

**United States Department of Labor
Employees' Compensation Appeals Board**

W.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Grandview, MO, Employer**

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**Docket No. 07-1913
Issued: February 22, 2008**

Appearances:
Melford V. McCormick, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 11, 2007 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated September 29, 2006 and June 18, 2007 denying his claim on the grounds that it was not timely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant's claim was timely filed pursuant to 5 U.S.C. § 8122(a).

FACTUAL HISTORY

On July 7, 2006 appellant, then a 42-year-old letter carrier, filed an occupational disease claim (Form CA-2) for a right knee condition which he alleged had worsened. He indicated that the Office had previously accepted his left knee claim and provided limited-duty positions as a

result.¹ Appellant attributed his right knee condition to working on his knees and to years of carrying mail. He was first aware of his condition and its relation to his federal employment on August 16, 2002. The Office assigned this file number 112035596.² The employing establishment controverted the claim. It asserted that appellant was last exposed to alleged hazardous employment conditions as a city carrier on November 4, 2002 when he began working in a limited-duty capacity because of his accepted left knee condition. Appellant's limited-duty work was described as being a "sedentary position with limited walking and standing." There is no indication that he stopped work for his right knee condition since being placed on limited duty.

On July 27, 2006 the Office wrote to appellant and the employing establishment to obtain factual and medical evidence regarding his claimed right knee condition. In response, the Office received factual statements from the employing establishment dated September 3, 2003 and August 3, 2006, offers of modified assignment (limited duty) dated August 27, 2003, March 8 and October 1, 2004 and December 27, 2005; a January 31, 2006 family medical leave act form; an undated and unsigned duty status report; a July 27, 2006 operative report for a left knee arthroplasty and an August 11, 2006 postsurgery status report. Each limited-duty position appellant performed was due to his accepted left knee injury. The record reflects that appellant's job duties were predominately sedentary in nature, with minimal (30 minutes or less per hour) walking, standing and climbing activities.

In a February 25, 2003 medical report, Dr. Thomas E. Scott, a Board-certified internist specializing in rheumatology, indicated that appellant had some minor problems with his right knee in the past and that the right knee demonstrated crepitus without warmth or swelling. Dr. Teresa Marshall, a Board-certified family practitioner, indicated that appellant had been seen since October 2001 for severe osteoarthritis of the knees and primarily addressed his left knee condition. In an undated letter, she indicated that on appellant's June 30, 2003 examination, his right knee began to show signs of arthritis and had mild crepitanace with flexion and extension. She opined that appellant's knee conditions were aggravated by his job duties of being on his feet constantly. In a July 18, 2006 disability slip, Dr. Marshall diagnosed severe osteoarthritis -- knees. In an August 15, 2006 letter, she indicated that appellant's symptoms were most severe in the left knee. Dr. Marshall indicated that since 2003 appellant had physical examination changes of crepitanaces in the right knee. She stated that it was obvious that the arthritic process started prior to that time and opined that it was likely several years prior to 2003. Dr. Marshall opined that the arthritis was due to years of mail carrying with constant wear and tear on the knees. She indicated that appellant required bilateral total knee replacements and indicated that he successfully completed his left knee replacement surgery.

¹ On July 28, 2003 appellant filed a claim (File No. 112017889) for osteoarthritis in the left knee on or prior to August 16, 2002 due to years of carrying the mail. His claim was accepted for aggravation of osteoarthritis in the left knee. Appellant has not appealed any of the decisions under File No. 112017889; thus, the Board will not review any of the decisions pertaining to the accepted left knee condition.

² The Office associated the current claim (File No. 112035596) with the claim for the accepted left knee condition (File No. 112017889) under the master file, File No. 112017889.

By decision dated September 29, 2006, the Office denied appellant's claim as untimely filed.

On October 11, 2006 appellant requested an oral hearing which was held on May 8, 2007. At the hearing, he testified that he worked as a letter carrier from 1992 until 2002 when appellant was placed on limited duty due to his left knee injury. Appellant stated that both of his knee problems started in 2001 with the pain in the left knee worse than the right. He was advised that bilateral knee replacements would ultimately be needed and he underwent a left knee arthroplasty on July 27, 2006. Appellant stated that he continued to work with pain in his right knee for several years and would like to have his right knee replaced. He indicated that his doctors advised him that his work as a letter carrier contributed to the arthritis in his knees. Appellant did not file a claim for his right knee condition until July 2006 as he assumed the right knee would be accepted by the Office as it had accepted his left knee condition. He filed the claim for his right knee when the pain became worse. Copies of work excuse/disability slips from Dr. Marshall dated July 18 and 26, 2006 were submitted together with a June 29, 2005 magnetic resonance imaging (MRI) scan of the left and right knee.

By decision dated June 18, 2007, an Office hearing representative affirmed the September 29, 2006 decision. The hearing representative found that appellant had not timely filed his claim.

LEGAL PRECEDENT

In cases of injury on or after September 7, 1974, section 8122(a) provides that a claim for disability or death must be filed within three years after the injury or death.³ The Board has held that, if an employee continues to be exposed to injurious working conditions after becoming reasonably aware of the causal relationship between the employment and the compensable disability, the time limitation begins to run on the date of last exposure.⁴

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.⁵ 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.⁶ The

³ 5 U.S.C. § 8122(a) (2000).

⁴ See *Paul Fierstein*, 51 ECAB 381 (2000).

⁵ *Larry E. Young*, 52 ECAB 264 (2001).

⁶ *Id.*

requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.⁷

ANALYSIS

In this case, the Office found that appellant did not file a timely claim for compensation for his right knee condition. It determined that he was last exposed to the employment conditions which allegedly caused his right knee condition on November 4, 2002 the date he started working a limited-duty position as a result of an accepted left knee condition. Since appellant did not file a claim until July 7, 2006, the Office concluded that his claim was not timely filed within the three-year time limitation.

The Board, however, finds that appellant's claim was timely filed. The Office found that the date of injury was November 4, 2002 when appellant started working limited duty as a result of his accepted left knee condition. The Board finds, however, that the Office's determination is in error. While the record reflects that appellant began limited duty on November 4, 2002 because of his accepted left knee condition, there is no indication that his limited-duty work eliminated his occupational exposure to walking, standing, climbing or other activities which involved use of appellant's right knee. The record indicates that his limited-duty position included, 30 minutes or less per hour, activities such as walking, standing and climbing. Appellant's July 7, 2006 occupational disease claim attributed his right knee condition to work which required him to be on his knees. Moreover, the employing establishment acknowledged that appellant's limited-duty work had limited walking and standing duties which would necessarily involve continued use of his right knee. While appellant's duties diminished the use of his knee he still had exposure to these work factors. He continued to be exposed to walking, standing and climbing activities, involving use of his right knee when he filed his claim on July 7, 2006. The impact of such work on his right knee condition raises a question to be resolved by probative medical evidence. The Board finds that appellant's claim was timely filed.⁸

The Board finds that appellant's claim was timely filed under 5 U.S.C. § 8122 and the Office's decisions of June 18, 2007 and September 29, 2006 will be reversed. The case is remanded for further action on the merits of his claim to be followed by a *de novo* decision.

⁷ *Debra Young Bruce*, 52 ECAB 315 (2001).

⁸ *See Gerald A. Preston*, 57 ECAB ____ (Docket No. 05-1198, December 15, 2005).

CONCLUSION

The Board finds that appellant timely filed a claim for benefits.

ORDER

IT IS HEREBY ORDERED THAT the June 18, 2007 and September 29, 2006 decisions of the Office of Workers' Compensation Programs are reversed. The case is remanded for further action consistent with this decision of the Board.

Issued: February 22, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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