United States Department of Labor
Employees' Compensation Appeals Board

M.L., Appellant	)	
and	)	**Docket No. 13-107**
	)	**Issued: October 21, 2013**
DEPARTMENT OF DEFENSE, PENTAGON FORCE PROTECTION AGENCY, Washington, DC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On October 18, 2012 appellant filed a timely appeal from an October 3, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant filed a timely claim for compensation under FECA.

[1] 5 U.S.C. §§ 8101-8193.

[2] The Board notes that appellant submitted evidence with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(a); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

On appeal, appellant generally asserts that he was unaware that his condition was employment related until he was diagnosed with post-traumatic stress disorder (PTSD) by his physician.

FACTUAL HISTORY

On April 16, 2012 appellant, then a 41-year-old supervisory police officer, filed an occupational disease claim asserting that working at the employing establishment on September 11, 2001 (9/11) and for weeks thereafter caused PTSD. He indicated that he was first aware of the condition and its relationship to employment on April 6, 2012, when he first received medical care.

In letters dated May 25, 2012, OWCP informed appellant of the type evidence needed to support his claim and asked the employing establishment to respond. In a statement dated April 16, 2012, appellant indicated that over the past several years he had symptoms including difficulty sleeping, night terrors, uncontrollable sweating, dramatic mood swings, forgetfulness, anxiety and depression. He continued that since the events of 9/11 he had two failed relationships, including a difficult divorce and had turned to alcohol as a coping mechanism. Appellant stated that it was difficult to commute to the employing establishment and that during the anniversary events that occurred at the employing establishment yearly, beginning with the first, he had added anxiety and noted that in the months following 9/11, he had to work overtime and that leave was cancelled.

In treatment notes dated April 6 and 20, 2012, Michelle Walker, a nurse practitioner, reported appellant's symptoms of night terrors and reliving scenes from 9/11. She diagnosed PTSD, insomnia and anxiety disorder and referred appellant to Dr. Corbin V. Robinson, a Board-certified psychiatrist.

In a psychiatric evaluation dated April 26, 2012, Dr. Robinson noted that appellant had been working at the employing establishment on 9/11 and had a 10-year history of nightmares, flashbacks, increased irritability and unstable mood. He noted that appellant's "usual episodes of nightmares, flashbacks, increase startle response, social isolation, irritability and threatening behaviors have not resolved like they usually do in October. Dr. Robinson indicated that appellant went to the employee assistance program in 2005 after having a fight with his ex-wife at a water park, which resulted in his arrest. Appellant had not sought any counseling and had transferred to the Raven Rock Relocative Complex (RRRC) in Waynesboro, Pennsylvania in 2005. He diagnosed chronic PTSD and alcohol abuse and advised that appellant's PTSD was induced by the events of 9/11 while performing his job but increased in severity beginning in September 2011, the 10th anniversary of 9/11. Dr. Robinson recommended that appellant not work for a minimum of four weeks. He submitted handwritten treatment notes dated May 21 through July 5, 2012 and a June 6, 2012 form report in which he described appellant's symptoms and diagnosis and provided work recommendations. In reports dated May 21, June 7 and July 5, 2012, Dr. Robinson reiterated his diagnosis and conclusion and recommended that appellant continue to be off work. On July 23, 2012 he advised that appellant could return to light duty for 20 hours a week beginning August 6, 2012. On September 19, 2012 Dr. Robinson indicated that appellant should continue light duty until October 22, 2012.

The employing establishment controverted the claim, stating that appellant reasonably should have been aware that his condition was related to the events of 9/11 prior to April 2012. It provided his work chronology from October 3, 1994 to March 25, 2012, his work hours from December 29, 2001 to December 28, 2002, a list of his performance awards and a list of nonwork-related stress. The employing establishment indicated that appellant was a police officer at the employing establishment on 9/11; that, after the attack, he was placed on mandatory 12-hour shifts, seven days a week, for about six months; that mandatory overtime ended in September 2002; that appellant was promoted to a supervisor position in May 2005 and transferred to RRRC. In an October 16, 2011 statement, Captain Jackie Buzzard, appellant's supervisor, indicated that appellant began using excessive leave in September 2011. In a July 10, 2012 statement, Captain Roosevelt Carter indicated that appellant was a police officer assigned to a special operations division on 9/11 and thereafter.

By decision dated October 3, 2012, OWCP denied the claim on the grounds that it was not timely filed because it was not filed within three years of the date of injury and because appellant's supervisor did not have actual knowledge of a work-related medical condition within 30 days of the injury.

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.[3] In cases of injury on or after September 7, 1974, section 8122(a) of FECA provides that 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
>
> "(2) written notice of injury or death as specified in section 8119 was given within 30 days."[4]

Section 8119 of FECA 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

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

[4] 5 U.S.C. § 8122(a).

address of the individual giving the notice.[5] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[6]

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.[7] 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.[8]

In a case of occupational disease, the time for filing a claim begins to run when the employee first becomes aware or reasonably should have been aware, of a possible relationship between his condition and his employment. When an employee becomes aware or reasonably should have been aware that he or she has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitation period even though the employee does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[9] Where the employee continues in the same employment after he or she reasonably should have been aware that he or she has a condition which has been adversely affected by factors of federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.[10] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[11]

OWCP's procedures provide that if the claimant did not file within the statutory time limitations after exposure to the employment factors ceased, the medical reports should be examined to determine whether the claimant was aware or reasonably should have been aware, of the illness and its possible relationship to employment. For example, the history obtained at the time of the first and subsequent examinations, the date when a definite diagnosis was made or the advice given by the physician to the claimant, may assist in determining the issue of possible awareness.[12]

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[5] *Id*. at § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

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

[7] 5 U.S.C. § 8119(b); *Delmont L. Thompson*, 51 ECAB 155 (1999).

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

[9] *Larry E. Young*, *supra* note 5.

[10] *Id.*

[11] *Debra Young Bruce*, 52 ECAB 315 (2001).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6(b) (March 1993).

ANALYSIS

The Board finds that appellant did not timely file his occupational disease claim. Appellant, a police officer, alleged that his employment duties on 9/11 and for a period thereafter caused PTSD. He asserted that he was unaware of his condition and its relationship to his employment until April 2012. OWCP denied the claim on the grounds that it was not timely filed because it was not filed within three years of the date of injury and his supervisor did not have actual knowledge of a work-related medical condition within 30 days of the injury.

Appellant maintained that the 10th anniversary of 9/11 intensified his anxiety symptoms and maintained that he had no knowledge that his federal employment resulted in an emotional condition until his diagnosis of PTSD in April 2012. He submitted reports and treatment notes indicating that he was first seen by a nurse practitioner on April 6, 2012, who referred him to Dr. Robinson, a Board-certified psychiatrist. In a psychiatric evaluation dated April 26, 2012, Dr. Robinson described appellant's work history on 9/11 and thereafter. He indicated that appellant reported a 10-year history of nightmares, flashbacks, increased irritability and unstable mood every 9/11 but the symptoms usually would resolve by October. These symptoms increased in severity beginning on September 11, 2011, the 10th anniversary of 9/11. Dr. Robinson diagnosed chronic PTSD and alcohol abuse and advised that appellant's PTSD was induced by his work activities around the events of 9/11. He recommended that appellant not work. Dr. Robinson submitted additional reports describing appellant's condition. In reports dated July 23 and September 19, 2012, he advised that appellant could work light duty for 20 hours a week.

As noted above, where the employee continues in the same employment after he or she reasonably should have been aware that he or she has a condition which has been adversely affected by factors of federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors[13] which in this case was September 11, 2001 and for a brief period thereafter.[14] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[15]

Appellant stated on his Form CA-2 that the events of September 11, 2001 "had a profound effect on me which I have been coping with for the past several years." While the record does not indicate that appellant sought medical treatment prior to April 2012, as reported by Dr. Robinson, appellant had a 10-year history of symptoms that occurred every year on the anniversary of 9/11. A reasonable person should have known that these regular recurring symptoms were related to the events of 9/11. The symptoms appellant experienced, according to Dr. Robinson began the year after 9/11 and continued for 10 years before his medical appointment on April 26, 2012. Appellant would have three years from September 11, 2002 to

[13] *Larry E. Young, supra* note 5.

[14] As noted, *infra*, the employer indicated that appellant was a police officer at the employing establishment on 9/11 and that, after the attack, he was placed on mandatory 12-hour shifts, seven days a week, for about six months.

[15] *Supra* note 11.

file a timely claim. As he did not file a claim until April 16, 2012, it was not filed within the statutory three-year time period.

CONCLUSION

The Board finds that appellant did not timely file his claim within the applicable provisions of FECA.

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2012 decision of the Office of Workers' Compensation Programs is affirmed.[16]

Issued: October 21, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

[16] The Board notes the date of injury is incorrect in the October 3, 2012 decision, but the final decision on timeliness is affirmed.