



## **FACTUAL HISTORY**

This case has previously been before the Board with respect to the rescission of appellant's recurrence of disability claim. In an order dated December 23, 2009,<sup>2</sup> the Board set aside OWCP's January 27, 2009 decision which denied appellant's claims for wage-loss compensation for recurrent disability causally related to her February 10, 2000 employment-related lumbosacral sprain/strain, left leg sprain and aggravation of lumbar degenerative disc disease and degenerative spondylolisthesis at L5-S1 and left hip osteoarthritis. The Board found that the proper issue was whether OWCP met its burden of proof to rescind the acceptance of appellant's claim for a recurrence of disability on October 31 and November 15, 2002. The Board remanded the case for it to properly adjudicate this issue. In a September 21, 2011 decision,<sup>3</sup> the Board affirmed OWCP's March 4 and July 28, 2010 decisions, finding that OWCP properly rescinded the acceptance of appellant's claim for a recurrence of disability on October 31 and November 15, 2002. The relevant facts are set forth below.

On February 13, 2012 appellant, then a 61-year-old meat inspector, filed a traumatic injury claim (Form CA-1) alleging that on October 31, 2002 she sustained a work-related injury. In an accompanying undated narrative statement, she described the claimed injury. Appellant returned to work that same day with restrictions due to back pain following her prior work-related back, hip and knee injuries. She noted that on October 31, 2002 instead of a normal workday, she had been required to climb a flight of stairs to attend a meeting. Appellant had difficulty climbing the stairs and experienced extreme lower back pain and pain in her legs. It took two weeks before she could get an appointment with her physician. Appellant stated that she reported the problem to her supervisor. She followed her supervisor's instructions regarding completion of necessary paperwork. In an April 23, 2012 letter, appellant's attorney advised the employing establishment that appellant had provided it with a Form CA-1 in February 2012 for an October 31, 2002 injury as instructed by OWCP following OWCP's and the Board's decisions.

On the claim form, a case management specialist at the employing establishment reflected receipt of notice of the injury on May 2, 2012. She related that no claim form was received in February 2012 as stated by appellant's attorney.

By letter dated June 1, 2012, OWCP advised appellant that the evidence submitted was insufficient to establish her claim and requested factual and medical evidence. Appellant was afforded 30 days to submit the requested evidence. Also, OWCP requested that the employing establishment submit any medical evidence regarding treatment she received at its medical facility.

In a July 6, 2012 decision, OWCP denied appellant's claim finding that she failed to submit any evidence to establish that the October 31, 2002 incident occurred as alleged.

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<sup>2</sup> *Order Remanding Case*, Docket No. 09-922 (issued December 23, 2009).

<sup>3</sup> Docket No. 10-2188 (issued September 21, 2011).

By letter dated July 10, 2012, appellant, through her attorney, requested a telephone hearing with an OWCP hearing representative and submitted medical evidence, including reports dated December 31, 2003 to January 18, 2006 from Dr. Mark L. Cecil, a Board-certified orthopedic surgeon, who advised that appellant sustained employment-related back injuries.

In a December 4, 2012 decision, an OWCP hearing representative affirmed the July 6, 2012 decision. She found that the medical evidence failed to establish that appellant sustained a traumatic injury on October 31, 2002 while in the performance of duty. The hearing representative found that none of the reports submitted mentioned the October 31, 2002 incident or explained how a new traumatic injury occurred on that date.

On May 29, 2013 appellant's attorney requested reconsideration. He cited Board cases to support his contention that appellant sustained a traumatic injury and disability due to an aggravation of a preexisting condition on October 31, 2002 while in the performance of duty.

In a March 6, 2013 report, Dr. Alexander Michael, III, a Board-certified orthopedic surgeon, advised that appellant did not sustain a new injury on October 31, 2002. Appellant experienced an exacerbation of her 2000 employment-related lumbar back injury.

In a July 22, 2013 decision, OWCP denied appellant's request for reconsideration without a merit review as it neither raised substantive legal questions nor included new and relevant evidence.

### **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.<sup>4</sup> The Board may raise the issue on appeal even if OWCP did not base its decision on the time limitation provisions of FECA.<sup>5</sup>

In cases of injury on or after September 7, 1974, section 8122(a) of FECA 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.”<sup>6</sup>

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<sup>4</sup> *Charles Walker*, 55 ECAB 238 (2004); see *Charles W. Bishop*, 6 ECAB 571 (1954).

<sup>5</sup> *Id.*

<sup>6</sup> 5 U.S.C. § 8122(a).

Section 8119 of FECA 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.<sup>7</sup> Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.<sup>8</sup> For actual knowledge of a supervisor to be regarded as timely filed, 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.<sup>9</sup>

When a traumatic injury definite in time, place and circumstances is involved, the time for giving notice of injury and filing for compensation begins to run at the time of the incident, even though the employee may not have been aware of the seriousness or ultimate consequences of his injury.<sup>10</sup> 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.<sup>11</sup>

### ANALYSIS

On February 13, 2012 appellant filed a traumatic injury claim alleging that on October 31, 2002 she sustained a back injury as a result of climbing stairs to attend a meeting at work. The Board finds that her claim was filed in an untimely manner.

The time for appellant giving notice of injury and filing for compensation began to run at the time of the claimed incident on October 31, 2002.<sup>12</sup> She did not file her claim for a work injury until February 13, 2012. Therefore, appellant's claim for this injury was not filed within the requisite three-year period limitation.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA if her immediate superior had actual knowledge of the injury within 30 days or under section 8122(a)(2) if written notice of injury was given to her immediate superior within 30 days of the claimed injury as specified in section 8119. She has not satisfied either of these provisions. Appellant stated that, following the claimed injury it took her two weeks to get an appointment with her physician. She alleged that at this time she reported the problem to her supervisor, but failed to submit any evidence to corroborate this notice. Further, the employing establishment

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<sup>7</sup> *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

<sup>8</sup> *Laura L. Harrison*, 52 ECAB 515 (2001).

<sup>9</sup> *Laura L. Harrison*, 52 ECAB 515 (2001).

<sup>10</sup> *Emma L. Brooks*, 37 ECAB 407, 411 (1986).

<sup>11</sup> *Delmont L. Thompson*, 51 ECAB 155 (1999).

<sup>12</sup> *See supra* note 10 and 11.

stated that it did not receive notice of the claimed injury until May 2, 2012. Even if it had received notice of the claim in February 2012 as alleged by appellant, this would not have constituted timely notice under section 8122(a)(1). Appellant did not allege nor does the record establish that her supervisor had knowledge within 30 days. Further that she provided written notice of her injury to the employing establishment within 30 days. For these reasons, the Board finds that she has not submitted sufficient evidence to satisfy the strictures of section 8122 and, thus, her claim for an October 31, 2002 injury was not timely filed.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 22, 2013 decision of the Office of Workers' Compensation Programs is affirmed, as modified.<sup>13</sup>

Issued: January 28, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>13</sup> The Board's decision in this case renders the reconsideration issue moot.