

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

D.H., Appellant

and

**DEPARTMENT OF THE AIR FORCE, TRAVIS
AIR FORCE BASE, CA, Employer**

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**Docket No. 07-2288
Issued: March 3, 2008**

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 5, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 20 and August 24, 2007 merit decisions denying her claim as untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these issues.

ISSUE

The issue is whether the Office properly determined that appellant's claim for compensation was barred by the applicable time limitation provisions of the Federal Employees' Compensation Act.

FACTUAL HISTORY

On January 18, 2007 appellant, then a 74-year-old retired cook, filed two occupational disease claims which were administratively combined. In the first claim, she alleged that she developed carpal tunnel syndrome as a result of repetitive work activities, which included chopping, dicing and slicing vegetables and meat and lifting heavy pots and pans. Appellant first

became aware of her condition in 1980 or 1981 and of its relationship to her employment by May 15, 1987. In her second claim, appellant alleged that she sustained injuries to her hips as a result of walking on a concrete floor eight hours per day and lifting heavy pots and pans. Appellant indicated that she first became aware of her hip condition in 1989 and of its relationship to her employment in 1990. In both instances, she stated that her delay in filing was due to failure on the part of her supervisor to inform her of the requirement to file a claim. Appellant retired from her job at the employing establishment in 1998.

In statements dated January 15, 2007, appellant contended that her duties as a cook for the employing establishment from 1977 until her retirement in 1998 were responsible for her carpal tunnel syndrome. Her pain became increasingly worse over time, culminating in right hand surgery in 1990. In a January 16, 2007 statement, appellant expressed her belief that walking on a concrete floor and lifting and carrying heavy pots and pans caused her hip condition, which began in 1985 and worsened over the years. Noting that she had no hip problems prior to working at the employing establishment, appellant stated that she underwent total left and right hip replacement surgeries, for which she used sick leave.

Documents submitted by appellant included, a July 21, 2006 request for access to Kaiser Permanente medical records; progress notes from Kaiser Permanente for the period June 18, 1980 through March 26, 1991; an August 13, 1990 operative report from Dr. Linda Specht, a Board-certified orthopedic surgeon; and a November 2, 1990 physical therapy report. On January 31, 2007 the Office informed appellant that the information submitted was insufficient to establish her claim and that more evidence was required as to its timeliness and the causal relationship between her diagnosed conditions and her federal employment. It advised her to submit a written statement, as well as any supporting documentation, that her supervisor was actually aware of her alleged conditions.

On February 25, 2007 appellant informed the Office that all coworkers and supervisors with whom she had worked at the employing establishment had retired. Therefore, she was unable to obtain any information supporting the employing establishment's awareness of her diagnosed conditions or their relationship to her employment. Appellant asserted that she had informed her supervisor of the problems she was having with her arms and hands and that the supervisor had advised her to see a doctor. She stated that it was "obvious" that her employer was aware of her illness and how it was related to her job, because appellant was given time off from work prior to and after her carpal tunnel syndrome release surgery.

Appellant submitted a February 14, 2007 report from Dr. Jeffrey Lee Gao, a Board-certified general practitioner specializing in occupational medicine. He diagnosed carpal tunnel syndrome. Appellant also submitted requests to access copies of medical records and signed authorizations to release medical documents. Operative reports from Dr. William Refvem, a Board-certified orthopedic surgeon, noted a total left hip arthroplasty on August 31, 1995 and a right hip arthroplasty on October 17, 2000.

By decision dated April 20, 2007, the Office denied appellant's claim on the grounds that it was not timely filed. It advised appellant that the date of injury was the date of her last occupational exposure, namely October 1, 1998 the date of her retirement and that appellant should have been aware of a relationship between her employment and the claimed condition by

that date. As her claim was filed on January 18, 2007, more than eight years after the date of injury, the Office found that it was untimely filed. It further found that there was no evidence that her supervisor had actual knowledge of her condition within 30 days.

On July 13, 2007 appellant requested reconsideration, contending that it was unfair to deny her claim on the grounds that it was not timely filed. She contended that it was the responsibility of her supervisor who did not properly inform her of the rules regarding the filing of claims. Appellant argued that the “three-year rule” was outdated and did not conform to the real world.

By decision dated August 24, 2007, the Office denied modification of its April 20, 2007 decision. It found that, although appellant had advanced a relevant legal argument not previously considered, she had failed to establish that she filed her claim in a timely manner or that she was unable to do so due to incompetence or exceptional circumstances.

LEGAL PRECEDENT

A claimant seeking compensation under the Act¹ has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence² including that she is an employee within the meaning of the Act³ and that she filed her claim within the applicable time limitation.⁴

In cases of injury on or after September 7, 1974, section 8122(a) of the Act provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.⁵ 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 (2) written notice of injury or death as specified in section 8119 was given within 30 days.⁶

¹ 5 U.S.C. §§ 8101-8193.

² *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

³ *Kenneth W. Grant*, 39 ECAB 208 (1987); *James E. Lynch*, 32 ECAB 216 (1980); *Emiliana de Guzman* (Mother of Elpedio Mercado), 4 ECAB 357 (1951); *see* 5 U.S.C. § 8101(1).

⁴ *Paul S. Devlin*, 39 ECAB 715 (1988); *Emmet L. Pickens*, 33 ECAB 1807 (1982); *Kathryn A. O'Donnell*, 7 ECAB 227 (1954).

⁵ 5 U.S.C. § 8122(a).

⁶ Section 8119 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.

Section 8122(b) provides that, in a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware, or by exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment. In such a case, the time for giving notice of injury begins to run when the employee is aware, or by the exercise of reasonable diligence should have been aware, that his condition is causally related to his employment, whether or not there is a compensable disability.⁷ Where the employee continues in the same employment after he reasonably should have been aware that he has a condition which has been adversely affected by factors of federal employment,⁸ the time limitation begins to run on the date of the last exposure to the implicated factors.⁹ The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.¹⁰

The time limitations in section 8122(a) and (b) do not (1) begin to run against a minor until he reaches 21 years of age or has had a legal representative appointed, (2) run against an incompetent individual while he is incompetent and has no duly appointed legal representative, or (3) run against any individual whose failure to comply is excused by the Secretary on the ground that such notice could not be given because of exceptional circumstances.¹¹

ANALYSIS

Appellant claimed that she sustained injuries to her hips and developed carpal tunnel syndrome due to conditions of her employment. By decisions dated April 20 and August 24, 2007, the Office denied her claim on the grounds that it was untimely filed. The Board finds that appellant's claim for compensation is barred by the applicable time limitation provisions of the Act.

Although she was last exposed to repetitive working conditions on October 1, 1998, when she retired, appellant acknowledged on her CA-2 forms that she first became aware that her carpal tunnel syndrome condition was caused by her employment as early as May 15, 1987 and was aware of the relationship between her hip condition and her employment by 1990. Appellant did not deny her awareness that her conditions were caused by her employment, but rather blamed her delay in filing on the failure of her supervisor to inform her of the requirement to file a claim. Appellant asserted that it was "obvious" that her employer was aware of her illness and how it was related to her job, as evidenced by the fact that she was given time off from work for injury-related surgery. The Board finds that the evidence establishes that she

⁷ 5 U.S.C. § 8122(b).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993); see *James A. Sheppard*, 55 ECAB 515 (2004).

⁹ *Id.*

¹⁰ *Debra Young Bruce*, 52 ECAB 315 (2001).

¹¹ 5 U.S.C. § 8122(d).

knew or reasonably should have known of a relationship between her claimed conditions and factors of her employment at the time of her last exposure.¹²

Appellant stated that she was aware of the relationship between her employment and her carpal tunnel and hip conditions by 1987 and 1990, respectively. However, where the employee continues in the same employment after she reasonably should have been aware that she has a condition which has been adversely affected by factors of federal employment,¹³ the time limitation begins to run on the date of the last exposure to the implicated factors.¹⁴ Therefore, the time limitations in this case began to run on October 1, 1998 appellant's last day of work and exposure to the implicated employment factors. Since appellant did not file a claim until January 18, 2007 her claim was filed outside the three-year limitation period.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if her immediate supervisor had actual knowledge of the injury within 30 days of her last exposure to the implicated employment factors on October 1, 1998.¹⁵ Additionally, the claim would be deemed timely if written notice of injury had been provided within 30 days pursuant to 5 U.S.C. § 8119.¹⁶ In the instant case, there is no indication that appellant provided written notice of injury prior to January 18, 2007, the date she filed her claim or that her immediate supervisor had actual knowledge of her claimed conditions. Although appellant contends that she informed her supervisor that she suffered from employment-related conditions, there is no evidence of record to corroborate her claim. The fact that she was given time off from work when she underwent surgery does not establish that appellant's supervisor was aware that her conditions were causally related to her employment.

Appellant contends that the employing establishment was obligated to inform her of the requirement to file a claim. However, the requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.¹⁷ Therefore, appellant's argument is without merit. Additionally, she has not alleged or established that her failure to file a timely claim was due to her incompetence or exceptional circumstances.¹⁸

¹² The Board notes that appellant stated in her occupational disease claim form that she first became aware of her carpal tunnel syndrome condition in 1980 or 1981 and of its relationship to her employment by May 15, 1987. Appellant also stated that she became aware of her hip condition in 1989 and of its relationship to her employment in 1990.

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993); see *James A. Sheppard*, *supra* note 8.

¹⁴ *Id.*

¹⁵ *Larry E. Young*, 52 ECAB 264 (2001). See Federal (FECA) Procedure manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

¹⁶ 5 U.S.C. §§ 8122(a).

¹⁷ *Debra Young Bruce*, *supra* note 10.

¹⁸ 5 U.S.C. § 8122(d).

CONCLUSION

The Board finds that the Office properly determined that appellant's claim for compensation is barred by the applicable time limitation provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the August 24 and April 20, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 3, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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