

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

N.L., Appellant)

and)

U.S. POSTAL SERVICE, ERIE DISTRICT,)
New Castle, PA, Employer)

**Docket No. 09-436
Issued: October 6, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On December 1, 2008 appellant filed a timely appeal from an August 11, 2008 decision of the Office of Workers' Compensation Programs and an October 2, 2008 decision of an Office hearing representative denying her claim on the grounds that it was untimely 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 the Office properly denied appellant's claim for compensation on the grounds that it was not timely filed under 5 U.S.C. § 8122. On appeal, appellant contended that she timely filed her occupational disease claim pursuant to the Office's procedures, citing to Chapter 2.810.6 of the Office's procedure manual.¹

¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993).

FACTUAL HISTORY

On March 19, 2008 appellant, then a 48-year-old former automation clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained cervical and left shoulder pain, temporomandibular joint (TMJ) syndrome, right carpal tunnel syndrome, bulging discs at L3-4 and L4-5 and tendinitis of the left shoulder due to her federal employment. She claimed that she was first aware of the condition and its relationship to her federal employment on July 24, 2007. The employing establishment controverted the claim on the grounds that appellant was last exposed to employment factors on January 17, 2003 when she stopped working.

By letter dated May 19, 2008, the Office notified appellant of the deficiencies in her claim and requested that she provide additional information.

A timeline provided by the employing establishment revealed that appellant stopped work on January 17, 2003. At that time, she filed a traumatic injury claim for burning in her neck and shoulders; however, the Office denied the claim. Appellant did not return to work and was officially separated in October 28, 2006 due to excessive absences without leave since 2003.

In a July 14, 2008 statement, appellant alleged that the continuous repetitive movement required by all of her federal employment positions, including bending, lifting, turning side-to-side, pushing, pulling and reaching for mail, caused her conditions. She stated that it was not difficult to come to the realization that her employment was the cause of her conditions because she lived it. Appellant contended that she first noticed her claimed conditions on February 24, 1996 and that the symptoms have been continuous. She acknowledged that she did not return to work after January 17, 2003 after she experienced an increase in pain and sought emergency medical treatment. Appellant contended that she never claimed an injury in 2007. She had two prior accepted claims, one for a February 24, 1996 injury (File No. xxxxxx250) accepted for cervical and shoulder sprain and TMJ and another on April 13, 1999 (File No. xxxxxx520) which was accepted for aggravation of cervical and shoulder sprain.

In a March 13, 2008 medical report, Dr. Robert S. Vandrak, Board-certified in physical medicine and rehabilitation, stated that he treated appellant on several occasions since May 3, 1999 for work-related cumulative trauma disorder after an initial work-related injury to the left shoulder in 1996. Appellant subsequently sustained injuries to the cervical spine and right shoulder and right carpal tunnel syndrome. Dr. Vandrak stated that appellant continued to return to work after her subsequent injuries until January 17, 2003 when her complaints increased significantly. He treated appellant on February 14, 2003 and diagnosed tendinitis, cervical disc herniation, cervical radiculopathy and right carpal tunnel syndrome. Dr. Vandrak opined that appellant's work required repetitive activities which placed her at increased risk for injury and that an injury did occur on January 17, 2003.

By decision dated August 11, 2008, the Office denied appellant's claim on the grounds that it was filed three years after her date of last exposure on January 17, 2003. It further found that there was no evidence that appellant's immediate supervisor had actual knowledge within 30 days of the date of injury and that appellant was or should have been aware of a relationship between her employment and the claimed condition by January 17, 2006.

On September 5, 2008 appellant filed a request for reconsideration. She submitted a letter from her then representative, Edward Daniel, who argued that the time limitation for filing an occupational disease claim does not begin to run until an employee becomes aware or reasonably should be aware of the possible relationship between a claimed condition and the employment. Appellant's claim stated that she was not aware of the connection between her illness and her employment until July 24, 2007.

By decision dated October 2, 2008, the Office denied modification of the August 11, 2008 decision on the grounds that appellant was aware that her condition was caused or aggravated by her federal employment on February 24, 1996 and the evidence did not support that she was unaware of the relationship until July 24, 2007 as alleged. Appellant did not file her claim until over three years after the date of her last exposure on January 17, 2003, thus, her claim was not timely filed.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act², as amended in 1974, a claimant has three years to file a claim for compensation.³ In a case of occupational disease, the Board has held that 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 her condition and her employment. When an employee becomes aware or reasonably should have been aware that she has a condition which has been adversely affected by factors of her federal employment, such awareness is competent to start the limitation period even though she does not know of the nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.⁴ Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of her last exposure to the implicated factors.⁵ 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 her employment and the compensable disability.⁶

ANALYSIS

On March 19, 2008 appellant filed a claim for cervical and left shoulder pain, TMJ, right carpal tunnel syndrome, bulging discs at L3-4 and L4-5 and tendinitis of the left shoulder. The issue is whether appellant's claim was timely filed pursuant to 5 U.S.C. § 8122.⁷

² 5 U.S.C. §§ 8101-8193.

³ See *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dotson*, 47 ECAB 253 (1995). See also 20 C.F.R. § 10.101(b).

⁴ *Larry E. Young*, 52 ECAB 264 (2001); *Duet Brinson*, *supra* note 3.

⁵ See *Larry E. Young*, *supra* note 4; *William D. Goldsberry*, 32 ECAB 536, 540 (1981).

⁶ See 5 U.S.C. § 8122(b); *Bennie L. McDonald*, 49 ECAB 509, 514 (1998).

⁷ See 5 U.S.C. § 8122(a).

The Board finds that appellant knew or should have known that her claimed conditions were caused by her employment more than three years prior to her filing her claim on March 19, 2008. Appellant previously filed traumatic injury claims in 1996 and 1999, which were accepted for cervical and shoulder sprain, TMJ and aggravation of cervical and shoulder sprain. The accepted work injuries relate primarily to the same areas of the body for which she is now claiming an occupational disease, including the shoulder, cervical spine and jaw. These prior work-related injuries should have put appellant on notice that the subsequent injuries to the same areas were probably related to her employment. Further, in the July 24, 2008 statement, appellant contended that she first noticed her claimed conditions on February 24, 1996 and that she easily knew they were related to her federal employment. Moreover, Dr. Vandrak, in the March 13, 2008 report, consistently attributed appellant's condition to her repetitive employment duties beginning in 1996 through her last date of employment in 2003. Thus, the record shows that appellant had knowledge of the claimed conditions and their relationship to her employment as early as 1996. Although appellant indicated on her claim form that she was not aware of the relationship between her claimed conditions and her employment until July 24, 2007, this is not supported by the evidence of record.

Appellant stopped working on January 13, 2003, thus, this is the date of last exposure to her employment factors. She did not file a claim until March 19, 2008, well over three years after she was last exposed to her work duties. Therefore, the Board finds that appellant did not file a timely claim for an occupational disease.⁸

On appeal, appellant cited to the Office's procedure manual, Chapter 2.801.6.⁹ This provision addresses the time period for filing an occupational disease claim as described above. It specifically provides that the three-year time limitation for occupational diseases does not begin to run until an employee is aware or reasonably should be aware of the causal relationship between the employment and the claimed condition. Further, if the employee continues to be exposed to injurious working conditions after such awareness, the time limitation starts to run on the last date of this exposure. As explained above, appellant was last exposed to her work factors over three years prior to the filing of the claim and there is no evidence to support her claim that she was unaware of the relationship between her employment and her claimed conditions prior to July 24, 2007. Thus, the Board finds that appellant's claim is not timely filed in accordance with either the cited provision of the Office procedure manual or section 8122 of the Act (5 U.S.C. § 8122).

CONCLUSION

The Board finds that the Office properly denied appellant's claim for compensation on the grounds that it was not timely filed under 5 U.S.C. § 8122.

⁸ The Board notes that appellant did not claim nor does the evidence support that her supervisor had actual knowledge of her claimed conditions within 30 days. See *William C. Oakley*, 56 ECAB 519 (2005).

⁹ *Supra* note 1.

ORDER

IT IS HEREBY ORDERED THAT the October 2 and August 11, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 6, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board