condition was work related within 30 days of the date of appellant's awareness of his condition on April 26, 1985. OWCP stated that although the record established that the employing

establishment personnel knew that his work stoppage was due to an emotional condition, the evidence was not sufficient to establish that appellant made the employing establishment aware that this emotional condition was job related. It determined that appellant's claim was not timely filed.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of FECA and that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[4]

Section 8122(a) of FECA[5] 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.[6] 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.[7] A claim, however, would still be regarded as timely under section 8122(a)(1) of FECA 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.[8]

ANALYSIS

As appellant had not filed his claim with the three-year period of limitation the Board previously held that his claim for compensation could not be considered as timely filed unless he established that his immediate supervisor had written notice within 30 days[9] or had actual knowledge of his injury and the work-related nature of that injury within 30 days.[10] He has not alleged that he provided his supervisor with written notice within 30 days. Instead, in support of

[3] 5 U.S.C. §§ 8101-1893.

[4] *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

[5] 5 U.S.C. § 8122(a).

[6] *Id.* at § 8122(b).

[7] *J.P.*, 59 ECAB 178 (2007); *Linda J. Reeves*, 48 ECAB 373 (1997).

[8] *Id.*

[9] 5 U.S.C. § 8122(a)(1); *see Ralph L. Dill*, 57 ECAB 248 (2005).

[10] *Delmont L. Thompson*, 51 ECAB 155 (1999).

his request for reconsideration, appellant has stated that the actual date that he became aware of his condition was April 26, 1985. He stated that he stopped work on April 26, 1985 and sought medical treatment on that date. Mr. Churchman has submitted two statements indicating that appellant worked for both him and Mr. Robinson in 1985. He indicated that he was involved in personnel matters including the events surrounding appellant's sick leave usage and disability retirement. Mr. Churchman noted that he and Mr. Robinson shared a common office area. He stated that appellant related his diagnosis and its cause to both him and Mr. Robinson on April 27, 1985, the date after his April 26, 1985 appointment with Dr. Gentry, stating that Dr. Gentry diagnosed job stress.

Appellant also submitted two statements from Mrs. Robinson that it was common knowledge in the workplace that appellant had been granted a disability retirement in June 1985.

The Board finds that Mr. Churchman's and Mrs. Robinson's statements are not sufficient to establish that his supervisor, Mr. Robinson, had actual knowledge within 30 days of his diagnosis of job stress. These statements made in 2010 about specific dates and events in 1985 are not sufficient to establish that Mr. Robinson, who is no longer able to make a statement, had firsthand knowledge of the work-related condition. While there is some suggestion that Mr. Robinson may have approved appellant's trip to the doctor, he did not make any confirming statement.[11] The evidence is not sufficient to establish that appellant's immediate supervisor, Mr. Robinson had actual knowledge of the alleged work-related nature of appellant's emotional condition. Consequently, the exception to the statute is not met and appellant's claim for compensation is not timely.

CONCLUSION

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

[11] *Cf. Duet Brinson*, 52 ECAB 168 (2000) (where the supervisor had submitted a statement in 1994 that he had knowledge of appellant's pentachlorophenol (PCP) exposure through late 1984 and issued him a dispensary note in February 1985 for appellant to confirm PCP exposure).

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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