United States Department of Labor
Employees' Compensation Appeals Board

L.Y., Appellant	)	
	)	
and	)	**Docket No. 06-2073**
	)	**Issued: March 16, 2007**
DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, CIRCLE OF NATIONS SCHOOL, Wahpeton, ND, 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 September 11, 2006 appellant filed a timely appeal from the June 26, 2006 decision of the Office of Workers' Compensation Programs denying her claim for traumatic injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(1), 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. On appeal, appellant argued that she had timely filed her claim, but that the employing establishment failed to process the claim or submit it to the Office.[1]

[1] The Board notes that appellant's submission on appeal included new factual information related to the alleged initial filing of her claim. Documents were also submitted to the Office following the issuance of the June 26, 2006 decision. As this information was not before the Office at the time of its final decision on June 26, 2006, it may not be considered by the Board at this time. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On January 21, 2006 appellant, a 51-year-old cultural coordinator and art instructor, filed a traumatic injury claim, Form CA-1. She alleged that, on August 27, 1997, while participating in a demonstration of a child restraint technique, she fell backward on her elbow, jarring her shoulder and neck. Appellant experienced irritation of her right rotator cuff and arthritis in her neck as a result of the initial fall. Charles R. King, a human resources manager, indicated by checkmarks on the claim form that appellant was injured in the performance of duty and that his knowledge of the event and injury was consistent with hers.

Appellant submitted records from Schwanke Chiropractic, which treated her in September and October 1997, and Dr. Dennis G. Sollom, a Board-certified physiatrist, who examined her in February 2006. The records from Schwanke Chiropractic included intake forms, unsigned physical examination reports and progress notes and correspondence regarding her claim. From September 2 to October 30, 1997, Dr. David Schwanke, the chiropractor,[2] provided a working diagnosis of cervical subluxation, cervical sprain/strain and muscle spasms. On physical examination appellant exhibited a diminished range in cervical flexion and extension, lateral flexion and rotation. In letters dated January 9, 1997 and April 13, 1998, Beth Schwanke, the office manager, sent records related to appellant's claim to the employing establishment with a request that it forward them to the Office. Ms. Schwanke indicated that she had attempted to send the information directly to the Office but had been given an incorrect address.

In a consultation report dated February 1, 2006, Dr. Sollom noted that appellant lost her balance and fell on her right elbow while participating in a demonstration on the safe restraint and control of children with behavioral problems. He stated that she was severely jarred through her shoulder, neck and upper back area, which led to gradually increasing pain in her upper right quarter, shoulder girdle, shoulder joint and neck areas. Dr. Sollom reported that appellant was treated by a chiropractor for two months following the employment incident and, in the time since, as neck and shoulder pain recurred. He indicated that she sought to file a workers' compensation claim near the time of the alleged injury, but after four years of trying, was ultimately unsuccessful.

Following a physical examination, Dr. Sollom diagnosed appellant with chronic cervicothoracic musculoligamentous sprain/strain with secondary myofacial pain syndrome in the upper quarters. He also noted muscle imbalances and postural abnormalities. Dr. Sollom stated that appellant probably had underlying ligamentous enthesophasies and appeared to have some tendonosis in her pectoral minor, bicep and supraspinatus. He indicated that it was difficult to say whether her current diagnosis was related to the reported employment incident because it had occurred nine and half years previously and he had not treated her before. However, Dr. Sollom did state that the fall appellant reported could lead to the type of pain problems, functional restrictions and abnormalities that she currently experienced.

[2] The medical records are unsigned and the identity of the author is unclear.

Dr. Sollom obtained x-ray on February 7, 2006. The x-rays of appellant's cervical spine showed interspace narrowing at C5-6 and C6-7 that indicated slight degeneration and drying of the disc. Mild bony spurring at those levels indicated mild arthritic changes. The right shoulder x-rays showed mild degenerative arthritic change at the acromioclavicular joint.

By letter dated May 25, 2006, the Office informed appellant that the evidence presented was not sufficient to support her claim because it did not prove that she timely notified the employing establishment of the alleged injury and did not contain a physician's opinion as to how the alleged injury resulted in the diagnosed condition. The record was held open to allow her to provide this information. Appellant did not respond in the allotted time.

By decision dated June 26, 2006, the Office denied appellant's claim on the grounds that she had not filed her claim within the time limitations set by the Act. The Office found that the claim had not been filed within three years of the alleged injury and that the evidence did not establish that her immediate supervisor had actual knowledge of the injury within 30 days of its occurrence.

LEGAL PRECEDENT

In cases of injury on or after September 7, 1974, section 8122(a) of the Act[3] provides that an original claim for compensation for disability or death must be filed within three years of the injury or death.[4] In claims filed after three years, compensation for disability or death, including medical care in disability cases, may not be allowed 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]

[3] 5 U.S.C. §§ 8101-8193.

[4] *See also* 20 C.F.R. § 10.100.

[5] 5 U.S.C. § 8122(a).

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

The Act's implementing regulations state that, if a claim is not filed within three years, "compensation may still be allowed if notice of injury was given within 30 days or the employer had actual knowledge of the injury or death within 30 days after occurrence."[7] This "actual knowledge" may consist of either written records or verbal notification.[8] The Office procedures define the "actual notice" provision as follows:

> "Knowledge by the immediate superior, another official at the employing agency, or any agency physician or dispensary that an employee has sustained an injury, alleges that an injury has been sustained, or alleges that some factor of the employment has resulted in a physical condition constitutes actual knowledge. Such knowledge does not have to be firsthand or acquired as an eyewitness to the accident."[9]

Both actual knowledge by the employer and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[10]

ANALYSIS

In a claim filed January 21, 2006, appellant alleged that she injured her neck and shoulder while participating in a child restraint demonstration at the employing establishment on August 27, 1997. The employing establishment did not controvert this claim.

The Board finds that appellant has not met her burden of proof to establish that she filed a claim within three years of the alleged injury. Under the regulations implementing the Act, a claim for traumatic injury is filed when an employee submits a Form CA-1 to the employer.[11] Though the report of Dr. Sollom and the letters of Schwanke Chiropractic contain some evidence to suggest that appellant timely filed a claim with the employing establishment following the employment incident of August 27, 1997, it is not adequate to establish this fact. Appellant has not produced a copy of the allegedly filed claim and the employing establishment has not acknowledged that it previously received a claim form from her. Without evidence of this sort, her argument that she filed a claim shortly after the employment incident is not supported by the evidence of record.

Under the Act, its implementing regulations and the Office procedures, a claim that is not filed within three years may still be accepted if the immediate superior or employer, through an official at the employing establishment, had actual knowledge of the injury within 30 days of its

[7] 20 C.F.R. § 10.100(b)(1).

[8] *Id.*

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(a)(3) (March 1993).

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

[11] 20 C.F.R. § 10.100(a).

occurrence.[12] For actual knowledge of the employer to be regarded as timely filing, an employee must show not only that the employer knew that she was injured, but also knew or reasonably should have known that it was an on-the-job injury.[13]

The Board finds that appellant has not established that her employer had actual knowledge of her alleged employment injury within 30 days of its occurrence. She has not submitted any statement or other evidence from an immediate superior or official of the employing establishment indicating that he or she knew that appellant had sustained an on-the-job injury within 30 days of its occurrence. The official supervisor's report attached to her January 21, 2006 CA-1 form does not meet the requirements of "actual knowledge" because it has not been established that Mr. King was employed as the human resources manager at the time of the alleged injury. Under the Office procedures in Chapter 2.801.3(a)(3), Mr. King's position as an official would qualify him as an immediate superior whose "actual knowledge" of the injury would satisfy the statutory period for filing an original claim for compensation. However, the evidence does not establish that he was employed at the employing establishment at the time of the alleged injury, and, if he was an employee, whether he was in a position that would qualify him as an "official." There is no evidence that Mr. King was employed as an official of the employing establishment at the time of the alleged injury. Appellant has not demonstrated actual knowledge by an immediate supervisor.

The evidence of record does not establish that appellant's immediate superior had actual knowledge of her alleged injury within 30 days of its occurrence. The Board finds that appellant has not met the timely filing requirements of the Act.

CONCLUSION

The Board finds that appellant has not established that she filed a timely claim for compensation under the Act.

[12] 5 U.S.C. § 8122(a); 20 C.F.R. § 10.100(b)(1); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(a)(3) (March 1993).

[13] *Ralph L. Dill*, 57 ECAB ___ (Docket No. 05-1620, issued December 6, 2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 26, 2006 is affirmed.

Issued: March 16, 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