NO. 28363

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

ALLEN VIDAL, Claimant-Appellant,
v.
STATE OF HAWAII, DEPARTMENT OF TRANSPORTATION,
Employer-Appellee, Self-Insured

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 2005-407 (2-04-41062)

MEMORANDUM OPINION
(By: Foley, Presiding Judge, Nakamura and Fujise, JJ.)

Claimant-Appellant Allen Vidal (Vidal) appeals pro se from the Decision and Order (D&O) filed on January 8, 2007 by the State of Hawaiʻi Labor and Industrial Relations Appeals Board (LIRAB). The LIRAB upheld the September 27, 2005 Decision[1] of the Director of the State of Hawaiʻi Department of Labor and Industrial Relations (the DLIR), who had determined that Vidal's claim for a work injury was time-barred by the statute of limitations (SOL) set forth in Hawaii Revised Statutes (HRS) § 386-82 (1993).[2]

---

[1] The Decision provided that "based upon [Hawaii Revised Statutes (HRS) § 386-82] and [Vidal's] Claim For Workers' Compensation Benefits (WC-5) dated 10/19/2004, filed on 10/21/2004, . . . this claim is barred . . . as it was not filed with the Director within two years from the date the effects of the injury became manifest." The Decision went on to state that "[t]he claim for compensation filed 10/21/2004 for an injury of 9/11/2001 is hereby denied."

[2] HRS § 386-82 (1993) provides in relevant part:

> **§386-82. Claim for compensation; limitation of time.** The right to compensation under this chapter shall be barred unless a written claim therefor is made to the director of labor and industrial relations (1) within two years after the date at which the effects of the injury for which the employee is entitled to compensation have become manifest, and (2) within five years after the date of the accident or occurrence which caused the injury.

On appeal, Vidal argues that the conclusion of law in the LIRAB's D&O that his claim was barred by the two-year SOL set forth in HRS § 386-82 was clearly erroneous for the following reasons:

(1) The DLIR improperly determined without a hearing that the date of his injury was the date of the accident, where his "Employee's Claim for Workers' Compensation Benefits" form (claim form) never reflected the date of injury.

(2) His accident occurred on September 11, 2001, and the date of injury was January 13, 2003. Vidal notified the DLIR of the injury on October 19, 2004. Therefore, Vidal notified the DLIR within the five-year limit from the accident and within the two-year limit from the injury as required by HRS § 386-82.

Vidal also argues that he did not receive proper notice of the hearing before the DLIR.

I. BACKGROUND

The LIRAB's D&O provided the following:

> This workers' compensation case is before the [LIRAB] on appeal by [Vidal] from the decision of the Director of [the DLIR], dated September 27, 2005. In that decision, the Director determined that [Vidal's] claim for a September 11, 2001 work injury, filed on October 21, 2004, was barred by the two-year [SOL] set forth in [HRS] §386-82.
>
> The sole issue on appeal is whether [Vidal's] claim for compensation filed on October 21, 2004, for a work injury of September 11, 2001, is time-barred pursuant to HRS §386-82.
>
> For the reasons stated below, we affirm.
>
> FINDINGS OF FACT
>
> 1. [Vidal], a Vietnam veteran, was employed by the State of Hawaii, Department of Transportation [the DOT] . . . as an electrician at the Honolulu International Airport.
>
> 2. On September 11, 2001, terrorists hijacked airplanes to attack the United States. Following the terrorist attacks on September 11, 2001, [the DOT] instituted heightened security measures at the airport.

3. On March 11, 2002, [Vidal] sought medical treatment with Dr. Matthew Ikeda, a psychiatrist at the Veteran's Affairs Medical and Regional Officer Center, for a worsening of his service-connected post-traumatic stress disorder ("PTSD"). [Vidal] told Dr. Ikeda that changes at work since September 11, 2001, caused him to experience increased stress and increased symptoms of PTSD. [Vidal] complained of sleep disturbance and greater irritability. [Vidal] expressed a desire to quit his job.

4. On January 13, 2003, [Vidal] stopped working.

5. On October 20, 2004, Dr. Ikeda submitted a WC-2 report of medical treatment, stating that he first treated [Vidal] on March 11, 2002 for a September 11, 2001 work injury. Dr. Ikeda identified the injury as chronic PTSD.

6. On October 21, 2004, [Vidal] filed a WC-5 claim for workers' compensation benefits, alleging a psychiatric injury in the form of PTSD that occurred on September 11, 2001, as a result of increased security measures at work. [Vidal] identified January 13, 2003, as the date he became disabled as a result of his work injury.

7. The effects of [Vidal's] injury manifested on March 11, 2002, when he sought medical treatment with Dr. Ikeda for a worsening of his PTSD following the implementation of new procedures at work that took effect on September 11, 2001 or shortly thereafter.

8. [Vidal] knew or should have known the nature, seriousness and probable compensable character of his injury on March 11, 2002, when the effects of his injury became manifest and prompted him to seek medical treatment with Dr. Ikeda.

9. [Vidal's] claim was filed more than two years after the date at which the effects of his injury became manifest.

CONCLUSIONS OF LAW

Hawaii Revised Statutes § 386-82 provides, in relevant part, as follows:

> The right to compensation under this chapter shall be barred unless a written claim therefor is made to the director of labor and industrial relations (1) within two years after the date at which the effects of the injury for which the employee is entitled to compensation have become manifest, and (2) within five years after the date of the accident or occurrence which caused the injury.

The time for filing a claim "'does not begin to run until the claimant, as a responsible person, should

> recognize the nature, seriousness and probable compensable character of an injury or disease.'" Demond v. University Of Hawaii, 54 Haw. 98, 104 (1972) (citations omitted).
>
> In this case, [Vidal] knew or should have known the nature, seriousness and probable compensable character of his injury on March 11, 2002, when the effects of his PTSD injury became manifest and prompted him to seek medical treatment with Dr. Ikeda.
>
> Having filed his claim on October 21, 2004, more than two years after his March 11, 2002 office visit with Dr. Ikeda, we conclude that [Vidal's] claim is barred by the two-year [SOL] set forth in HRS §386-82.
>
> ORDER
>
> The decision of the Director, dated September 27, 2005 is affirmed, in accordance with the foregoing.

The underlying facts provided in the LIRAB's D&O are undisputed, except that whereas the LIRAB determined that Vidal's injury occurred on September 11, 2001 and that the effects of his injury became manifest on March 11, 2002, Vidal argues that his accident occurred on September 11, 2001 and that his injury occurred on January 13, 2003 -- the day he stopped working for the DOT.[3]

In addition to filing his claim for workers' compensation, Vidal applied for "Ordinary Disability Retirement" (ODR) in January 2003. In a report filed on June 10, 2003, the Employees' Retirement System of the State of Hawaii, Medical Board, (Medical Board) denied the application. Vidal appealed the Medical Board's decision to the Board of Trustees of the Employees' Retirement System (Board of Trustees). The Board of Trustees denied his appeal. Apparently, Vidal resubmitted his

[3] In his "Final Closing Statement for Trial Date: October 18, 2006" filed on November 24, 2006 in the LIRAB, Vidal explained that he stopped working on January 13, 2003 because "the stressors in the work place due to the heighten[ed] airport security measures and workload reached a point for [Vidal] that he could no longer safely function in [h]is current job capacity as an electrician. He went on medical leave due to the effects he was suffering from increased hypertension and stress."

request for ODR, and the Board of Trustees approved his request on October 18, 2004.

II. STANDARD OF REVIEW

> Ordinarily, deference will be given to decisions of administrative agencies acting within the realm of their expertise. The rule of judicial deference, however, does not apply when the agency's reading of the statute contravenes the legislature's manifest purpose. Consequently, we have not hesitated to reject an incorrect or unreasonable statutory construction advanced by the agency entrusted with the statute's implementation.

Coon v. City & County of Honolulu, 98 Hawai'i 233, 245, 47 P.3d 348, 360 (2002) (internal quotation marks, citations, and brackets omitted).

> Appellate review of a LIRAB decision is governed by HRS § 91-14(g) (1993), which states that:
>
> Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedure; or
> (4) Affected by other error of law; or
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> We have previously stated:
>
> [Findings of Fact] are reviewable under the clearly erroneous standard to determine if the agency decision was clearly erroneous in view of reliable, probative, and substantial evidence on the whole record.
>
> [Conclusions of Law] are freely reviewable to determine if the agency's decision was in violation of constitutional or statutory provisions, in excess of statutory authority or jurisdiction of agency, or affected by other error of law.

> A [Conclusion of Law] that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case. When mixed questions of law and fact are presented, an appellate court must give deference to the agency's expertise and experience in the particular field. The court should not substitute its own judgment for that of the agency.

Igawa v. Koa House Rest., 97 Hawai'i 402, 405-06, 38 P.3d 570, 573-74 (2001) (internal quotation marks, citations, and brackets in original omitted) (quoting In re Water Use Permit Applications, 94 Hawai'i 97, 119, 9 P.3d 409, 431 (2000)).

> An FOF or a mixed determination of law and fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding or determination, the appellate court is left with the definite and firm conviction that a mistake has been made. We have defined "substantial evidence" as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

In re Water Use Permit Applications, 94 Hawai'i at 119, 9 P.3d at 431 (internal quotation marks and citations omitted).

III. DISCUSSION

Vidal argues that the conclusion of law in the LIRAB's D&O that his claim was barred by the two-year SOL set forth in HRS § 386-82 was clearly erroneous for the following reasons:

(1) The DLIR improperly determined without a hearing that the date of his injury was the date of the accident, where his claim form never reflected the date of injury.

(2) His accident occurred on September 11, 2001, and the date of injury was January 13, 2003. Vidal notified the DLIR of the injury on October 19, 2004. Therefore, Vidal submitted his claim within the five-year limit from the accident and within the two-year limit from the injury as required by HRS § 386-82.

Vidal filed his claim on October 21, 2004.[4] Vidal indicated that his accident occurred on September 11, 2001 and his disability began on January 13, 2003, which was the date he stopped working.

The LIRAB determined that Vidal's injury occurred on September 11, 2001 and that the effects of his injury became manifest on March 11, 2002 when Vidal "sought medical treatment with Dr. Ikeda for a worsening of his PTSD following the implementation of new procedures at work that took effect on September 11, 2001 or shortly thereafter." The LIRAB found that Vidal "knew or should have known the nature, seriousness and probable compensable character of his injury on March 11, 2002, when the effects of his PTSD injury became manifest and prompted him to seek medical treatment with Dr. Ikeda."

Technically, Vidal's claim did not indicate that his "injury" occurred on September 11, 2001; rather, the claim stated that his "accident" occurred on that date. Nevertheless, the discrepancy between what the claim indicated and what the LIRAB determined was the date of injury is of little significance in the instant case. The more salient question is when the "effects" of Vidal's injury became manifest.

Hawai'i courts "have consistently adopted and applied a liberal interpretation of the laws comprising and relating to the Worker's [sic] Compensation Act" and have observed that "worker's [sic] compensation laws should be liberally construed in order to accomplish the intended beneficial purposes of the statute." Tomita v. Hotel Serv. Ctr., 2 Haw. App. 157, 158, 628 P.2d 205, 207 (1981) (internal quotation marks and citations omitted).

HRS § 386-82 provides in relevant part that a person must make a claim to the DLIR for workers' compensation benefits

---

[4] Although Vidal appears to maintain that he submitted the claim to the DLIR on October 19, 2004, the form was actually filed on October 21, 2004.

"within two years after the date at which the effects of the injury for which the employee is entitled to compensation have become manifest." (Emphasis added.)

"[P]ursuant to HRS § 386-82, the time period for notice or claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of his injury or disease." Flor v. Holguin, 94 Hawai'i 70, 81, 9 P.3d 382, 393 (2000) (internal quotation marks, citation, and brackets omitted).

In Tomita, this court affirmed a LIRAB decision determining that the employee's claim was timely and compensable because it was filed within two years of the injury becoming manifest. 2 Haw. App. at 159, 628 P.2d at 208. We held that the employee's "injury did not become manifest within the meaning of HRS § 386-82 until its effects forced her to seek medical attention and prevented her from working[.]" 2 Haw. App. at 159, 628 P.2d at 208 (emphasis added).

Vidal cites to In re Securing Compensation by John K. Palama, Sr. [In re Palama], 34 Haw. 65 (1937), in support of his argument. In In re Palama, the Supreme Court of the Territory of Hawai'i held that the time provided by the Workmen's Compensation Law within which a claim for compensation must be filed does not begin to run until the injured employee is disabled by the injury from doing his work. Id. at 67-68.

The DOT maintains that In re Palama and Tomita are inapposite to the instant case because Vidal did not provide the DOT with notice of his injury pursuant to HRS § 386-81 (1993), whereas the injured employees in In re Palama and Tomita provided their employees with notice of their injuries. HRS § 386-81 provides:

> **§ 386-81. Notice of injury; waiver.** No proceedings for compensation under this chapter shall be maintained unless written notice of the injury has been given to the

> employer as soon as practicable after the happening thereof. The notice may be given by the injured employee or by some other person on the employee's behalf. Failure to give such notice shall not bar a claim under this chapter if (1) the employer or the employer's agent in charge of the work in the place where the injury was sustained had knowledge of the injury; or (2) medical, surgical, or hospital service and supplies have been furnished to the injured employee by the employer; or (3) for some satisfactory reason the notice could not be given and the employer has not been prejudiced by such failure.
>
> Unless the employer is prejudiced thereby notice of injury shall be deemed to have been waived by the employer if objection to the failure to give such notice is not raised at the first hearing on a claim in respect of such injury of which the employer is given reasonable notice and opportunity to be heard.

However, whether Vidal gave the DOT notice of his injury was not an issue in this case and had no bearing on the timeliness of his claim to the DLIR.

We believe that In re Palama and Tomita are applicable to the instant case and that, pursuant to those cases, Vidal's claim was timely. There is no evidence in the record on appeal that prior to January 13, 2003, Vidal's injury disabled him from working. In fact, Vidal's application for ODR in January 2003 supports the notion that he did not recognize the injury would disable him from working -- i.e., the "probable compensable character of his injury," Flor, 94 Hawai'i at 81, 9 P.3d at 393 -- until that time. Therefore, although he sought medical attention for the injury on March 11, 2002 for purposes of HRS § 386-82, the SOL did not begin to run until January 13, 2003 -- or within two years of his October 21, 2004 claim to the DLIR.

Given the foregoing, the LIRAB's conclusion that Vidal's claim was time-barred by HRS § 386-82 was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. In light of this holding, we do not need to discuss Vidal's remaining point of error.

IV. CONCLUSION

The Decision and Order filed on January 8, 2007 by the State of Hawaiʻi Department of Labor and Industrial Relations Appeal Board is vacated, and this case is remanded for a hearing consistent with this opinion.

DATED: Honolulu, Hawaiʻi, April 9, 2008.

On the briefs:

Allen Vidal,
Claimant-Appellant pro se.

James E. Halvorson
John H. Murphy
Deputy Attorneys General
235 S. Beretania St., 15th Floor
Honolulu, HI 96813
for Employer-Appellee.

Presiding Judge

Associate Judge

Associate Judge