

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

J.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Terrell, TX, Employer**

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**Docket No. 08-2019
Issued: January 21, 2009**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 16, 2008 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated June 26, 2008 which denied appellant's claim for compensation as untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this merits of the case.

ISSUE

The issue is whether appellant's claim for compensation was filed within the time limitations set forth in 5 U.S.C. § 8122.

FACTUAL HISTORY

On October 29, 2007 appellant, then a 59-year-old letter carrier, filed an occupational disease claim for an injury to his right knee. He alleged that on or about August 1985 he stepped in a hole and twisted his right leg and felt pain in his right knee. Appellant alleged that he first became aware of his employment-related condition in August 1985. George Givens, a supervisor, controverted the claim as untimely filed. He noted that appellant indicated that it was

a traumatic injury which occurred in 1985 and it was never reported. Mr. Givens also alleged that he could “not verify that [appellant] was working when accident occurred.”

Appellant also submitted a statement alleging that he stepped in a hole that was covered in grass. He also stated that the next day, he went to a physician and underwent surgery to the right knee two days later. Appellant claimed further that his right knee had worsened and he was in need of a total knee replacement.

By decision dated November 20, 2007, the Office denied the claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. It noted that the evidence did not support a finding that appellant’s immediate supervisor had actual knowledge within 30 days of the injury.

On March 25, 2008 the Office received appellant’s request for reconsideration and by decision dated June 26, 2008, it denied modification of its previous decision.

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.¹ Section 8122 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.² Compensation for disability or death may not be allowed if a claim is not filed within that time unless:

“(1) [T]he 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) [W]ritten notice of injury or death as specified in section 8119 was given within 30 days.”³

In cases involving a traumatic injury, the time limitation commences to run on the date of the incident even though the employee may not be aware of the seriousness or ultimate consequences of the injury or the nature of the injury is not diagnosed until sometime later.⁴ 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 was injured, but also knew or reasonably should have known that it was an on-the-job injury.⁵

Even if an original claim for compensation for disability or death is not filed within three years after the injury or death, compensation for disability or death may be allowed if written

¹ *Charles Walker*, 55 ECAB 238 (2004); see *Charles W. Bishop*, 6 ECAB 571 (1954).

² 5 U.S.C. § 8122.

³ *Id.* at 8122(a).

⁴ See *Paul S. Devlin*, 39 ECAB 715 (1988); *Kenneth W. Beard*, 32 ECAB 210 (1980).

⁵ *Duet Brinson*, 52 ECAB 168 (2000).

notice of injury or death, as specified in section 8119, was given within 30 days. 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 for 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

ANALYSIS

The record establishes that appellant did not file his claim for compensation within the three-year statutory limitation. He alleged that he sustained an on-the-job injury on August 1, 1985.⁸ Appellant alleged that he stepped in a hole and twisted his right leg and felt pain in his right knee. Pursuant to section 8122(a) of the Act, he had three years from the date of his alleged injury to timely file a claim. However, appellant did not file his claim until October 29, 2007, more than 20 years later. Accordingly, the Board finds that his claim was not timely filed.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate superior had actual knowledge of the injury within 30 days or under section 8122(a)(2), if written notice of injury was given within 30 days. However, he has not satisfied either of these provisions. The record reflects that Mr. Givens, a supervisor, controverted the claim as untimely filed. He noted that appellant indicated that it was a traumatic injury which purportedly occurred in 1985 and it was not reported. Mr. Givens also indicated that he could "not verify that [appellant] was working when accident occurred." This statement does not support that appellant's actual supervisor had actual knowledge of a work-related injury within 30 days. The Board notes that, for actual knowledge of a supervisor to be regarded as timely filing, appellant must show not only that the immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.⁹ Appellant has not shown that Mr. Givens or any supervisor was aware of his condition and that he knew or reasonably should have known that his injury was work related. He also has not established that he submitted written notice to the employing establishment within 30 days of his claimed injury. The employing establishment indicated that appellant did not submit either a traumatic injury claim or any documentation concerning medical treatment for an on-the-job injury within 30 days of his claimed injury. Appellant has not presented any evidence indicating that he did, in fact, provide written notice to the employing establishment within 30 days of his claimed on-the-job injury. Accordingly, the Board finds that he has not established that his claim was timely

⁶ *Larry E. Young*, 52 ECAB 264 (2001).

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

⁸ The Board notes that appellant also indicated August 1, 1995 in his statement, which appears to be a typographical error. In any event, either date would be considered untimely.

⁹ *David R. Morey*, 55 ECAB 642 (2004).

filed by showing either that his supervisor knew or reasonably should have known that he sustained an on-the-job injury or that he provided written notice to the employing establishment within 30 days.

On appeal, appellant alleged that his original surgery was paid for by “workers’ comp.” He alleged that his knee replacement was work related and should also be covered. However, as noted above, appellant has not established that his claim was timely filed and thus, compensation for disability or a knee replacement may not be allowed.

For these reasons, appellant’s claim is not timely and is barred by the applicable time limitation provisions of the Act.

CONCLUSION

Appellant’s claim is barred by the applicable time limitation provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2008 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: January 21, 2009
Washington, DC

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

David S. Gerson, Judge
Employees’ Compensation Appeals Board

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