



and first became aware of the condition and its relationship to his employment on December 16, 1997. The employing establishment controverted the claim, arguing that it was not timely filed. By letter dated November 19, 2003, the Office informed appellant of the type of evidence needed to support his claim.

In a statement dated December 1, 2003, appellant indicated that he carried mail until both shoulders became so painful in November 1998 that he could not perform regular duty. He worked modified duty until November 2002. In a November 3, 1997 report, Dr. Richard A. Mayo, an attending Board-certified orthopedic surgeon, advised that appellant had degenerative arthritis of the acromioclavicular (AC) joint of the left shoulder with probable chronic tendinitis of the rotator cuff and impingement. In a December 16, 1997 report, he stated:

“[Appellant] has painful degenerative arthritis at the AC joint of the left shoulder, forcing him some time back to change his technique of carrying a mailbag to the right shoulder. This now produces pain in that shoulder as well. Because of this problem [appellant] has had to cut down on any overtime activity and he appears at this point to be unable to continue carrying a [mail]bag. At the present time he could be most useful in the [employing establishment] working inside, but [appellant] could not lift heavy bags of mail. [Appellant] could not have repeated use of the arm overhead and, again, he appears totally unable to carry a mailbag with a strap on his shoulder.”

Dr. George B. McManama, Jr., provided a fitness-for-duty examination report dated February 13, 1998 which noted that appellant had a history of left shoulder problems caused by work duties beginning in the fall of 1995. He started carrying mail on the opposite shoulder, but experienced right shoulder pain such that on January 15, 1998 he accepted light duty because of his inability to carry a mailbag. Dr. McManama noted appellant’s complaints of bilateral shoulder soreness with direct pressure and with overhead activities, left greater than right. Examination findings included prominence of the left AC joint with swelling and acute sensitivity to light touch. Appellant was also sensitive to direct palpation of the AC joint on the right. Dr. McManama found no limitation of range of motion but positive impingement testing bilaterally. He reviewed medical records and x-ray findings and diagnosed evidence of degenerative arthritis in the AC joint of the left shoulder, caused by carrying mail which, he advised, would not improve. Dr. McManama concluded that appellant was capable of modified work that did not require any overhead lifting or carrying a bag on either shoulder with lifting limited to 40 pounds.

Dr. Edward Nalband, a Board-certified internist, provided an attending physician’s report dated November 16, 2003, in which he diagnosed degenerative shoulder disease. He checked the “yes” box, indicating the condition was employment related, stating “repetitive lifting contributed to degenerative disorder.” Dr. Nalband concluded that appellant had permanent impairment to both shoulders limiting his ability to lift and carry.

In a December 13, 2003 report, Dr. Paul S. Blachman, Board-certified in internal medicine and neurology, noted appellant’s complaints of bilateral shoulder pain with significant limitation of range of motion in both shoulders. He reported magnetic resonance imaging (MRI) scan findings of a bulging disc at C5-6 with a small disc at C7-T1 and advised that,

electromyography (EMG) and nerve conduction studies were normal. Dr. Blachman concluded that appellant had minor cervical radiculopathy but had an intrinsic shoulder problem.

In a statement dated February 18, 2004, the manager of customer services at the employing establishment<sup>1</sup> advised that “to the best of my knowledge, [appellant] has not carried a satchel to deliver mail in the last five years.” The employing establishment also submitted a modified letter carrier permanent rehabilitation job offer, accepted by appellant on November 5, 1998, with restrictions of no overhead lifting, no lifting more than 40 pounds and no carrying a mailbag on either shoulder.

By decision dated March 2, 2004, the Office denied the claim for a right shoulder injury as not timely filed. The Office noted that under Office file number 010344417, appellant had an accepted left shoulder injury. On March 23, 2004 he requested a hearing. In an October 15, 2004 letter, Michael P. Watson, postmaster, Randolph Post Office, advised that in December 1997 appellant was manager of customer services at the employing establishment. He stated that appellant was on limited duty due to an injury to his left shoulder with restrictions including that he could not carry mail.

At the hearing, held on October 27, 2004 it was clarified that the instant claim was for a right shoulder injury. Appellant testified that after switching shoulders because of his left shoulder injury, his right shoulder became sore. He also submitted an employing establishment routing sheet dated January 6, 1998, asking that Mr. Watson review his work restrictions and provide a temporary duty offer to him. A temporary limited-duty assignment dated January 6, 1998, signed by appellant and Mr. Watson, provided restrictions of no lifting of heavy mailbags, no repeated reaching above with either left or right shoulder and no carrying mailbags on either shoulder. Mr. Watson appended a notation that these restrictions were “per treating physician report [of] December 16, 1997.”<sup>2</sup> In a routing sheet dated March 30, 1998, appellant was identified as a potential rehabilitation candidate and his supervisor was asked to review attached medical evidence. A position description signed by Mr. Watson on April 16, 1998 provided restrictions of no overhead lifting, no carrying a mailbag on either shoulder and a lifting limit of 40 pounds “as determined by a fitness-for-duty examination.”

A statement of accepted facts dated August 3, 1998 for Office file number 010344417, accepted for aggravation of left shoulder strain, advised that appellant carried a mailbag on his left shoulder for 18 years, first experienced pain in October 1995 and changed the manner in which he carried his bag in September 1996. The statement of accepted facts noted that on January 15, 1998 he began a light-duty position which did not require the carrying of a mail bag.

Appellant also submitted reports from Dr. Mayo dated August 6 and December 27, 1996 and December 5, 1997, which described shoulder symptoms. In a letter received by the Office on November 24, 2004, he stated that his left shoulder pain began in October 1995 and that, on the advice of his physical therapist, in September 1996 appellant began to carry his mailbag on

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<sup>1</sup> The signature is illegible.

<sup>2</sup> Mr. Watson dated his signature “January 1, 1997.” However, the offer was dated January 6, 1998 and was based on a December 16, 1997 medical report.

his right shoulder, continuing until December 16, 1997 when he stopped carrying mail. Appellant stated that he began his limited-duty position on January 15, 1998 and asserted that at that time Mr. Watson was aware of his right shoulder injury.

In a November 3, 2004 report, Dr. Nalband advised that appellant had bilateral shoulder and neck pain, which was first documented by Dr. Mayo on December 16, 1997 as supported by Dr. Blachman's finding of bilateral limitation of range of motion. Dr. Nalband concluded that he continued to have bilateral pain and limitation of range of motion.

By decision dated February 17, 2005, an Office hearing representative found that appellant's claim for a right shoulder injury was not timely filed.

### **LEGAL PRECEDENT**

In cases of injury on or after September 7, 1974, section 8122(a) of the Act<sup>3</sup> 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) [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.”<sup>4</sup>

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 by and contain the address of the individual giving the notice.<sup>5</sup> Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.<sup>6</sup>

Section 8122(b) 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 and the Board has held that the applicable statute of limitations commences to run although the employee

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 5 U.S.C. § 8122(a).

<sup>5</sup> *Larry E. Young*, 52 ECAB 264 (2001).

<sup>6</sup> *Laura L. Harrison*, 52 ECAB 515 (2001).

does not know the precise nature of the impairment.<sup>7</sup> 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 or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.<sup>8</sup>

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

### ANALYSIS

The Board finds that appellant's claim for a right shoulder injury was timely filed. He indicated on his claim form that he first became aware of his injury and its relationship to his employment in December 1997. The record supports that appellant had an accepted left shoulder condition which caused him to shift carrying his mailbag to his right shoulder in September 1996. He continued to experience pain and became unable to carry the mailbag on either shoulder. Appellant stopped delivering mail in December 1997. An employing establishment supervisor acknowledged in 2004 that he had not carried a mailbag in the last five years. Mr. Watson advised that appellant was placed on restrictions in December 1997 which included that he could not carry mail. Appellant, thus, ceased to be exposed to the implicated employment condition, carrying a mailbag on his right shoulder in December 1997. Therefore, the time limitations began to run at that time. Since he did not file a claim for a right shoulder injury until April 2003, his claim was filed outside the three-year time limitation period.<sup>12</sup>

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor had actual knowledge of the injury within 30 days of his last exposure to the implicated employment factor. In a report dated December 17, 1997, his attending orthopedic surgeon, Dr. Mayo advised that appellant's painful left shoulder condition forced him

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<sup>7</sup> *Delmont L. Thompson*, 51 ECAB 155 (1999).

<sup>8</sup> *Duet Brinson*, 52 ECAB 168 (2000).

<sup>9</sup> *Larry E. Young*, *supra* note 5.

<sup>10</sup> *Id.*

<sup>11</sup> *Debra Young Bruce*, 52 ECAB 315 (2001).

<sup>12</sup> 5 U.S.C. § 8122(b).

to carry his mailbag on the right shoulder which, in turn, produced pain in that shoulder. He advised that appellant was totally unable to carry a bag on his right shoulder and provided further restrictions that he could not lift heavy bags of mail or have repeated overhead use of the arms. Appellant stated that he last carried mail on December 17, 1997 the date Dr. Mayo placed him on restrictions. An employing establishment routing sheet dated January 6, 1998 asked that Mr. Watson, his supervisor, review the work restrictions provided and provide a temporary-duty offer. A January 6, 1998 temporary limited-duty assignment, signed by appellant and Mr. Watson, provided restrictions of no lifting heavy mailbags, no repeated reaching above with either left or right shoulder and no carrying mailbags on either shoulder, incorporating the restrictions provided by Dr. Mayo. Mr. Watson appended a note indicating that the offer was based on a physician's report dated December 16, 1997. In his October 15, 2004 letter, he also acknowledged that the restrictions placed on appellant in December 1997 prevented him from carrying mail.

The Board finds that the evidence of record is sufficient to establish that appellant's immediate superior, Mr. Watson, had actual knowledge of an on-the-job injury in January 1998.<sup>13</sup> Consequently, the exception to the statute was met and his claim for compensation for a right shoulder injury was timely filed. Accordingly, the February 17, 2005 decision of the Office will be set aside and the case remanded for further development of the claim.

### CONCLUSION

The Board finds that appellant timely filed a claim for a right shoulder injury.

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<sup>13</sup> *Duet Brinson, supra* note 8.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 17, 2005 is reversed and the case remanded to the Office for further proceedings regarding the merits of his claim.

Issued: December 15, 2005  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board