

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANNA M. VAN FRACHEN and U.S. POSTAL SERVICE,
AIRPORT MAIL CENTER, Seattle, WA

*Docket No. 03-925; Submitted on the Record;
Issued June 20, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) whether appellant's claim for a back injury is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On March 18, 2002 appellant, then a 76-year-old retired postal worker, filed a notice of occupational disease claim alleging that she first became aware of her condition of spondylolisthesis on July 6, 1995 and realized it was a result of her federal employment duties on October 20, 1998. Appellant claimed that the delay in filing her claim was due to a misunderstanding regarding a second work-related back injury in October 1998.¹ Appellant returned to part-time, light-duty work on October 11, 1995. She stated that she worked until December 29, 1998, when she was no longer able to work due to a severe increase in back pain and a worsening of tingling and numbness in her toes. The record indicates that appellant retired from the postal service on April 1, 1999.

By letter dated May 8, 2002, the Office requested that appellant submit additional factual and medical evidence to perfect her claim. In a personal statement dated May 31, 2002, appellant noted that she allegedly suffered a second on-the-job back injury on October 17, 1998. In support of her claim for the July 6, 1995 work injury, appellant submitted a report from Dr. Judith L. Marsden, an attending Board-certified family practitioner, dated May 31, 2002.

¹ Appellant claimed that she did not know whether to file a recurrence of disability (Form CA-2a) or a claim for a new injury.

By decision dated July 8, 2002, the Office denied appellant's claim for compensation on the grounds that it was untimely, as she failed to file the claim within three years of the date of the injury.²

Appellant disagreed with the Office's decision and requested a review of the written record. In support of her request, she submitted a signed affidavit from Dr. Marsden and two signed affidavits from her supervisor at the time of the injury, Eric Colon. In the affidavit dated May 23, 2002, Mr. Colon confirmed that appellant had worked as a ramp clerk for approximately 10 years for 4 to 5 hours a day, which consisted of clearing the ramp and lifting and loading containers of mail weighing anywhere from 1 to 70 pounds. In the affidavit dated July 31, 2002, he confirmed that he signed appellant's Form 3971, a notification of absence form, on January 7, 1999, which indicated "back-work injury." The form approved appellant's absence from work on January 6, 1999 and use of sick leave.

In a letter dated October 8, 2002, Mr. Colon stated that the Form 3971 was not a "work-injury" form as appellant asserted but merely a time keeping document. He claimed that she could have added the words "back injury" at a later date without his knowledge and stated that he had "no memory" of her requesting sick leave due to an on-the-job injury.

By decision dated December 9, 2002, the Office hearing representative affirmed the July 8, 2002 decision. The representative found that the time limitation for filing a claim began to run on December 29, 1998 the last day of appellant's exposure to work factors.³ The representative also found that appellant's immediate supervisor did not have knowledge of the alleged injury within 30 days after the occurrence.

Appellant disagreed with the Office's decision and requested reconsideration. In support of her January 22, 2003 request she submitted a personal statement, a copy of the 3971 leave slip, an affidavit from LeAnn Doyle (Gunderson) dated January 24, 2003 and a claim form alleging recurrence of disability on December 25, 1998 (Form CA-2a), dated January 13, 1999.

By decision dated January 30, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant review of the previous decision.⁴ The Office noted that the claim for recurrence of disability on December 25, 1998 was identical to a previous claim that appellant filed under a different case number, which had already been adjudicated.

² The Office noted that appellant should have been aware of a relationship between her condition and her federal employment on or before December 29, 1998. She indicated on her CA-1 Form that she was aware of the relationship on October 20, 1998.

³ The Office mistakenly stated that December 29, 1998 was the date that appellant indicated on her claim form as first realizing a relationship between the condition and the employment, when December 29, 1998 was actually the last date of exposure.

⁴ The Office mistakenly noted that the last merit decision of record was February 9, 2002, when it was December 9, 2002.

The Board finds that the Office properly denied appellant's compensation claim on the grounds that she did not establish that her claim was filed within the applicable time limitation provisions of the Act.

Appellant alleged that she suffered an injury on July 6, 1995 and returned to work on October 11, 1995. She claimed that she suffered a second work-related injury on October 17, 1998. On October 20, 1998 appellant stated that she realized her condition was caused or aggravated by her federal employment duties. On December 29, 1998 appellant claimed that she was in severe pain and could no longer work. December 29, 1998 was her last day of exposure to work factors, which she alleged caused her back condition. On April 1, 1999 appellant retired from the employing establishment. On March 18, 2002 she filed written notice of her alleged injury, stating that on July 6, 1995 she became aware of her disease or illness and that on October 20, 1998 she realized that her disease or illness was caused or aggravated by her employment.

Section 8122(a) of the Act⁵ states that “[a]n original claim for compensation for disability or death must be filed within three years after the injury or death.”⁶ Section 8122(b) provides that in latent disability cases, 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.⁷ The Board has held that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.⁸

In the present case, the time limitation for filing a claim began to run on December 29, 1998 the date that appellant was last exposed to the employment conditions which she alleged caused her back injury. Since appellant did not file a notice of occupational disease claim until March 18, 2002, it was not timely filed within the three-year period of limitation. Appellant's claim, however, would still be regarded as timely under section 8122(a)(1) of the Act if her immediate supervisor had actual knowledge of the injury 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.⁹

On appeal, appellant's primary contention is that she met the exception to the time limitation requirement as she advised her supervisor of her back condition and of its casual relationship to her federal employment. Appellant contends that the 3971 leave request form she completed on January 7, 1999 provided Mr. Colon with knowledge of her injury within 30 days, such that her supervisor was reasonably aware of an on-the-job injury. The Board finds, however, that the evidence of record does not support her contention.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8122(a).

⁷ 5 U.S.C. § 8122(b).

⁸ See *Garyleane A. Williams*, 44 ECAB 441 (1993); *Charlene B. Fenton*, 36 ECAB 151 (1984).

⁹ 5 U.S.C. § 8122(a)(1); see *Garyleane A. Williams*, *supra* note 8; *Jose Salaz*, 41 ECAB 743 (1990).

The 3971 leave request form consists of a January 7, 1999 notification of absence and request for sick leave for January 6, 1999. The form contains under remarks: "Back-work injury." The leave form was signed as approved by Mr. Colon on January 9, 1999. The Board finds that the 3971 form is not sufficient to establish that the immediate supervisor had actual knowledge of appellant's injury as claimed in this case.

Prior to her retirement, appellant alleged a traumatic injury sustained on July 6, 1995 and a second traumatic injury on October 20, 1998. The evidence of record does not reflect that appellant filed a timely claim for these injuries or that the January 7, 1999, 3971 form was filed within 30 days of either of the traumatic incidents.

The 3971 leave request form is insufficient to establish that appellant's supervisor had actual knowledge of the alleged occupational disease claim. The Board has held that the employee must show not only that the immediate supervisor knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.¹⁰ Knowledge of a condition, alone, is not sufficient.¹¹ Written notice must be such that the immediate supervisor is provided notice of the circumstances of the alleged injury.¹²

The October 8, 2002 statement from Mr. Colon reflects that he had no actual knowledge of appellant's claim of occupational injury, noting that he had no recall of her requesting sick leave as a result of any on-the-job injury. The 3971 form, while relating a back condition for which sick leave was sought, is insufficient to provide actual knowledge of the alleged occupational disease claim. While the employing establishment may have had notice of a preexisting back condition and appellant's allegations of traumatic injury on July 6, 1995 and October 20, 1998; nothing in the 3971 form provided reasonable notification to Mr. Colon of the circumstances of the occupational disease (spondylolisthesis) claimed on March 18, 2002. There is no reference to any employment activities or other work factors of employment giving rise to the disease.¹³ For this reason, the Board concludes that appellant's notice of occupational disease was not timely filed within the three-year time limitation period under section 8122(a)(1).

The evidence of record indicates that appellant filed her occupational disease claim on March 18, 2002, over 3 years after the date of last exposure and does not establish that her

¹⁰ See *Willis E. Bailey*, 49 ECAB 509 (1998).

¹¹ See *Leo Ferraro*, 47 ECAB 350 (1996) (knowledge of the claimant's preexisting condition is insufficient to show the immediate supervisor had actual knowledge of the claimed injury).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(b) provides that such knowledge or notification must be such as to put the employing establishment reasonably on notice of an on-the-job injury. It is not sufficient that the immediate supervisor or official was aware that the employee complained of back pain or suffered a myocardial infarction. To constitute actual knowledge, it must be found that the immediate supervisor or other official was aware that the employee related the condition to an injury sustained while in the performance of duty or to some factor of the employment.

¹³ Occupational disease is distinguished from traumatic injury and defined "as a condition produced by the work environment over a period longer than a single workday or shift." 20 C.F.R. § 10.5(q).

supervisor had knowledge of appellant's injury within 30 days. As such, appellant's claim is not timely.

The Board also finds that the Office properly denied appellant's request for a merit review.

To require the Office to reopen a case for merit review, section 10.606 provides that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and setting forth arguments or submitting evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹⁴ When a claimant fails to meet at least one of the above standards, the Office will deny the application for review without reviewing the merits of the claim.¹⁵

In support of her January 22, 2003 request for reconsideration, appellant submitted a personal statement, a copy of her leave slip, an affidavit from Ms. Doyle and a claim for recurrence of disability dated January 13, 1999. The Board notes that the underlying issue in this case is whether appellant's claim for compensation was timely filed within the three year time limitation. As the notice of recurrence of disability does not address the issue of whether appellant's claim was timely filed, it is irrelevant and insufficient to warrant merit review. Also, Ms. Doyle's affidavit is irrelevant, as it merely noted that Ms. Doyle delivered appellant's 3971 form to Mr. Colon. This affidavit does not establish that appellant's supervisor had actual knowledge of the injury. Also, the leave slip that appellant submitted with her request was already in the record and is, therefore, considered duplicate evidence. The Board has previously found that the submission of duplicate evidence has no evidentiary value and does not constitute a basis for reopening a claim.¹⁶ In her personal statement, appellant claimed that she had talked with three of her former supervisors and was told to send the leave slip as evidence that she had notified her supervisor of a work-related injury in a timely fashion. Appellant's statement also does not establish that Mr. Colon had any knowledge of the injury and what other supervisors may have advised appellant is irrelevant in establishing whether her immediate supervisor had any actual knowledge of the injury. Appellant did not claim that the Office erroneously applied or interpreted a specific point of law in the previous decisions, nor did she make a relevant legal argument not previously considered by the Office.

Appellant has not established that the Office improperly denied her request for reconsideration because she did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

¹⁴ 20 C.F.R. § 10.606(a). *See generally* 5 U.S.C. § 8128.

¹⁵ 20 C.F.R. § 10.608(a).

¹⁶ *See Paul Kovash*, 49 ECAB 350 (1998).

The decisions of the Office of Workers' Compensation Programs dated January 30, 2003, December 9 and July 8, 2002 are hereby affirmed.

Dated, Washington, DC
June 20, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member