United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 08-28**
	)	**Issued: April 23, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Atlanta, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 1, 2007 appellant filed a timely appeal of the September 21, 2007 decision of the Office of Workers' Compensation Programs which denied her occupational disease claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly denied appellant's occupational disease claim on the grounds that it was not timely filed under 5 U.S.C. § 8122.

FACTUAL HISTORY

On December 14, 2006 appellant, then a 62-year-old clerk, filed an occupational disease claim alleging that due to a fall at work on December 4, 1993 she developed tendinitis of the right shoulder. She indicated that she first became aware of the condition on March 31, 1999

and realized the condition was aggravated by factors of her federal employment on December 4, 1993. Appellant retired on September 20, 2005.[1]

Appellant submitted a February 16, 2006 statement which referenced an accident report dated December 4, 1993, allegedly prepared by her supervisor, Harold Milner, who was deceased. The unsigned accident report noted that appellant tripped on a loose footplate and fell injuring her left side, arm, hand and leg.

By decision dated February 14, 2007, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that her claim was timely filed in accordance with 5 U.S.C. § 8122.

On February 16, 2007 appellant appealed her claim to the Board.[2] In an order dated July 25, 2007, the Board remanded the matter for further development. The Board noted that the Office failed to advise appellant of any defect in her claim prior to issuing its February 14, 2007 decision which denied her claim.

By letter dated August 6, 2007, the Office requested additional information from appellant noting that the evidence submitted was insufficient to establish her claim. The Office specifically requested that appellant provide her employment history and duties performed, the date she was last exposed to the work duties which caused her condition, the date she retired and a physician's reasoned opinion addressing the relationship of her claimed condition and specific employment factors.

Appellant submitted a statement dated August 23, 2007 and noted that on December 4, 1993 she fell at work and injured her shoulder, sought treatment and subsequently returned to a light-duty position. She advised that while performing her light-duty position her supervisor instructed her to lift a 70-pound mailbag which was outside of her 5-pound lifting restriction and she experienced severe shoulder pain. Appellant indicated that her shoulder condition was caused by performing her light-duty clerk duties which included repetitive reaching, lifting, pulling, grasping and pushing activities, up to five pounds, one to four hours per day, five days per week. She noted beginning her career as a clerk in 1966 and retiring on September 20, 2005. Appellant indicated that she was last exposed to the work duties which caused her condition on December 4, 1993. She submitted reports from Dr. William M. Craven, a Board-certified orthopedist, dated August 23 and October 16, 2006, who treated her for right shoulder pain and diagnosed right shoulder pain, tendinitis and impingement shoulder syndrome. Dr. Craven noted that appellant reached maximum medical improvement on October 16, 2006 and was released to work with restrictions of no overhead lifting and no lifting over five pounds. In a report dated August 27, 2007, he noted that appellant reported being pain free before she fell at work on December 4, 1993. Dr. Craven initially treated appellant on December 4, 1996 for chronic tendinitis and impingement of the right shoulder which never resolved and opined that this

[1] Appellant filed a traumatic injury claim for an injury which occurred on December 4, 1993 which was accepted for bilateral carpal tunnel syndrome, claim No. 06-2181847. The current claim was treated as an occupational disease claim.

[2] Docket No. 07-950 (issued July 25, 2007).

condition was related to overuse and repetitive use syndrome. He opined that appellant's current diagnosis was related to her original compensation injury.

On September 21, 2007 a telephone conference was held and appellant advised that she sustained a work-related fall on December 4, 1993 which was accepted for bilateral carpal tunnel syndrome in claim No. 06-0586417. She reported that she returned to a limited-duty position and her supervisor instructed her to lift a mailbag weighing over her five-pound lifting restriction and she reinjured her hand. Appellant indicated that she sought medical treatment and subsequently returned to a sedentary modified position where she sat at a mail belt and picked up letters and placed them in a tray and was not required to push, pull or lift over five pounds. She noted that she held this position from 1993 until her retirement in 2005 and was last exposed to the work duties that caused her condition in 1993.

By decision dated September 21, 2007, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that her claim was timely filed in accordance with 5 U.S.C. § 8122. The Office found that appellant first became aware of her condition in 1993 and became aware of the relationship between her employment and the claimed condition in 1993. The Office advised that appellant was last exposed to the work duties that caused her condition in 1993 and did not file her claim until December 14, 2006, which was over three years after she was last exposed to work factors. The Office further noted that there was no evidence that appellant's supervisor had knowledge of the employment-related injury within 30 days.

LEGAL PRECEDENT

Section 8122(a) of the Act states that "[a]n original claim for compensation for disability or death must be filed within three years after the injury or death."[3] 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.[4] 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.[5]

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if her immediate supervisor had actual knowledge of her alleged employment-related injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of

[3] 5 U.S.C. § 8122(a).

[4] 5 U.S.C. § 8122(b).

[5] *See Larry E. Young*, 52 ECAB 264 (2001); *Garyleane A. Williams*, 44 ECAB 441 (1993); *Mitchell Murray*, 53 ECAB 601 (2002); *Alicia Kelly*, 53 ECAB 244 (2001).

appellant's injury.[6] An employee must show not only that her immediate superior knew that she was injured, but also knew or reasonably should have known that it was an on-the-job injury.[7]

ANALYSIS

In its September 21, 2007 decision, the Office denied appellant's claim for compensation on the grounds that the evidence of record failed to demonstrate that her claim was timely filed in accordance with 5 U.S.C. § 8122.

Appellant indicated that she first became aware of a connection between her shoulder condition and her employment on December 4, 1993. The record reveals that appellant fell at work on December 4, 1993 and returned to a limited-duty position and was reinjured when lifting a mailbag. Appellant sought treatment and returned to a sedentary-modified position which she held from 1993 until her retirement in 2005 and which did not require her to push, pull or lift over five pounds. She advised that she first became aware of the relationship between her claimed right shoulder condition and her employment on December 4, 1993 and also advised that she was last exposed to the work duties that caused her condition in 1993. Appellant did not allege that any of her duties after 1993 caused or aggravated her claimed condition. Therefore, the time limitations began to run in 1993, her last exposure to the implicated employment factor. Since appellant did not file a claim until December 14, 2006 her claim was filed outside the three-year time limitation period under section 8122(b).

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.[8] Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days.[9]

The record also contains no evidence that appellant's supervisor had actual knowledge of the injury or that written notice of the injury was given within 30 days. Appellant submitted an unsigned accident report dated December 4, 1993, which she indicated was prepared by her supervisor, Harold Milner, who was deceased. The accident report noted that appellant tripped on a loose footplate and fell injuring her left side, arm, hand and leg. The Board notes that this report indicates awareness of appellant's slip and fall injury on December 4, 1993, which was subsequently accepted by the Office for bilateral carpal tunnel syndrome in claim No. 06-2181847; however, it does not indicate knowledge of subsequent right shoulder tendinitis which developed when appellant returned to work in a modified position and was instructed to lift a 70-pound mailbag and perform repetitive reaching, lifting, pulling, grasping and pushing activities.

[6] 5 U.S.C. § 8122(a)(1); *see also Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2. 801.3(a)(3) (March 1993).

[7] *Charlene B. Fenton*, 36 ECAB 151 (1984).

[8] 5 U.S.C. § 8122(a)(1); *see Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

[9] 5 U.S.C. § 8122(a)(1) and (2).

Therefore this report does not establish that appellant's supervisors were reasonably on notice of a work-related injury caused by performing her repetitive light-duty clerk duties.[10] Knowledge merely of an employee's illness is not sufficient to establish actual knowledge and timeliness, it must be shown that the circumstances were such as to put the supervisor on notice that the alleged injury was actually related to the employment or that the employee attributed it thereto.[11]

Therefore, the Board finds that appellant has not established actual knowledge by her supervisors of her work-related condition within 30 days and therefore has not established a timely claim. The record contains no indication that appellant's immediate supervisors had written notice of her work-related injury within 30 days. The exceptions to the statute have not been met, and thus, appellant has failed to establish that she filed a timely claim on December 14, 2006.

CONCLUSION

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.

[10] *See Linda J. Reeves*, 48 ECAB 373 (1997) (where the Board held that while appellant submitted a statement from a former supervisor that established that he had some knowledge of appellant's complaints, this statement is not sufficient to establish that her immediate superior had actual knowledge of a work-related injury as the statement only makes a vague reference to appellant's health and does not indicate that she sustained any specific employment-related injury, rather the knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death).

[11] *See id.; Roseanne S. Allexenberg*, 47 ECAB 498 (1996) (where the Board held that knowledge of an employee's illness is not sufficient to establish actual knowledge and timeliness of a claim, it must be shown that the circumstances were such as to put the supervisor on notice that the alleged injury was actually related to the employment or that the employee attributed it thereto).

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 23, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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