

FACTUAL HISTORY

On February 26, 2007 appellant, then a 60-year-old manager, filed an occupational disease claim alleging that on December 15, 2002 she first became aware of the exacerbation of her sarcoidosis, iritis, uveitis and multiple skin lesions and post-traumatic stress disorder. On September 20, 2006 appellant first realized that her conditions were caused by the September 11, 2001 terrorist attacks while working at the Church Street Station in downtown Manhattan. She was exposed to fire, fume and falling debris. Appellant stated that, in the Fall of 2006, there was newspaper coverage about a man who was in poor health due to such exposure. Articles mentioned that people who suffered from sarcoidosis were adversely affected by the September 11, 2001 incident. Appellant realized that her health had declined significantly since her exposure. She discussed her condition with an attending physician who confirmed that the September 11, 2001 incident contributed to her failing health.

In a February 26, 2007 narrative statement, appellant described her injury. On September 11, 2001 she was stationed at the employing establishment's Church Street Station. After the terrorist attack of September 11, 2001, the New York City Police Department ordered the evacuation of her building. As a manager, appellant evacuated employees and visitors from the building and remained for 30 minutes in order to secure the facility. When she left the building, debris was falling and glass shattered onto the street. Appellant was two blocks away from the building when she saw the first of two towers collapse. Her extended exposure to a polluted environment caused her sarcoidosis and related iritis, uveitis and skin lesions to be exacerbated and the development of her post-traumatic stress disorder.

In medical reports covering the period December 24, 2002 through September 28, 2004, Dr. C. Michael Arenas Samson, an attending Board-certified ophthalmologist, stated that he had treated appellant for uveitis associated with sarcoidosis and chronic panuveitis. In a December 18, 2006 report, he stated that she had an autoimmune condition that was consistent with reports of increased inflammatory disease in people associated with the September 11, 2001 terrorist attack.

In letters dated April 19, 2007, the employing establishment controverted appellant's claim. It contended that the evidence was insufficient to establish that she sustained an injury while in the performance of duty. The employing establishment contended that appellant's claim was not timely filed as it was filed four years and five months after she first became aware of her conditions in December 2002.

By letter dated May 2, 2007, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It addressed the additional factual and medical evidence she needed to submit. The Office also requested that the employing establishment respond to appellant's allegations and provide information regarding her workplace exposure.

In a May 11, 2007 statement, Larry Goodwin, an employing establishment manager, related that he could not confirm appellant's activities on September 11, 2001. He was not her supervisor at that time and her former supervisor had retired. Mr. Goodwin stated that the Church Street Station was reopened in July 2004. Appellant returned to this station in October 2005 on a detail assignment as a pricing and classification specialist. Mr. Goodwin

stated that she worked in this position until April 2006. Subsequently, appellant worked in a detail administrative position at the Bronx Processing and Distribution Center. In a May 16, 2007 statement, Mr. Goodwin stated that she never mentioned any health issues related to the September 11, 2001 incident.

In a May 20, 2007 letter, appellant stated that her post-traumatic stress disorder was caused by observing people jump from the World Trade Center towers, the towers collapse, wounded individuals bleeding and in pain from debris falling from the towers. Her condition was also caused by hearing sirens from a multitude of emergency vehicles and emergency personnel ordering people to run for their life and the polluted environment. Appellant's eyes were treated in November 2001 and she was hospitalized multiple times since 2004 for severe skin lesions, which developed into cellulitis. She stated that she received counseling in October 2001 due to the September 11, 2001 incident.

In a May 19, 2007 report, Ellen H. Reiner, a licensed social worker, stated that she had been providing psychotherapy to appellant on a weekly basis since October 2001 for post-traumatic stress disorder due to the September 11, 2001 incident. She reviewed a history that appellant conscientiously followed police orders to evacuate all employees and visitors from her building and secured the building after the September 11, 2001 terrorist attacks. When appellant left the building, debris was falling from the World Trade Center towers and glass was shattering onto the street. She witnessed the first of two towers collapse and people jumping from windows to their death. Ms. Reiner noted appellant's symptoms, which included inability to sleep, recurrent severe nightmares and intrusive distressing recollections of the towers collapsing and the loss of so many lives, emotional detachment from family, friends and coworkers, poor concentration, irritability and intense fear and helplessness. She stated that, due to appellant's exposure to poor air quality and falling debris, her sarcoidosis, iritis, uveitis and multiple skin lesions were exacerbated. Ms. Reiner opined that appellant needed to stop work to prevent blindness and outbreaks of her sarcoidosis and skin lesions.

By decision dated August 15, 2007, the Office denied appellant's claim. It found that her claim for her physical injuries was timely filed under 5 U.S.C. § 8122, but the evidence was insufficient to establish that these injuries arose out of and in the course of her employment. The Office stated that appellant was two blocks away from her assigned-duty station when the September 11, 2001 incident occurred. It found that her claim for an emotional condition was not timely filed under section 8122 as she knew or reasonably should have known that her condition was caused by her employment. The Office found that the medical evidence established that she sought treatment for her condition in October 2001, less than two months after the September 11, 2001 incident. It also found that her exposure to the implicated employment factors ceased on September 11, 2001.

In a letter dated March 17, 2008, appellant requested reconsideration. She stated that as a manager and member of the emergency evacuation team she had to search and secure the building following the September 11, 2001 incident. After appellant left the building, she comforted her coworkers, responded to her superiors' orders and distributed walkie-talkies to other managers on the street. She experienced physical and mental stress due to not knowing when the next terrorist attack would occur as she crossed a bridge to leave Manhattan since no public transportation was allowed to enter the city. Appellant did not want to file a claim for

post-traumatic stress disorder because she believed that her initial stress disorder would fade within a short time period. In a March 25, 2008 report, Ms. Reiner reiterated the same history as provided in her May 19, 2007 report. An award certificate and a December 24, 2001 letter from the employing establishment recognized appellant for leadership skills that she displayed during the evacuation of employees from her building on September 11, 2001. Excerpts from newspapers, magazines, research studies and internet inquiries addressed health problems caused by exposure to hazardous particles following the September 11, 2001 incident. Appellant stated that a digital video disc prepared by the employing establishment showed her account of the September 11, 2001 incident. In a March 12, 2008 report, Dr. Samson stated that appellant had been under his care since December 24, 2002 for panuveitis in both eyes secondary to sarcoidosis. He opined that the exacerbation of her condition was caused by the September 11, 2001 incident.

By letter dated April 18, 2008, the Office advised appellant that the August 15, 2007 decision denied her emotional condition claim on the grounds that it was untimely filed. However, the denial of her physical conditions on the grounds that they were not sustained in the performance of duty was not clear because these conditions were not specifically mentioned in the decision. The Office stated that it would consider appellant's request for reconsideration regarding the denial of her emotional condition claim. It would redevelop her claim for her physical conditions based on her March 17, 2008 statement, to be followed by a separate decision.

By decision dated May 19, 2008, the Office denied appellant's request for reconsideration regarding the denial of her emotional condition claim. It found that the evidence submitted was either duplicative in nature or was not relevant and, thus, insufficient to warrant further merit review of its prior decision.¹

LEGAL PRECEDENT -- ISSUE 1

Section 8122(a) of the Federal Employees' Compensation Act states that "[a]n original claim for compensation for disability or death must be filed within three years after the injury or death."² 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.³ 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.⁴

¹ The Board notes that, on appeal, appellant has submitted new evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

² 5 U.S.C. § 8122(a).

³ *Id.* at § 8122(b).

⁴ *Mitchell Murray*, 53 ECAB 601 (2002); *Alicia Kelly*, 53 ECAB 244 (2001); *see Larry E. Young*, 52 ECAB 264 (2001); *Garyleane A. Williams*, 44 ECAB 441 (1993).

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 her injury.⁵ An employee must show not only that appellant's immediate superior knew that she was injured, but also knew or reasonably should have known that it was an on-the-job injury.⁶

ANALYSIS -- ISSUE 1

Appellant claimed that she sustained an emotional condition due to the terrorist attacks on the World Trade Center towers on September 11, 2001. The Office denied her occupational disease claim for an emotional condition on the grounds that it was not timely filed. The Board finds that the Office properly denied appellant's claim on the basis that she did not file a timely claim for an employment-related emotional condition.

The evidence establishes that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between her employment and the claimed emotional condition as early as October 2001. Her May 20, 2007 letter stated that she received counseling in October 2001 due to the September 11, 2001 incident. Appellant's statement is corroborated by the May 19, 2007 report from Ms. Reiner, a licensed social worker. Since October 2001, Ms. Reiner provided psychotherapy to appellant on a weekly basis for post-traumatic stress disorder due to the September 11, 2001 incident. She reviewed a detailed history of the development of appellant's emotional condition including, witnessing the towers collapse and people jumping from windows to their death.

Appellant continued to work at the employing establishment following the September 11, 2001 incident. The May 16, 2007 statement from Mr. Goodwin, an employing establishment manager, related that the Church Street Station reopened in July 2004. He stated that appellant returned to work at the station in October 2005 on a detail assignment. Mr. Goodwin stated that she worked in this position until April 2006 and subsequently went to work in a detail assignment at the Bronx Processing and Distribution Center. The Board notes that appellant has not contended that she continued to be exposed, to the implicated employment factors after September 11, 2001 while working at the employing establishment. Therefore, her last possible exposure to the implicated employment factors occurred on September 11, 2001. As noted, 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.⁷ Therefore, the Board finds that the time limitation in appellant's case began to run no later than September 11, 2001. Since appellant did not file a claim until February 26, 2007, her claim was not filed within the three-year period of limitation.

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).

⁶ *Charlene B. Fenton*, 36 ECAB 151 (1984).

⁷ *See* cases cited, *supra* note 4 and accompanying text.

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 the injury within 30 days of her last exposure to the implicated employment factors on September 11, 2001.⁸ Additionally, the claim would be deemed timely if written notice of injury had been provided within 30 days pursuant to 5 U.S.C. § 8119.⁹ Appellant has not made any claim that she has satisfied either of these provisions. Further, Mr. Goodwin related in a May 16, 2007 statement that appellant never mentioned any health issues related to the September 11, 2001 incident. Therefore, the Board finds that the exceptions to the statute have not been met and thus, appellant has failed to establish that she filed a timely claim on February 26, 2007.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,¹⁰ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹¹ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹² When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 2

In a March 17, 2008 letter, appellant disagreed with the Office's August 15, 2007 decision, which found that her occupational disease claim for an emotional condition was not timely filed under section 8122 of the Act. The relevant issue is whether she established that her occupational disease claim was timely filed.

Appellant submitted Ms. Reiner's March 25, 2008 report, which essentially reported the same history regarding the development of her emotional condition as provided in her earlier report dated May 19, 2007. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹³ Ms. Reiner's March 25, 2008 report is repetitive of evidence that was previously of record and

⁸ *Larry E. Young, supra* note 4. See Federal (FECA) Procedure manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

⁹ 5 U.S.C. § 8122(a).

¹⁰ *Id.* at §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.606(b)(1)-(2).

¹² *Id.* at § 10.607(a).

¹³ *James W. Scott*, 55 ECAB 606, 608 n.4 (2004); *Freddie Mosley*, 54 ECAB 255 (2002).

addressed by the Office in its prior decision and, thus, does not constitute relevant and pertinent new evidence not previously considered by the Office.

The award certificate and the employing establishment's December 24, 2001 letter recognized appellant's leadership skills that she displayed during the evacuation of employees from her building on September 11, 2001. Newspaper and magazine excerpts, research studies and internet inquiries addressed health problems arising from exposure to hazardous particles following the September 11, 2001 incident. However, this evidence failed to address whether appellant filed a timely claim for benefits pursuant to section 8122 of the Act. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.¹⁴

Dr. Samson's March 12, 2008 report stated that appellant had been under his care since December 24, 2002 for panuveitis in both eyes secondary to sarcoidosis. He opined that the exacerbation of her condition was caused by the September 11, 2001 incident. This evidence does not address the issue of whether appellant timely filed a claim for an emotional condition. Dr. Samson's report does not constitute a basis for reopening her claim for merit review.¹⁵

In her request for reconsideration, appellant acknowledged that she did not want to file a claim because she believed that her initial post-traumatic stress disorder would resolve within a short time period. As noted in *Gerald A. Preston*,¹⁶ the requirement to file a claim within three years is the claimant's burden. Appellant has not advanced a relevant legal argument sufficient to require further merit review. The Office properly denied her request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's occupational disease claim for an emotional condition on the grounds that it was not timely filed under 5 U.S.C. § 8122. The Board further finds that the Office properly denied her request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁴ *D. Wayne Avila*, 57 ECAB 642 (2006).

¹⁵ *Id.*

¹⁶ 57 ECAB 270 (2005).

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2008 and August 15, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 9, 2009
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