

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

A.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dearborn, MI, Employer**

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**Docket No. 10-2166
Issued: May 17, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 24, 2010 appellant filed a timely appeal from a July 13, 2010 decision of the Office of Workers' Compensation Programs that denied her claim as untimely. Pursuant to the Federal Employees' Compensation Act¹ 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 appellant filed a timely claim for compensation under the Act.

On appeal her attorney asserts the July 13, 2010 decision is contrary to fact and law.

FACTUAL HISTORY

On October 10, 2009 appellant, then a 35-year-old former part-time flexible city carrier, filed an occupational disease claim alleging that her federal duties caused employment-related plantar fasciitis of the left foot and bilateral heel spurs and knee pain. She first became aware of

¹ 5 U.S.C. §§ 8101-8193.

the condition and its relationship to her federal employment on October 24, 2006 and was not informed of the proper procedure for filing a claim. In an undated statement, appellant described her job duties and noted that while delivering mail she would have pain in her feet and knees, that her knees would buckle, and that on multiple occasions the pain was so bad she had to stop and rest while delivering mail. After work, the pain was so bad she would have to pull over and stop before continuing home. In October 2006, appellant went to the emergency room for treatment, was referred to an orthopedic surgeon and to a podiatrist. She had surgery on the left foot but her foot and knee pain persisted when standing or walking for five minutes. Appellant maintained that she had never felt pain on walking, standing or sitting until she began her employment as a mail carrier. The employing establishment noted that she was removed effective December 31, 2006 for being absent without leave since October 4, 2006.

In an October 14, 2009 report, Dr. Tara Long Scott, a podiatrist, advised that she initially treated appellant on October 24, 2006 for foot pain associated with plantar fasciitis. She reported that appellant stated that she had pain on the first step in the morning, when standing after sitting for extended periods of time, after excessive activity and at the end of the workday. Dr. Scott opined that appellant's job responsibilities at the employing establishment could trigger plantar fasciitis and noted that appellant had surgery to relieve her symptoms.

In letters dated November 1, 2009, the Office informed appellant of the evidence needed to support her claim and asked that the employing establishment respond. Appellant provided treatment reports from Dr. Scott dated October 24 to December 12, 2006 in which she noted appellant's complaint of bilateral foot pain and diagnosed plantar fasciitis on the left and heel spur. On October 31, 2006 Dr. Scott advised that appellant had sprained her ankle in a nonwork-related fall. On December 15, 2006 she performed endoscopic gastrocnemius resection and plantar fasciotomy on the left. In reports dated December 18, 2006 to February 12, 2007, Dr. Scott reported on appellant's postoperative care and her complaint of continued heel pain.

On December 31, 2009 Tonya Garner, appellant's supervisor, noted that appellant was hired in March 2005, spent part of 2006 on maternity leave and had continual attendance issues. She stated that appellant failed to call or show up for work from October 4, 2006 until she was removed on November 25, 2006. A notification of personnel action effective December 29, 2006 advised that appellant's last day in pay status was October 8, 2006 and that she was removed for being absent without leave.

By decision dated February 1, 2010, the Office denied the claim finding that it was not timely filed.

On February 11, 2010 appellant, through her attorney, requested a hearing that was held on May 10, 2010. At the hearing, appellant testified that she began work at the employing establishment in March 2005 and described her job duties. She stated that her foot pain began immediately and she had no prior foot problems. Appellant related that Dr. Scott advised her in October 2006 that she needed foot surgery and maintained that she did not know what type of claim to file until instructed by her attorney.

In a July 13, 2010 decision, an Office hearing representative affirmed the February 1, 2010 decision.

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.² In cases of injury on or after September 7, 1974, section 8122(a) of the Act provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless:

“(1) the immediate superior had actual knowledge of the injury or death 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; or

“(2) written notice of injury or death as specified in section 8119 was given within 30 days.”³

Section 8119 of the Act provides that a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury, or in the case of death, the employment factors believed to be the cause; and be signed by and contain the address of the individual giving the notice.⁴ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.⁵ For actual knowledge of a supervisor to be regarded as timely filing, an employee must show not only that the immediate superior knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.⁶

Section 8122(b) provides that the time for filing in latent disability cases 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,⁷ and the Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.⁸ 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

² *Charles Walker*, 55 ECAB 238 (2004); see *Charles W. Bishop*, 6 ECAB 571 (1954).

³ 5 U.S.C. § 8122(a).

⁴ *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

⁵ *Laura L. Harrison*, 52 ECAB 515 (2001).

⁶ *Delmont L. Thompson*, 51 ECAB 155 (1999).

⁷ 5 U.S.C. § 8119(b).

⁸ *Richard Narvaez*, 55 ECAB 661 (2004).

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.⁹

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.¹⁰ The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.¹¹

ANALYSIS

The Board finds that appellant's claim is barred by the applicable time limitation provisions of the Act.

Appellant filed the instant claim on October 10, 2009. She noted on her claim form that she became aware of the condition and its relationship to her federal employment on October 24, 2006. Her exposure to employment factors ceased on October 4, 2006, the date she last worked. Thus, the time to file a claim began to run on October 4, 2006. Appellant did not file her claim until October 10, 2009, beyond the three-year time limitation period provided in section 8122(a) of the Act.¹² Appellant's claim would still be considered timely if her immediate supervisor had actual knowledge of her injury within 30 days of her last exposure or if she provided written notice.¹³ The record does not reflect that appellant provided written notice of injury prior to filing the instant claim.

In a case of latent disability, 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 or her condition and employment. The Board has held that, 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 employment, such awareness is competent to start the running of the time limitations period even though he does not know the precise nature of the impairment or whether the ultimate result of such adverse effect would be temporary or permanent.¹⁴ In this case, in her initial statement, appellant maintained that she had never felt pain on walking, standing or sitting until she began her postal duties, and she reiterated this at the May 10, 2010 hearing testimony, where she also testified that foot pain began immediately when she began work at the employing establishment in March 2005. While she stated on her claim form that she first became aware of the claimed condition and its relationship to her federal employment on October 24, 2006, the Board finds that her statement and hearing testimony are more

⁹ *Larry E. Young*, *supra* note 4.

¹⁰ *Id.*

¹¹ *Debra Young Bruce*, 52 ECAB 315 (2001).

¹² 5 U.S.C. § 8122(a).

¹³ *Id.* at § 8122(a)(1); *see Ralph L. Dill*, 57 ECAB 248 (2005).

¹⁴ *Richard Narvaez*, *supra* note 8.

probative as to the date she first became aware of her condition and its relationship to her federal employment and was competent to start the running of the time limitations period.

A claimant seeking compensation under the Act has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including that he or she is an “employee” within the meaning of the Act and that the claim was filed within the applicable time limitation.¹⁵

Accordingly, appellant’s claim, which is outside the three-year time limitation period, is untimely.¹⁶

CONCLUSION

The Board finds that appellant’s claim is barred by the applicable time limitation provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2010 decision of the Office of Workers’ Compensation Programs be affirmed.

Issued: May 17, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees’ Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees’ Compensation Appeals Board

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

¹⁵ *J.P.*, 59 ECAB 178 (2007).

¹⁶ *See Richard Narvaez, supra* note 8.