United States Department of Labor
Employees' Compensation Appeals Board

E.B., Appellant	)	
	)	
and	)	**Docket No. 07-1325**
	)	**Issued: December 11, 2007**
U.S. POSTAL SERVICE, CUPEY STATION, Guayama, PR, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 18, 2007 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated October 5, 2006 and March 20, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant filed a timely claim for compensation under the Federal Employees' Compensation Act.

FACTUAL HISTORY

On July 11, 2006 appellant, then a 45-year-old retired city carrier, filed a Form CA-2, occupational disease claim, alleging that factors of his federal employment caused bilateral carpal tunnel syndrome. He was first aware of the condition on February 5, 2002 and its relationship to his employment on May 16, 2006. Appellant had retired on disability on March 5, 2003. In support of his claim, he submitted an electromyographic (EMG) study dated March 5, 2002 that demonstrated early/mild bilateral carpal tunnel syndrome with median nerve

entrapment and neuropathy at the wrist. In a February 28, 2006 report, Dr. James V. Gainer, a Board-certified neurosurgeon, diagnosed musculoskeletal pain and possible carpal tunnel syndrome. A May 16, 2006 EMG demonstrated evidence of moderate bilateral median neuropathies at the wrist with borderline right ulnar compression at the elbow.

By letter dated August 3, 2006, the Office informed appellant that his claim was not timely filed and informed him of the evidence needed to establish timeliness. Appellant was given 30 days to respond. In an August 29, 2006 letter, he explained that he had not been aware that the pain he felt in both arms while working as a city carrier was carpal tunnel syndrome. Appellant noted that the pain had worsened.

On October 5, 2006 the Office denied the claim as untimely filed.

On October 30, 2006 appellant requested reconsideration, arguing that, as he had a previously accepted neck injury adjudicated by the Office under file number 022022418,[1] the Office was aware at that time that he had carpal tunnel syndrome. He also noted that he has been depressed since that time and had undergone carpal tunnel surgery on his right hand. Appellant also submitted the first page of a Form CA-1 claim submitted on January 22, 2002 and a February 20, 2007 report in which Dr. Bao T. Pham, a Board-certified physiatrist, noted a history that, while moving parcels at home, appellant felt pain in his neck, shoulders and head and numbness in his upper limbs. Dr. Pham stated that appellant reported that he had a similar condition in the Army but not with his current carpal tunnel syndrome and noted examination findings of marked spasms and limitations of neck and upper extremities with mid- to low-back pain and pain down both legs. He diagnosed carpal tunnel syndrome, lumbago, thoracic and lumbar spine neuritis and a cervical herniated disc. Dr. Pham checked "yes," indicating that the diagnoses were employment related, noting that he had treated appellant beginning on April 7, 2007 and that he had been totally disabled since that time.

By decision dated March 20, 2007, the Office denied modification of the October 5, 2006 decision.[2]

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 the Act[4] provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation

[1] The instant case was adjudicated by the Office under file number 022518600.

[2] The Board notes that the Office characterized this decision as a denial of appellant's request for reconsideration. However, it is clear from a reading of the decision that the Office weighed appellant's argument that this claim should be timely because, under Office file number 022022418, it was aware that he had carpal tunnel syndrome. As discussed *infra*, the Board finds the March 20, 2007 decision to be on the merits of appellant's claim.

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

[4] *See supra* note 1.

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."[5]

Section 8119 of the Act 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.[6] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[7]

Section 8122(b) of the Act 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.[8] 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.[9]

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.[10] 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

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[5] 5 U.S.C. § 8122(a).

[6] 5 U.S.C. § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

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

[8] 5 U.S.C. § 8122(b); *see Luther Williams, Jr.*, 52 ECAB 360 (2001).

[9] 5 U.S.C. § 8122(b); *Duet Brinson*, 52 ECAB 168 (2000).

[10] *Larry E. Young*, *supra* note 6.

limitation begins to run on the date of the last exposure to the implicated factors.[11] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[12]

ANALYSIS

The Board initially finds that the Office's decision dated March 20, 2007 is a decision on the merits of appellant's claim. Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[13] In this case, appellant raised a new argument regarding his former claim adjudicated by the Office under file number 022022418 and the Office clearly weighed this argument in its March 20, 2007 decision. The Office therefore granted merit review under section 10.606(b)(2)(ii) of its regulations.

As noted above, if an employee continues to be exposed to injurious working conditions, the time limitation begins to run on the date of the last exposure.[14] Therefore, the time for filing appellant's claim did not begin to run until March 5, 2003, the date he retired. Accordingly, the three-year statute of limitations would have expired no later than March 5, 2006 and appellant's July 11, 2006 claim for compensation would be barred by this exception to the statute of limitations.[15] The record also does not support that appellant's immediate superior had actual knowledge of the injury or death within 30 days.[16] While appellant argued that because he had an accepted claim for a neck injury that occurred in January 2002, the first page of the claim form submitted by him does not state that he was claiming any kind of upper extremity injury. There is therefore no evidence of record that establishes that appellant's supervisor had actual knowledge of any injury within 30 days or that written notice of the injury was given within 30 days. This is not a case where the employing establishment had constructive knowledge of an employment-related carpal tunnel syndrome and even if the employing establishment knew that appellant suffered from carpal tunnel syndrome in 2002, appellant also has to show that his supervisors knew or reasonably should have known that this condition was caused by his employment.[17] There is no probative evidence to establish that appellant's superior had constructive knowledge sufficient to be reasonably put on notice that his carpal tunnel syndrome was work related within 30 days of March 5, 2003, the day he retired.

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[11] *Id.*

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

[13] 20 C.F.R. § 10.606(b)(2).

[14] *Larry E. Young*, *supra* note 6.

[15] *Supra* note 3.

[16] 5 U.S.C. § 8122(a)(1); *see also Duet Brinson*, *supra* note 9.

[17] *See David R. Morey*, 55 ECAB 642 (2004).

In cases of latent disability, however, 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.[18] When appellant filed this claim for compensation on July 11, 2006, he indicated that he was first aware of his carpal tunnel syndrome on February 5, 2002 and its relationship to his employment on May 16, 2006 because a physician then explained to him the causal relationship. While he submitted an EMG dated March 5, 2002 which diagnosed early mild carpal tunnel syndrome, neither that report nor any other medical evidence of record shows that at that time this condition was considered employment related. There is no medical evidence to show that appellant reported symptoms of carpal tunnel syndrome at that time and he stated that he did not know that the pain he felt in his arms while working as a city carrier was related to carpal tunnel syndrome. There is no evidence to support that appellant should have had actual knowledge of a possible causal relationship between his work activities and the claimed carpal tunnel syndrome.[19] The Board therefore finds that there is no competent evidence of record to start the running of the time limitations period prior to appellant's assertion that he became aware in May 2006 that his carpal tunnel syndrome was employment related. As appellant has filed a timely claim for compensation, the case will be remanded to the Office for further development to determine if appellant sustained the claimed carpal tunnel syndrome causally related to factors of his federal employment. Following such development as the Office deems necessary, it shall issue a *de novo* decision on the merits of this case.

CONCLUSION

The Board finds that appellant's claim was timely filed.

[18] 5 U.S.C. § 8122(b).

[19] *Debra Young Bruce*, *supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 20, 2007 and October 5, 2006 are reversed and the case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: December 11, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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