United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 10-1965**
	)	**Issued: May 16, 2011**
DEPARTMENT OF THE AIR FORCE, LOGISTICS READINESS SQUAD, ROBINS AIR FORCE BASE, GA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 21, 2010 appellant filed a timely appeal from March 23 and July 7, 2010 merit decisions of the Office of Workers' Compensation Programs which denied his occupational disease claim. Pursuant to the Federal Employees' Compensation Act[1] and 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 January 8, 2010 appellant, then a 49-year-old equipment specialist, filed an occupational disease claim alleging that he developed bilateral tennis elbow over a 17-year

[1] 5 U.S.C. § 8101 *et seq.*

period as a result of using rivet guns, drill motors and hand tools at work. He listed his date of injury as June 1, 2008, but stated that he did not realize it was caused or aggravated by his employment until December 2, 2009. Appellant's last day of exposure to the alleged factors of employment was on March 1, 2002, at which time he was promoted to a new position. His supervisor indicated that the date of last exposure was March 1, 2002 and that appellant first reported the injury on December 4, 2009.

In a January 15, 2010 letter, the Office requested additional evidence from the employing establishment regarding appellant's claim, including comments from a knowledgeable supervisor regarding the accuracy of appellant's statements and when he informed management that he sustained a job-related condition.

On January 19, 2010 the Office received the employer's response and a description of appellant's position. It agreed with appellant's statements regarding his claim and listed his aircraft mechanic tasks as daily use of hand tools, including wrenches, hammers, and screwdrivers, daily riveting and bucking rivets, and daily drilling out fasteners with a drill motor such as steel and aluminum. Appellant wore leather gloves to minimize the vibrations and constant pounding.

In an e-mail dated December 31, 2009, appellant's supervisor provided additional comments. He stated that appellant informed him that he was suffering from old injuries he sustained while working as an aircraft mechanic and that he was diagnosed by clinic personnel with tennis elbow on March 1, 2009.

By letter dated January 15, 2010, the Office advised appellant that the evidence submitted was insufficient to establish his claim and requested additional information.[2] It specifically asked him to provide a description of his duties as an aircraft mechanic, the date he first noticed his elbow condition, the date he realized his elbow condition resulted from his employment and the date of last exposure. The Office also requested that appellant provide a comprehensive medical report from his treating physician which described his symptoms, results of examinations and tests, a clear diagnosis, and an opinion, with stated medical reasons, on how appellant's work activities caused his condition.

On January 19, 2010 appellant responded by e-mail to the Office's development letter. He described his aircraft mechanic duties as including using a drill motor, rivet gun, and bucking bar and noted that the only precaution was to wear leather gloves. Appellant used these tools daily for several hours from 1986 until 2001. He also provided a history of injury. Appellant's elbow pain began while working at Kelly Air Force Base in 1998. He described the pain as continuous and ranging from moderate to very painful. Appellant explained that the pain worsened when using a lawn blower, raking, driving, bumping the area "or almost anything." His treatments included cortisone shots, physical therapy, electro treatment, and prescription medication but none were effective.

[2] In a letter dated January 21, 2010, corrected copies of the Office's development letter were sent to appellant and the employing establishment with the correct medical condition listed.

In an undated statement, appellant noted that he no longer worked as an aircraft mechanic but had a desk job with mostly computer duties. He listed 2003 as the date of last exposure to his mechanic duties.

In a November 11, 2009 report, Dr. C. Scott Edenfield, Board-certified in internal medicine, noted that he had examined appellant that day and that appellant was new to his practice. Appellant's chief complaint of bilateral elbow pain, first developed about two years ago, and that his condition worsened when participating in any activity, including blowing the lawn or driveway, holding a cup, or any type of labor with his hands. To relieve pain, appellant had used a transcutaneous electrical nerve stimulation (TENS) unit and brace and took a number of nonsteroidal anti-inflammatory drugs. He stated that none provided him with relief. Dr. Edenfield noted that appellant had never seen an orthopedic surgeon for this condition. He noted that appellant worked as a sheet metal mechanic and frequently used various hand tools, such as a riveter and drill. Dr. Edenfield also observed that appellant had degenerative joint disease and a problem with his lumbosacral spine for the past 18 years. Upon physical examination, he observed that appellant was tender over both lateral epicondyles with a little bit of swelling. Dr. Edenfield diagnosed appellant with bilateral lateral epicondylitis.

In a December 2, 2009 health record, Dr. Marvin E. Taylor, Board-certified in occupational medicine, stated that appellant was in his clinic for a follow-up injury. He noted that appellant worked as an equipment specialist doing sheet metal work from 1986 to 2002 and currently worked as a lead equipment specialist. Appellant first noticed pain when he was a mechanic working at Kelly Air Force Base, but did not report it. Dr. Taylor also reviewed appellant's medical history and noted that appellant was receiving medical treatment from various doctors over the years who diagnosed tennis elbow. His treatments include cortisone shots, anti-inflammatory crème and prescription medication. Dr. Taylor released appellant to return to work immediately. In another December 2, 2009 medical note, a registered nurse stated that she saw appellant that day.

In a December 17, 2009 letter, Dr. George Arimah, a Board-certified family practitioner, confirmed that appellant was his patient and stated that he might have chronic and progressive bilateral epicondylitis as a result of his occupation.

In a January 8, 2010 note, a physical therapist stated that she was treating appellant for bilateral lateral epicondylitis. She noted that he had tenderness over lateral epicondyle bilaterally with pain with resisted wrist extension. The physical therapist further reported that due to appellant's poor response to physical therapy she recommended appellant see an orthopedist.

Appellant provided a February 9, 2010 memorandum written by his supervisor to the employing establishment. His supervisor stated that appellant informed him of old injuries he sustained when he worked as an aircraft mechanic for 17 years. Appellant also stated that a doctor at a local clinic diagnosed tennis elbow and informed him to fill out a claim form. He reported that the date of his most recent medical care was March 1, 2009 with Dr. Marvin Taylor at Robins Air Force Base and that he also had an appointment on December 2, 2009 with a registered nurse.

In a decision dated March 23, 2010, the Office denied appellant's claim on the grounds that it was not timely filed. It found that the date of injury was March 1, 2002 and that he should have been aware of the relationship between his employment and his condition by March 1, 2005.

On June 2, 2010 the Office received appellant's request for reconsideration. Appellant explained that he did not file a claim within three years because he was unaware of the three-year time limitation for filing a claim and further described his medical condition. He developed chronic pain when he worked as an aircraft mechanic but decided to seek other job opportunities instead of seeking medical attention for his condition. Appellant reported that the pain in his arms had progressively worsened and affected his daily activities. He provided additional medical evidence from Dr. Todd E. Kinnebrew, a Board-certified orthopedic surgeon, and resubmitted the January 8, 2010 physical therapy note and December 17, 2009 Dr. Arimah note.

In a May 4, 2010 note, Dr. Kinnebrew reported that appellant was seen for an initial evaluation regarding pain over the lateral elbow. Appellant described the pain as moderate to severe dull aching occurring in a persistent pattern for several years. Dr. Kinnebrew also reviewed appellant's medical background, noting his previous medical evaluations and physical therapy treatments. He confirmed that appellant had chronic lateral epicondylitis that had not responded to conservative treatment.

In a May 10, 2010 medical note, Dr. Kinnebrew stated that he evaluated appellant on May 4, 2010 for chronic lateral epicondylitis. As appellant had not responded to conservative treatment he was scheduled for surgery. Dr. Kinnebrew opined that it was certainly plausible that appellant's condition was a result of repetitive stress and use while employed as a sheet metal worker. He explained that the work history appellant described could certainly have led to this chronic injury.

In a letter dated June 16, 2010, the Office informed the employing establishment that appellant filed a request for reconsideration and asked the employing establishment to comment on the evidence newly submitted. It did not receive a response.

By decision dated July 7, 2010, the Office denied modification of its March 23, 2010 decision finding that the evidence submitted did not establish that her claim was timely filed pursuant to 5 U.S.C. § 8122.

LEGAL PRECEDENT

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

[3] 5 U.S.C. § 8122(a).

[4] *Id.*

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] 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.[6]

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 alleged employment-related injury within 30 days. The knowledge must be such as to put the immediate supervisor reasonably on notice of appellant's injury.[7] An employee must show not only that her immediate supervisor knew that she was injured, but also knew or reasonably should have known that it was an on-the-job injury.[8]

ANALYSIS

Appellant alleged that he developed bilateral tennis elbow as a result of his employment as an equipment specialist. By decisions dated March 23 and July 7, 2010, the Office denied appellant's occupational disease claim on the grounds that it was not timely filed within three years of March 1, 2002, the date of last exposure. The Board finds that appellant timely filed a claim for compensation.

The Office found that appellant should have filed his claim within three years of the date of last exposure; therefore, his claim should have been filed by March 1, 2005. As stated however, 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. Appellant noted on his claim form, that he first became aware of his condition on June 1, 2008 and first realized that his elbow condition was a result of his employment on December 2, 2009.

Regarding whether appellant should have reasonably been aware of a possible relationship between his condition and his employment within three years of March 1, 2002, the record lacks evidence establishing that appellant should have reasonably known prior to December 2, 2009 that his bilateral tennis elbow was a result of his employment. The evidence of record reflects that appellant experienced elbow pain while he worked as an aircraft mechanic from 1986 until 2002 and received medical treatment for this pain. While the employing establishment stated that appellant had spoken of an old injury he sustained while working as an aircraft carrier, the record does not contain any medical evidence dated before the December 2,

[5] *See Larry E. Young*, 52 ECAB 264 (2001); *Duet Brinson*, 52 ECAB 168 (2000).

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

[7] 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).

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

2009 report demonstrating that appellant should have realized this elbow condition was a result of his employment.[9] A supervisor's statement indicates that appellant was diagnosed with tennis elbow on March 1, 2009, but this report is not of record and there is no indication that the cause of the diagnosis was discussed. Although appellant may have been generally aware of his bilateral tennis elbow, this knowledge, along with the lack of contemporaneous evidence indicating his elbow condition was caused or aggravated from his employment, is insufficient to establish that he should have known prior to December 2, 2009 that he had an employment-related elbow condition.[10] There are no medical reports or other evidence prior to Dr. Taylor's December 2, 2009 reports which suggest that appellant's elbow condition was a result of his employment.

The record establishes that appellant first became aware that his elbow condition resulted from his employment activities on December 2, 2009 and no other evidence demonstrates that he should have been aware of a causal relationship prior to that date. Appellant's claim filed on January 8, 2010 was timely. The case will be remanded for the Office to address the merits of the claim.

CONCLUSION

The Board finds that appellant's claim filed on January 8, 2010 is timely.

[9] The only medical evidence of record dated before December 2, 2009 is Dr. Edenfield's November 11, 2009 report. Although Dr. Edenfield diagnosed appellant with bilateral lateral epicondylitis, he did not give an opinion as to the cause of this condition.

[10] *See William C. Oakley*, 56 ECAB 519 (2005) (the Board found that the lack of audiogram evidence indicating that appellant suffered from a noise-induced hearing loss was insufficient to establish that appellant should have known earlier than August 26, 2003 that his hearing loss was a result of his employment); *see also L.C.*, 57 ECAB 740 (2006) (the Board found that a diagnosis of an ear infection does not establish that appellant should have been aware of the causal relationship between his federal employment and hearing loss before the date indicated on the claim form).

ORDER

IT IS HEREBY ORDERED THAT the March 23 and July 7, 2010 decisions of the Office of Workers' Compensation Programs are set aside and remanded for further action consistent with this decision.

Issued: May 16, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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