

subsequently a lump on his left shoulder from reaching to pick up a tray of mail from the back of a mail vehicle. He first realized that his condition was caused or aggravated by his employment on April 3, 1997. Appellant stopped work on October 24, 2007 and did not return. He notified his supervisor of the alleged injury on February 13, 2008 and noted that he did not file a claim within 30 days because he thought his surgery would stop the pain and he did not want to file an “on-the-job injury” claim. The employing establishment controverted the claim and stated that appellant was last exposed to conditions alleged to have caused the claimed illness on October 24, 2007.

After the Office advised appellant of the factual and medical evidence needed to establish his claim, he submitted an April 3, 1997 report from Dr. Ayse Gokaslan, a Board-certified internist, who noted appellant’s complaint of a lump in his left shoulder which he noticed after a shoulder injury sustained a couple of months prior. Dr. Gokaslan diagnosed bursitis versus lipoma in the left shoulder area.

In a March 7, 2008 letter, the employing establishment asserted that appellant’s claim should be treated as a traumatic injury claim since appellant attributed his injury to reaching back to pick up a tray of mail from the back of his work vehicle whereupon he felt a sharp pain in his left shoulder with a lump thereafter appearing on the shoulder. The employing establishment contended that the claim was not timely filed.

In a March 11, 2008 report, Dr. Jeffrey Budoff, a Board-certified orthopedic surgeon, noted that appellant had shoulder pain since 1997 which was occasionally bothered by lifting. He also noted appellant’s history of injury consisted of a repaired massive right rotator cuff tear and surgery on the left shoulder for rotator cuff and anterior stabilization. Dr. Budoff found left rotator cuff tendinopathy following two repairs and indicated that a contributing factor may be appellant’s job involving repetitive lifting and casing.

In an April 18, 2008 decision, the Office denied appellant’s claim for compensation finding that it was not timely filed as appellant was aware of his claimed condition on April 3, 1997 and filed his claim on February 13, 2008. It noted that appellant’s claim attributed his injury to a specific incident, reaching back to pick up a tray of mail from his work vehicle. The Office advised that this made his claim one for a traumatic injury and not an occupational disease.

Appellant requested reconsideration on November 4, 2008 in a statement that also indicated that he wanted to claim wage-loss compensation beginning April 13, 1997 as he did not notify the employing establishment until that time. He further asserted that his employment was the only cause of his shoulder condition.

Appellant submitted a December 14, 2001 operative report from Dr. Budoff who performed an arthroscopic glenohumeral debridement and mini open repair of complete rotator cuff avulsion. Dr. Budoff also diagnosed right massive rotator cuff tear.

In a November 19, 2008 decision, the Office denied appellant’s request for reconsideration without a merit review as he did not meet any of the criteria under section 8128 under the Act.

LEGAL PRECEDENT -- ISSUE 1

Section 8122(a) of the Act¹ states that “[a]n original claim for compensation for disability or death must be filed within three years after the injury or death.” In cases involving a traumatic injury, the time limitation commences to run on the date of the incident even though the employee may not be aware of the seriousness or ultimate consequences of the injury or the nature of the injury is not diagnosed until sometime later.²

The Act provides an exception to the three-year limit for filing a claim, stating that a claim may be regarded timely if an immediate superior had actual knowledge of the injury within 30 days, or if written notice of injury as specified in section 8119 was given 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.³ Office regulations also provide that the Office “may excuse failure to comply with the three-year time requirement because of truly exceptional circumstances.”⁴

ANALYSIS -- ISSUE 1

The Board finds that the Office properly denied appellant’s compensation claim as it was not timely filed within the provisions of the Act.

Appellant alleged that he became aware of his left shoulder condition and its relationship to his employment on April 3, 1997, which was the date he felt left shoulder pain after reaching to pick up a tray of mail from the back of a mail vehicle. Although he filed a claim for an occupational disease, his February 13, 2008 claim form clearly identifies a traumatic incident, reaching to pick up a tray of mail, occurring within one work shift, as causing his claimed condition.⁵ Appellant did not allege that he had any continuing exposure to work factors that caused or aggravated his claimed left shoulder condition. Thus, the Office properly developed the claim as one for a traumatic injury. Appellant filed his claim on February 13, 2008, which was not within the three-year limitation set forth in the Act. As noted, a claim for compensation must be filed within three years after the injury. This is not a case involving latent disability⁶ as appellant sustained a single identifiable incident, reaching and picking up a mail tray, and appellant acknowledged his awareness that the incident occurred.⁷ Accordingly, appellant’s time limitation began to run on April 3, 1997, the date on which he reached to pick up a tray of mail

¹ 5 U.S.C. § 8122(a).

² *Corey W. Davis*, 57 ECAB 674 (2006).

³ 5 U.S.C. § 8122(a)(1); *Virginia D. King (Charles B. King)*, 57 ECAB 143 (2005).

⁴ 20 C.F.R. § 10.100(b)(2).

⁵ 20 C.F.R. § 10.5(ee) defines a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift. 20 C.F.R. § 10.5(q) defines an occupational disease or illness as a condition produced by the work environment over a period longer than a single workday or shift.

⁶ *See* 5 U.S.C. § 8122(b).

⁷ *See Corey W. Davis supra* note 2.

and sustained the claimed left shoulder injury. As more than three years had elapsed since the April 3, 1997 incident and the filing of the claim on February 13, 2008, the claim was not timely filed.

Appellant's claim also does not qualify under either of the exceptions as provided by the Act and its implementing provisions. As noted, the first exception would regard the claim as timely if an immediate superior had actual knowledge of the injury within 30 days. The record does not support that the employing establishment had any knowledge of appellant's injury within 30 days; rather, the record reflects that appellant's supervisor did not receive notice of the claimed condition until February 13, 2008, the date appellant filed his claim. Additionally, appellant asserted that he did not file his claim sooner as he believed surgery would stop the pain and he did not want to file an "on-the-job injury" claim. These assertions do not rise to the level constituting exceptional circumstances.⁸

Consequently, appellant's claim is barred by the applicable time limitation provisions of the Act.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a), the Office's regulations provide that the evidence or argument submitted by 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.⁹ Section 10.608(b) of Office regulations provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁰

ANALYSIS -- ISSUE 2

In his reconsideration request, appellant asserted that the only cause of his shoulder condition was his employment. He further indicated that he wanted to claim wage-loss compensation beginning April 13, 1997 as he did not notify the employing establishment until that time. However, the issue before the Office was whether appellant's claim was timely filed. As neither of his assertions was relevant regarding the issue of whether his claim was timely filed, the Board finds that appellant failed to meet any of the requirements for reopening a case for a merit review under the Office's regulations.

Appellant also submitted an operative report from Dr. Budoff. As this report did not address the pertinent issue of whether his claim was timely filed, the evidence was not relevant

⁸ An "exceptional circumstance" recognized by the Secretary of Labor is where an employee is a prisoner of war. The record does not reflect that appellant was under that type of circumstance. See 20 C.F.R. § 10.100(b)(2); *Paul S. Devlin*, 39 ECAB 715 (1988).

⁹ 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

¹⁰ 20 C.F.R. § 10.608(b); *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

to the particular issue involved and thus did not warrant a reopening of the case for merit review.¹¹ Consequently, the Office properly denied appellant's request for reconsideration without a merit review as he has not shown that the Office erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered by the Office, or constituted relevant and pertinent new evidence not previously considered by the Office.

On appeal, appellant advised that the Office disregard the April 13, 1997 date and use February 13, 2008 as the date beginning the time limitation period. He acknowledges that he waited too long to file his claim. Appellant also indicates that his job as a letter carrier which required repetitive motion is the only cause of his shoulder condition. As noted above, the Board finds that his claim was untimely filed based on the evidence submitted in support of his February 13, 2008 claim.¹²

CONCLUSION

The Board finds that the Office properly denied appellant's compensation claim on the grounds that it was not filed within the applicable time limitation provisions of the Act. The Board further finds that the Office properly denied appellant's request for reconsideration without a merit review.

¹¹ See *E.M.*, 60 ECAB ___ (Docket No. 09-39, issued March 3, 2009) (where the Board held that new evidence submitted upon a reconsideration request that does not address the pertinent issue is not relevant evidence); *Freddie Mosley*, 54 ECAB 255 (2002).

¹² This decision does not preclude appellant from filing a new occupational disease claim should he feel that he has a medical condition produced by the work environment over a period longer than a single workday or shift. As noted in the text of this decision, appellant's February 13, 2008 claim was treated as one for a traumatic injury as it identifies a single incident in 1997 as the cause of his claimed condition.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated November 19 and April 18, 2008 are affirmed.

Issued: September 16, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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