

[the employing establishment], it was my job for the first 11 years to work on a letter sorting machine, which started the damage to both of my hands. Then for the next 11 years it was my job to hand sort large bundles of letters into box and case. Having to hold these bundles and working on these machines these 22 years cause me to have this problem.” Appellant indicated that he first became aware of the claimed condition in October 2004 and that he first realized that it was caused or aggravated by his employment on December 16, 2004.¹ He last worked for the employing establishment on October 29, 2004.

In a November 9, 2007 letter, the Office advised appellant regarding the standards for timely occupational disease claims and requested that he submit additional factual and medical evidence within 30 days of the date of the letter. Appellant did not submit any additional evidence within the allotted time.

In a January 28, 2008 decision, the Office denied appellant’s claim for bilateral carpal tunnel syndrome on the grounds that it was untimely filed. It indicated that 5 U.S.C. § 8122 requires that an original claim for compensation be filed within three years of the date of injury, or date of awareness of a relationship between the claimed condition and the employment, unless the immediate supervisor had actual knowledge of a work-related medical condition within 30 days. The Office noted that in claims for occupational disease the date of injury is the date of last occupational exposure to the claimed employment factors and stated:

“The claimed date of injury is December 16, 2004. Your date of last exposure and retirement date was October 29, 2004. The claim for compensation was filed on October 30, 2007. You should have been aware of a relationship between your employment and the claimed condition by October 29, 2007 (3 years from your date of last exposure). The evidence does not support a finding that the immediate supervisor had actual knowledge within 30 days of the date of injury.”

Appellant requested reconsideration of his claim in an undated letter received by the Office on April 15, 2008. He indicated that he performed repetitive hand and arm duties for 22 years prior to retiring and stated that his attending physicians indicated that these activities caused his bilateral carpal tunnel syndrome.² Appellant submitted numerous medical reports pertaining to a variety of medical conditions. None of the medical reports from the period prior to his retirement on October 29, 2004 contain any indication that he was diagnosed with carpal tunnel syndrome. The only medical report from the period prior to October 29, 2004, which mentions appellant’s arms is an August 24, 2004 report which notes that he reported bilateral elbow and arm pain. The report does not contain any diagnosis of an arm condition. The first medical report to mention carpal tunnel syndrome is a December 27, 2004 report of Dr. John T. Wells, an attending orthopedic surgeon, who stated that appellant “has been evaluated by me for problems regarding his right wrist. I suspect that his [sic] is related with his

¹ Appellant also filed a traumatic injury claim on October 30, 2007 alleging that he sustained bilateral carpal tunnel syndrome on December 16, 2004. The claim contained a similar description of the cause of the claimed injury. The Office properly developed appellant’s claim as an occupational disease claim.

² Appellant also claimed that he sustained other employment-related conditions, including sleep disturbance, depression, dysphonia and problems involving his head, neck, feet and legs. The Office did not issue any decision regarding these matters and they are not currently before the Board.

22 years with the employing establishment and will probably need carpal tunnel release some time in the future.” In a February 15, 2005 report, Dr. Wells indicated that clinical findings and electromyogram (EMG) testing (of an unspecified date) showed that appellant had bilateral carpal tunnel syndrome. He stated that he suspected that “it is related to [appellant’s] work environment with repetitive motion and lifting at the [employing establishment].” Appellant also submitted several reports from later periods in which Drs. Wells and Mohammad Entezari-Taher, an attending neurologist, indicated that he had employment-related bilateral carpal tunnel syndrome.³

In a June 19, 2008 decision, the Office denied appellant’s request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.⁴ In cases of injury on or after September 7, 1974, section 8122(a) of the Federal Employees’ Compensation Act 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.”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

³ The first diagnostic testing of record showing carpal tunnel syndrome is dated December 19, 2006.

⁴ *Charles Walker*, 55 ECAB 238 (2004); see *Charles W. Bishop*, 6 ECAB 571 (1954).

⁵ 5 U.S.C. § 8122(a).

⁶ *Id.* at 8119; *Larry E. Young*, 52 ECAB 264 (2001).

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

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.⁸ 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.⁹ 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.¹⁰ The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.¹¹

ANALYSIS -- ISSUE 1

On October 20, 2007 appellant filed an occupational disease claim alleging that he sustained employment-related bilateral carpal tunnel syndrome. He asserted that 22 years of repetitive arm movements at work caused this condition. Appellant indicated that he first became aware of the claimed condition in October 2004 and that he first realized that it was caused or aggravated by his employment on December 16, 2004. He last worked for the employing establishment on October 29, 2004.

In a January 28, 2008 decision, the Office denied appellant's claim for bilateral carpal tunnel syndrome on the grounds that it was untimely filed. It indicated that appellant's date of last exposure was October 29, 2004 but that his claim for compensation was filed more than three years later on October 30, 2007. The Office found that appellant should have been aware of a relationship between his employment and the claimed condition by October 29, 2004, the date of his last exposure. It noted that the evidence did not support a finding that his immediate supervisor had actual knowledge within 30 days of the date of injury.

The Board finds that the Office properly determined that appellant's October 30, 2007 claim for bilateral tunnel syndrome was untimely filed given the evidence and argument that appellant had submitted prior to the time the Office made its January 28, 2008 decision. Prior to the issuance of the Office's decision, appellant had only submitted a brief statement on his claim form regarding the believed cause of his condition. Appellant had not submitted any medical evidence in support of his claim. He asserted that he first realized that his claimed bilateral

⁸ *Larry E. Young, supra* note 6.

⁹ *Id.*

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

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

carpal tunnel syndrome was caused or aggravated by his employment on December 16, 2004 and this assertion suggests that appellant's claimed condition might have been latent in nature and that he was not aware of the condition and/or its relation to his work until after he stopped work.¹² However, appellant did not submit any evidence to support this suggested latent injury and therefore the Office had no basis to find that he did not become aware of the claimed employment-related condition until less than three years before filing his claim on October 30, 2007.¹³

Given these circumstances, it was appropriate for the Office to find that appellant should have known of the possible relationship between his claimed bilateral carpal tunnel syndrome and employment factors by the time he had his last exposure to employment factors and retired effective October 29, 2004. It properly found at that time that appellant's filing of a claim more than three years after October 29, 2004 was untimely.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁴ the Office's regulations provide that the evidence or argument submitted by a claimant must show that: (1) the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁵ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.¹⁶ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.¹⁷ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹⁸ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁹ While a reopening of a case may be predicated solely on

¹² As noted above, 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. *See supra* note 10 and accompanying text.

¹³ Appellant also did not show that his immediate supervisor had actual knowledge within 30 days of the date of injury.

¹⁴ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

¹⁵ 20 C.F.R. § 10.606(b)(2).

¹⁶ *Id.* at § 10.607(a).

¹⁷ *Id.* at § 10.608(b).

¹⁸ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁹ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.²⁰

ANALYSIS

The Board finds that in connection with appellant's April 15, 2008 reconsideration request, he submitted relevant evidence which requires the Office to reopen his claim for further review of the merits. This evidence suggests that he might have sustained latent bilateral carpal tunnel syndrome such that he did not become aware of the condition and/or its relation to employment factors until around December 2004, *i.e.*, a period less than three years prior to his October 30, 2007 claim filing.

Prior to the Office's January 28, 2008 denial of his claim, appellant had not submitted any medical evidence. In connection with his reconsideration request, he submitted numerous medical reports pertaining to a variety of medical conditions. None of the medical reports from the period prior to appellant's retirement on October 29, 2004 contain any indication that he was diagnosed with carpal tunnel syndrome.²¹ The first medical report to mention carpal tunnel syndrome is a December 27, 2004 report of Dr. Wells, an attending orthopedic surgeon, who voiced his suspicion about an employment-related cause for appellant's diagnosed bilateral carpal tunnel syndrome. In a February 15, 2005 report, Dr. Wells stated with regard to appellant's bilateral carpal tunnel syndrome that "it is related to his work environment with repetitive motion and lifting at the [employing establishment]."²²

Given that these reports suggest that appellant might not know about the employment-related nature of his claimed condition until a time less than three years prior to his October 30, 2004 claim filing, the reports are relevant to the main issue of the present case. Therefore, the Office improperly denied appellant's request for further review of the merits of his claim. The case is remanded to the Office for further review of the evidence to include further consideration of the timeliness of the filing of his claim. After such development it deems necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that the Office properly determined that, at the time of its January 28, 2008 decision, appellant had not shown that he filed a timely compensation claim. The Board further finds that the Office improperly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

²⁰ *John F. Critz*, 44 ECAB 788, 794 (1993).

²¹ The only medical report from the period prior to October 29, 2004, which mentions appellant's arms is an August 24, 2004 report which notes that he reported bilateral elbow and arm pain. The report does not contain any diagnosis of an arm condition.

²² Appellant also submitted several reports from later periods in which Drs. Wells and Mohammad Entezari-Taher, an attending neurologist, indicated that he had employment-related bilateral carpal tunnel syndrome.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' January 28, 2008 decision is affirmed. The Office's June 19, 2008 decision is reversed and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: July 2, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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