

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

K.M., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
U.S. SECRET SERVICE, Washington, DC,
Employer**

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**Docket No. 12-762
Issued: January 14, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On February 15, 2012 appellant filed a timely appeal from a September 22, 2011 decision of the Office of Workers' Compensation Programs (OWCP) which denied her claim as untimely filed. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 FECA.

FACTUAL HISTORY

On February 1, 2011 appellant, then a 40-year-old law enforcement officer, filed an occupational disease claim alleging that she sustained a fifth metatarsal fracture, right knee, joint and back pain and other right lower leg complications as a result of the repeated stress and strain of her work environment over an extended period of time. She noted a prior history of right knee

¹ 5 U.S.C. § 8101 *et seq.*

arthroscopic surgery and open surgery of the quadriceps tendon. Appellant listed that she was injured and realized her knee condition worsened December 31, 2004. She explained that she did not file a claim within 30 days because she did not realize her condition was related to her duties as a law enforcement officer. Appellant noted the date of last exposure was when she stopped work on October 16, 2009.

Appellant was treated by Dr. David C. Johnson, a Board-certified orthopedic surgeon, who diagnosed right knee pain, chondromalacia, mild quadriceps tendonosis, possible postsurgical synovitis adhesions, right ankle pain and peroneal tendinitis/occasional subluxation. Dr. Johnson recommended gait analysis with possible orthotics or shoe change and low impact strengthening of the right lower extremity with modalities to improve symptoms and attained goals for more aggressive exercise programs. In an April 22, 2009 work restriction form, he authorized appellant to return to work with restrictions.

The April 28, 2009 emergency room records from Inova Alexandria Hospital stated that appellant was examined for right foot and ankle pain. The date of injury was listed as September 2001 and the most recent severe pain was in March 2009, described the pain as burning and tingling. Appellant stated that the pain was severe for several weeks and worsened with wearing shoes, standing and walking. She also noted that she exercised four or more times a week.

In a May 7, 2009 medical form, Dr. R. Miller, a Board-certified internist, stated that appellant was not medically qualified to perform the essential functions of her job. She sustained a stress fracture to her right foot and was in a walking cast until May 19, 2009. Dr. Miller restricted appellant to sedentary desk duty only.

From May 4 to September 29, 2009, appellant was also treated by Dr. Matthew Buchanan, a Board-certified orthopedic surgeon, who listed a history of right foot pain, a third interdigital neuroma and peroneal pseudosubluxation. Dr. Buchanan authorized her to return to limited duty on May 4, 2009 and recommended physical therapy. On May 19, 2009 he related that on May 3, 2009 appellant sustained a right foot stress fracture to her fifth metatarsal as a result of running. Appellant submitted physical therapy reports from September 2009 to March 2010 physical therapy records and diagnostic reports.²

In a September 9, 2009 report, Dr. Kari Kindschi, a Board-certified family practitioner, stated that appellant had a history of chronic knee pain since a January 1998 volleyball injury. Appellant underwent a right knee arthroscopy in October 1998. Dr. Kindschi related that she had some peaks and valleys in her symptoms with several setbacks, including joint pain and two stress fractures of the right fifth metatarsal. Appellant noted that her knee pain had worsened over the prior four months and that her knee had to “pop” to get into place in the mornings.

² In an August 14, 2009 magnetic resonance imaging (MRI) scan report, Dr. Djamil Fertikh, a Board-certified diagnostic radiologist, noted appellant’s history of knee pain. He observed signal change involving the patellar attachment of the quadriceps tendon consistent with tendinopathy. Bony structures, medial and lateral menisci, anterior and posterior cruciate ligaments and medial and lateral collateral ligaments were normal. Dr. Fertikh diagnosed stable findings manifested by abnormal signal involving the patellar attachment of the quadriceps tendon consistent with partial tear and/or tendinopathy, overall stable. In a September 14, 2009 bone scan report, Dr. Monjari Gillian, a Board-certified diagnostic radiologist, noted appellant’s complaints of pain. He did not observe any abnormal perfusion and blood pool images were unremarkable.

Upon examination, Dr. Kindschi observed tenderness to palpation under the medial insertion of the quadriceps tendon of the patella. He diagnosed right knee pain with quadriceps atrophy and tenderness on palpation.

In an October 5, 2009 report, Dr. James A. Nunley, a Board-certified orthopedic surgeon, stated that appellant was referred to him for pain along the lateral border of her right foot. He related that she had several prior knee problems and began to experience pain along the right fifth metatarsal in 2001 with a reinjury in March 2009. Upon examination of her right foot, Dr. Nunley observed normal right ankle motion with no effusion or crepitus. Appellant was able to tiptoe walk, heel walk and perform single heel rise. Her fifth metatarsal base was tender. Dr. Nunley concluded that appellant had slight varus to the heel and weakness in the peroneals which threw her on the lateral side of the foot and gave her pain in the fifth metatarsal along with some peroneal tendinitis.

From October 2009 to June 2010, appellant was treated by Dr. William Garrett, Board-certified in orthopedic sports medicine. On October 20, 2009 Dr. Garrett performed a right knee arthroscopy with chondroplasty of the medial femoral condyle and debridement of the quadriceps tendon. It listed a history that, in January 1998, appellant sustained a right knee quadriceps tendon tear and underwent right quadriceps debridement after a fall.

Appellant was also treated by Dr. Paul J. Tawney, Board-certified in physical medicine and rehabilitation, who diagnosed lower leg pain, abnormality of gait and instability of the sacrum. Dr. Tawney recommended she undergo physical therapy two times a week for six weeks. On August 18 and September 21, 2010 he reported that in January 1998 appellant sustained a knee injury and underwent knee arthroscopy as a result of playing volleyball.

On March 16, 2011 OWCP advised appellant that the evidence submitted was insufficient to establish that she provided timely notification of her work injury. It requested further evidence regarding the timeliness of her claim. OWCP further requested additional evidence including a description of the employment activities she believed caused or contributed to her alleged conditions and medical evidence addressing how the work activities caused her alleged conditions.

In an April 6, 2011 letter, the employing establishment controverted appellant's claim. It noted that her orthopedic condition was sustained prior to her employment in 2004. The employing establishment stated that the medical reports attributed appellant's right knee condition to playing volleyball, running or from a fall which occurred before her employment on December 6, 2004. It contended that she was not injured on December 31, 2004 because she was only 18 days into her training and her tasks would not have required lifting, pushing, pulling, bending or stooping. The employing establishment provided appellant with several limited-duty positions to accommodate her medical restrictions until she stopped working on October 16, 2009. It submitted a description of her duties as a police officer, which is largely illegible.

In an October 5, 2009 report, Dr. Robert A. Magnussen, a Board-certified orthopedic surgeon, noted appellant's history of right knee problems dating back 11 years. Appellant had a chondral injury to her distal femur and underwent a debridement, but continued to experience pain. Upon examination, Dr. Magnussen observed tenderness along the proximal aspect of her

patella and at the insertion of the quadriceps tendon primarily on the medial aspect. He reviewed the MRI scan and found no abnormalities.

In a May 15, 2011 decision, OWCP denied appellant's claim finding that it was not timely filed within the three-year time limitation period.

On May 30, 2011 appellant requested a review of the written record. She contended that her right leg conditions were the result of repeated stress and strain in her employment from December 31, 2004 to February 1, 2011. Appellant related the injuries she originally sustained were a result of playing volleyball, running and falling down before her employment as a federal law enforcement officer; but in 2003 and 2004 she was medically cleared for work with regards to her preexisting injuries. Upon completion of her required training on December 31, 2004, she began to experience right knee discomfort, which she treated with rest, ice, compression and elevation. From December 2004 to May 2007 appellant noticed that her right knee condition worsened until she sought care from Dr. Johnson in May 2007. She noted that she did not participate in any extracurricular sports or physical hobbies but stayed fit in order to maintain the physical fitness requirements of her job. Appellant stated that she worked long hours and carried law enforcement gear weighing approximately 40 pounds. She first realized that her injuries were caused or aggravated by her employment on February 1, 2011, the date she filed her claim.

Appellant provided a chart of her medical history. In January 1998, she sustained a right knee injury while playing volleyball and underwent arthroscopic debridement in October 1998. In August 2000, appellant underwent physical therapy treatments. In November 2001, she was treated for right foot and knee pain and continued to receive treatment until August 2007. In February 2009, appellant was treated for right knee and foot pain and in April 2009 she was diagnosed with right foot metatarsal stress fracture. In October 2009, she underwent right knee arthroscopy with chondroplasty of the medial femoral condyle and microfracture of the lateral femoral condyle. Appellant underwent physical therapy until June 2010.

In an August 16, 2011 letter, the employing establishment reiterated that appellant's claim was untimely and resulted from injuries sustained prior to her federal employment.

It contested appellant's statement that she first realized that her injuries were caused or aggravated by her employment on February 1, 2011, the date she filed her claim as the medical record showed treatment by an orthopedic specialist in May 2007. At the earliest, she was on notice of her injury by that date, but she still did not file a claim within three years. The employing establishment related that the December 31, 2004 date of injury reported on the claim form was only 18 days after her training began. From 2005 to 2007, appellant was "unassigned" to a permanent position but received specialized training in areas such as the control center, station clerk, assignments and scheduling office and the West Wing and Mansions of the White House. These positions were primarily sedentary or a seated post. In September 2007, she was selected for a permanent, one-year assignment in the control center, which was also a sedentary position.

On August 25, 2011 appellant responded that the date she first became aware of her condition should be June 31, 2005. She explained that, when she filed her claim, she was asked when she first felt discomfort in her knee and she listed December 31, 2004. June 31, 2005 was the first time appellant had knee pain at work. She was not aware that her condition was related

to her work environment until February 1, 2011. Appellant stated that, during training and while at work from 8 to 12 hours a day, she wore 30 to 35 pounds of gear and equipment.

By decision dated September 22, 2011, OWCP's hearing representative affirmed the May 15, 2011 decision.

LEGAL PRECEDENT

Under FECA, as amended in 1974, a claimant has three years to file a claim for compensation.³ In occupational disease claims, 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 the condition and his or her employment.⁴ 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 or her 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

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 his or her employment and the compensable disability.⁶ Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of last exposure to the implicated factors.⁷ The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.⁸

Compensation for disability or death may still be allowed even if a claim is not filed within the three-year time frame if appellant can show that: (1) her immediate supervisor had actual knowledge of his or her alleged employment-related injury within 30 days such that the immediate supervisor was put reasonably on notice of an on-the-job injury; or (2) death or written notice of injury or death as specified in section 8119 was given within 30 days.⁹ Section 8119 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

³ *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); *see also* C.F.R. § 10.101(b).

⁴ *See William C. Oakley*, 56 ECAB 519 (2005).

⁵ *Larry E. Young*, 52 ECAB 264 (2001).

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

⁷ *Id.*; *see also William D. Goldsberry*, 32 ECAB 536, 540 (1981).

⁸ *Debra Young Bruce*, 52 ECAB 315 (2001).

⁹ 5 U.S.C. § 8122(a).

employment factors believed to be the cause and be signed by and contain the address of the individual giving the notice.¹⁰ The Board has held that actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.¹¹ 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.¹²

ANALYSIS

On February 1, 2011 appellant filed an occupational disease claim alleging that she sustained chronic back pain, right knee, quadriceps tendon and right leg complications as a result of repeated stress and strain at work. She listed that she was aware of her condition and realized it resulted from her employment on December 31, 2004. The claim form indicates that appellant was last exposed to her work duties on October 16, 2009 when she stopped work. The time for filing an occupational disease 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. Where the employee continues in such employment after she reasonably should have been aware that she has a condition adversely affected by factors of her federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.¹³ In this case, appellant continued to work following December 31, 2004 and the record establishes the date of last exposure to work factors as October 16, 2009.

Appellant attributed her condition to her work as a police officer. She explained that she worked long hours and carried law enforcement equipment weighing from 30 to 40 pounds. Appellant performed her duties as a law enforcement officer for the period December 2004 to October 2009, a period of approximately five years. During this period, she received medical treatment for her right leg and feet. Because appellant continued in her employment after she reasonably should have been aware that her condition was adversely affected by factors of her federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.¹⁴ She stopped work on October 16, 2009 and was on leave without pay after October 27, 2009. As an occupational disease claim, the Board accepts October 16, 2009, the date that appellant stopped work, as the date of last exposure to the implicated factors of federal employment.

Appellant's employer contended that the claim was untimely based largely on arguments that pertain to claims of traumatic injury rather than occupational disease. Further, it noted that her right leg conditions preexists her federal employment and she performed largely sedentary duty. The question of any contribution by appellant's federal work duties to her preexisting right leg conditions is a medical issue, unrelated to the principles for determining whether her

¹⁰ *Id.* at § 8119.

¹¹ *Laura L. Harrison*, 52 ECAB 515 (2001).

¹² *Delmont L. Thompson*, 51 ECAB 155 (1999).

¹³ *Supra* note 7.

¹⁴ 5 U.S.C. § 8119(b); *Delmont L. Thompson*, *supra* note 12.

occupational claim was timely filed. The medical evidence of record reveals treatment in 2007 and a diagnoses of a right foot metatarsal fracture in April or May 2009. Because the claim was denied as untimely, OWCP did not address the medical evidence of record.

Because the time limitation began to run on October 16, 2009, the Board finds that appellant timely filed a February 1, 2011 occupational disease claim within the three-year time limitation. It is not barred by the time limitations under FECA. The Board will remand the case to OWCP for review of the medical evidence and consideration of whether appellant sustained an injury in the performance of duty. Following this and such further necessary development, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant's occupational disease claim was timely filed.

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision.

Issued: January 16, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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