U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLES R. JORDAN and U.S. POSTAL SERVICE,
POST OFFICE, San Diego, CA

*Docket No. 99-211; Submitted on the Record;*
*Issued June 22, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's claim for a right elbow condition is barred by the three-year time limitation provision of section 8122 of the Federal Employees' Compensation Act; and (2) whether the Office properly refused to reopen appellant's claim for a merit review on February 10, 1998.

On September 1 and 16, 1997 appellant, then a retired letter carrier, filed a notice of occupational disease alleging that he suffered an injury to his right elbow as a result of casing letters while in the performance of duty. Appellant stated that he became aware of the disease or illness on September 11, 1991 and that it was caused or aggravated by his employment on November 11, 1991.

On September 24, 1997 the employing establishment indicated that appellant was last exposed to the condition that he alleged caused his elbow injury, casing mail, in August 1994. The letter stated that in August 1994 appellant worked a limited-duty position, which including lifting less than 20 pounds and no working above chest level.[1] It stated that carrying and casing mail was precluded under those limitations. The employing establishment stated that appellant remained on this limited duty until he retired in August 1996.

On October 3, 1997 the Office requested additional information from appellant, including a description of the specific work duties he believed contributed to his right elbow condition and supporting documents establishing that his condition began during his federal employment.

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[1] Appellant filed two previous claims, in which the Office accepted that he sustained left lateral epicondylitis with left elbow arthroscopy, left carpal tunnel syndrome and release, a left shoulder condition, right carpal tunnel syndrome and release and right rotator cuff sprain. On November 4, 1997 an Office hearing representative reviewing these claims determined that appellant's right elbow condition was clearly unrelated to these accepted 1991 injuries.

On October 10, 1997 appellant indicated that he had no previous injuries to his shoulders, elbows or wrists before 1991. Appellant stated that his duties included heavy lifting, reaching and pulling 10 hours per day and casing mail and flats.

On October 16, 1997 the employing establishment again indicated, that following his previous claim, appellant was placed in a restricted-duty position during September 1991 that did not involve casing and carrying mail. It stated that appellant's duties only involved writing second notices, answering the telephone and other sedentary duties.

By decision dated November 10, 1997, the Office denied appellant's claim finding that the claim was not timely filed pursuant to the Act. In an accompanying memorandum, the Office noted that appellant became aware of the relationship between his job and the claimed right elbow condition on November 11, 1991, that he was not exposed to the alleged work factor of casing mail after September 1991 when he went on restricted duty and that he did not file a claim for this injury until September 16, 1997. It concluded that because appellant did not file his claim within three years of September 1991, the date of his last exposure to the claimed work factor, that his claim was outside the three year time limit specified by the Act.

Appellant subsequently requested reconsideration. In support, he submitted a letter dated October 10, 1997, in which he requested that the employing establishment provide time cards, work sheets and paperwork showing that he was a full-time letter carrier, casing and carrying mail, until December 6, 1994.

Appellant also submitted a December 6, 1993 report from Dr. Robert Clifford, a dermatologist and specialist in general preventive medicine, indicating that appellant was then on full duty, casing and delivering mail. He also indicated that appellant had no work restrictions and that he had been on regular duty since October 26, 1993.

Appellant submitted a portion of a notice of occupational disease, Form CA-2, dated November 27, 1991, indicating that he suffered right tennis elbow as a result of his federal employment. On the form, appellant indicated that he had filed this notice with the employing establishment.

By decision dated December 18, 1997, the Office reviewed the merits of the case and denied modification because the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision. In an accompanying memorandum, the Office stated that appellant failed to provide any probative evidence that he was casing mail within three years of the date he filed his claim for a right elbow condition in September 1997. Moreover, it stated that the record failed to establish that the employing establishment received a claim dated November 27, 1991 for right tennis elbow.

Appellant subsequently requested reconsideration.

In support, appellant submitted faxes dated December 30 and 31, 1997, contending that the employing establishment lied in stating that he performed only sedentary duties after September 1991. Appellant alleged that he cased mail until December 6, 1994. Appellant also submitted a letter dated January 2, 1998, contending that the employing establishment's

October 16, 1997 letter stating that he did not case mail after September 1991 was a lie. He alleged that his supervisor since 1992, Wayne Davenport, lied and knew that he was a full-time carrier. He again indicated that he carried mail until December 6, 1994.

By decision dated February 10, 1998, the Office found that the evidence submitted in support of the request for review was irrelevant and insufficient to warrant a review of the prior decision. In an accompanying memorandum, the Office indicated that appellant submitted no specific evidence that his exposure to the claimed work factors continued until December 6, 1994 rather than September 1991.

The Board finds that the Office properly determined that appellant's claim for compensation is barred by the three-year time limitation provisions of section 8122 of the Act.

Section 8122(a) 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, unless the immediate superior had actual knowledge of the injury or death within 30 days, which knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury or death, as provided by 5 U.S.C. § 8122(a)(1), or written notice of injury or death was given within 30 days. In a case of occupational disease, such as this, the Board has held that 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.[2]

When an employee becomes aware, or reasonable should have been aware that he has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitations period even though he does not know the precise nature of the impairment or whether the ultimate result of such adverse affect would be temporary or permanent.[3] Where the employee continues in the same employment, after such awareness, the time limitation begins to run on the date of his last exposure to the implicated factors.[4]

In both his September 1 and 16, 1997 claim forms, appellant indicated that he first realized his claimed right elbow condition was caused or aggravated by his employment on November 11, 1991. This acknowledgement of awareness by appellant was competent to start the running of the limitations period under section 8122(a).[5] Thus, appellant indicated that he was aware of a possible causal relationship between his right elbow conditions and the factors of his federal employment more than five years before he filed his claims for that condition on September 1 and 16, 1997. This interval is clearly outside the three-year time limitation under section 8122 of the Act.[6]

[2] *William D. Goldsberry*, 32 ECAB 536, 540 (1981).

[3] *Leo Ferraro*, 47 ECAB 350 (1996); *Edward Lewis Maslowski*, 42 ECAB 839, 846 (1991).

[4] *William D. Goldsberry*, *supra* note 2.

[5] *See John Giovanni Carollo*, 41 ECAB 778, 794 (1990).

[6] Appellant also submitted a notice of occupational disease, Form CA-2, dated November 27, 1991 indicating that

However, appellant asserts that he was exposed to the implicated factor of employment, casing mail, after September 1991 to December 6, 1994. The employing establishment contradicted appellant's assertion and stated that he had not cased mail since September 1991 when he began restricted duty limited to only sedentary duties.[7] Appellant submitted insufficient evidence to establish that he cased mail after September 1991. In this regard, he submitted a December 6, 1993 report from Dr. Clifford, a dermatologist and specialist in general preventive medicine, stating that appellant resumed his regular duties, including casing mail, without work restrictions on October 26, 1993. Dr. Clifford's report, however, does not indicate that the physician had direct knowledge of appellant's casing of mail within three years of his filing of his claims in September 1997. Nor did Dr. Clifford state the basis for the history of appellant's duties. In addition, appellant submitted no other specific evidence indicating that he was exposed to the implicated factors within three years of his filing of his claims in September 1997. Accordingly, appellant's claim was not timely filed within three years.

Appellant's claim would still be timely under 5 U.S.C. § 8122 if his immediate superior had actual knowledge of the injury or death within 30 days. However, there is no evidence of record indicating that appellant's supervisor had actual knowledge, sufficient to put him reasonably on notice of appellant's contention that his right elbow condition was work related, within 30 days of his last exposure to the implicated factor of employment. Thus, appellant did not submit sufficient evidence to establish that there was actual notice of a work-related injury.

Consequently, appellant failed to meet his burden of proof in establishing that his claims were timely filed within the three-year time limitation period under section 8122 of the Act.

The Board also finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review on February 10, 1998.

Under section 8128(a) of the Act,[8] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,[9] which provides that a claimant may obtain review of the merits of the claim by:

"(i) Showing that the Office erroneously applied or interpreted a point of law; or

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he suffered right tennis elbow due to his federal employment. Appellant indicated on the form that he filed it with the employing establishment. Nevertheless, the record is devoid of any evidence establishing that either the Office or the employing establishment actually received this claim prior to its inclusion in this record on December 11, 1997.

[7] The employing establishment earlier indicated that appellant had cased mail no later than August 1994. This statement does not contradict its subsequent statement that appellant stopped casing mail in September 1991. Moreover, the August 1994 date is still more than three years prior to appellant's filing of his claim in September 1997.

[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.138(b)(1).

"(ii) Advancing a point of law or a fact not previously considered by the Office; or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[10]

In support of his request for reconsideration, appellant sent faxes dated December 30 and 31, 1997 and a letter dated January 2, 1998 again contending that he had cased mail until December 6, 1994 and that the employing establishment, including his supervisor Mr. Davenport, had lied about the requirements of his position. The Office, however, had previously reviewed appellant's contention on this point. Because appellant again failed to provide sufficient evidence to support his allegation, the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review in its February 10, 1998 decision.[11]

[10] 20 C.F.R. § 10.138(b)(2).

[11] The Board notes that the Office's November 17, 1998 decision was issued after the appeal was filed in this case on October 5, 1998. For this reason the November 17, 1998 decision is null and void; *see Douglas E. Billings*, 41 ECAB 880 (1990).

The decisions of the Office of Workers' Compensation Programs dated February 10, 1998, December 18 and November 10, 1997 are affirmed.

Dated, Washington, D.C.
June 22, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member