

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

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G.V., Appellant )

and )

DEPARTMENT OF THE TREASURY, OFFICE )  
OF THE COMPTROLLER OF THE )  
CURRENCY, Washington, DC, Employer )

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**Docket No. 14-876  
Issued: May 27, 2014**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On March 7, 2014 appellant filed a timely appeal from an October 29, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim as untimely filed and a February 20, 2014 nonmerit decision denying his request for reconsideration. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant's occupational disease claim is barred by the applicable time limitation provisions of FECA; and (2) whether OWCP properly denied his request for further merit review under 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On July 29, 2013 appellant, then a 65-year-old retired organizational effectiveness supervisor, filed an occupational disease claim (Form CA-2) alleging that he developed a back injury due to his federal employment duties. He stated that he first became aware of his condition and of its relationship to his employment on April 1, 1997. Appellant noted that in April 1997, he became aware of increasing back pain due to the frequent travel required by his employment. He further stated that he was retired by the army due to a back injury and worked for the next 25 years for the Department of the Treasury without incident until December 1997 when he was no longer able to work and was placed on medical leave. On the reverse side of the form, appellant's supervisor reported that he was first notified of the injury on August 12, 2013.

By letter dated August 20, 2013, OWCP advised appellant that the evidence of record was insufficient to establish his claim and requested that he submit additional factual and medical evidence. It also requested that the employing establishment provide a statement detailing appellant's job duties, dates of employment and any other evidence regarding his allegations.

By letter dated August 28, 2013, appellant stated that he provided timely notification of his injury because he was processed for and received disability retirement from the Office of the Comptroller of Currency (OCC). In support of his claim, he submitted an April 7, 1976 Department of the Air Force Memorandum which noted that he retired from the U.S. Army on May 11, 1971 due to disability.

By letter dated October 17, 2013, the employing establishment reported that appellant's supervisors were no longer with the employing establishment and could not comment on the allegations made. It controverted the claim stating that his file contained nothing that would indicate an on-the-job injury. The employing establishment reported that appellant was receiving long-term disability benefits from OCC. It further noted that the policy was not in lieu of and did not affect any requirements under workers' compensation.

The employing establishment provided an official position description for a customer service and organizational performance officer as well as a copy of appellant's performance evaluation.

By decision dated October 29, 2013, OWCP denied appellant's claim on the grounds that it was not timely filed. It found that he had failed to file a claim within three years of the date of alleged injury, April 1, 1997. OWCP further noted that there was no evidence that a supervisor had actual knowledge of appellant's claim within 30 days of the date of injury.

On November 20, 2013 appellant requested reconsideration of OWCP's decision.

In a November 20, 2013 narrative statement, appellant reported that the employing establishment never presented him with the option to file a workers' compensation claim. He noted that it processed him for disability retirement and he received long-term disability payments which would be terminated in October 2014, causing him to file a workers' compensation claim.

Appellant submitted a Civil Service Retirement System (CSRS) “supervisor’s statement form” for disability retirement. His supervisor reported that his back injury was making it difficult for him to travel to office sites and would not be able to perform his job according to expectation. The form did not have a legible date.

Appellant also submitted a February 3, 1998 OCC letter documenting his long-term disability claim with an attending physician’s report, a March 31, 1998 CSRS application for immediate retirement, an April 23, 1998 Office of Personnel Management (OPM) letter welcoming him to CSRS and an October 22, 2005 medical report.

By decision dated February 20, 2014, OWCP denied appellant’s request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence. It noted that, while he submitted new evidence, it was irrelevant and immaterial to the issue upon which his claim was denied.

### **LEGAL PRECEDENT -- ISSUE 1**

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>2</sup>

The three-year time period begins to run from the time the employee is aware or by the exercise of reasonable diligence should have been aware, that his or her condition is causally related to the employment. 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.<sup>3</sup>

Even if an original claim for compensation for disability or death is not filed within three years after the injury or death, compensation for disability or death may be allowed if written notice of injury or death as specified in section 8119 was given within 30 days. 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 be 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

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<sup>2</sup> *Id.*

<sup>3</sup> *Duet Brinson*, 52 ECAB 168 (2000).

believed to be the cause; and be signed by and contain the address of the individual giving the notice.<sup>4</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>5</sup>

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 or her condition and his or her employment. When an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his or her federal employment, the limitation period begins to run even if the employee does not know the precise nature of the impairment or whether the ultimate result of such affect will be temporary or permanent.<sup>6</sup> 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 the federal employment awareness, the time limitation begins to run on the date of the last exposure to the implicated factors.<sup>7</sup> The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.<sup>8</sup>

### ANALYSIS -- ISSUE 1

Appellant claimed that he developed a back condition due to conditions of his employment as an organizational effectiveness supervisor. By decision dated October 29, 2013, OWCP denied his claim on the grounds that it was untimely filed. The Board finds that appellant's claim for compensation is barred by the applicable time limitation provisions of FECA.

On his Form CA-2, appellant alleged that he was last exposed to his work conditions on April 1, 1997 when he retired. He further alleged that he became aware of his back injury and of its relationship to his employment on April 1, 1997. Appellant did not deny knowing that his condition was caused by his employment, but rather blamed his delay in filing a claim on the employing establishment which allegedly failed to inform him that he was eligible for workers' compensation. He also argued that he initially did not file a claim because he was receiving disability retirement from OCC. Appellant however also states that he was aware of an employment-related injury beginning April 1, 1997 for which he received disability retirement. The Board finds that the evidence establishes that he knew or reasonably should have known of a relationship between his claimed condition and that alleged factors of his employment at the time of his last exposure.

When an employee continues in the same employment after he reasonably should have been aware that he has a condition which has been adversely affected by factors of federal

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<sup>4</sup> *Larry E. Young*, 52 ECAB 264 (2001).

<sup>5</sup> *Laura L. Harrison*, 52 ECAB 515 (2001).

<sup>6</sup> *Supra* note 4.

<sup>7</sup> *Id.*

<sup>8</sup> *Debra Young Bruce*, 52 ECAB 315 (2001).

employment,<sup>9</sup> the time limitation begins to run on the date of the last exposure to the implicated factors.<sup>10</sup> Therefore, the time limitation in this case began to run on April 1, 1997, appellant's last day of work and exposure to the implicated employment factors. Since appellant did not file a claim until July 29, 2013, his claim was filed well outside the three-year limitation period.

While the Board has determined that appellant's claim does not fall within the three-year limitation period, his claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate supervisor had actual knowledge of the injury within 30 days of his last exposure to the conditions alleged to have caused his condition, *i.e.*, within 30 days of April 1, 1997. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.<sup>11</sup> Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days.<sup>12</sup> Appellant, however, has not alleged that his supervisor had actual knowledge of an on-the-job injury within 30 days of his last exposure and did not submit evidence to establish that his supervisor, another employing establishment official or an employing establishment physician or dispensary, had actual knowledge of his claimed employment injury within 30 days after the date of his last exposure to the implicated employment factors.<sup>13</sup>

The Board finds that appellant has not established actual knowledge by his supervisors of his work-related condition within 30 days. Therefore, appellant has not established a timely claim.

Appellant argues that the employing establishment failed to inform him that he was eligible for workers' compensation. Section 8122(d)(3) of FECA<sup>14</sup> provides that time limitations for filing a claim do not run against any individual whose failure to comply is excused by the Secretary on the grounds that such notice could not be given because of exceptional circumstances. None of the exceptions relating to appellant's ability to file a claim apply in this case. Appellant was not a minor, has not alleged that he was incompetent and has not provided evidence of an exceptional circumstance that would excuse his failure to timely file a claim.<sup>15</sup> His excuse for not filing a timely claim was that he was unaware that he was eligible for workers' compensation. However, the Board has held that unawareness of possible

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993); *see James A. Sheppard*, 55 ECAB 515 (2004).

<sup>10</sup> *Id.*

<sup>11</sup> 5 U.S.C. § 8122(a)(1); *see Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

<sup>12</sup> *Id.* at §§ 8122(a)(1) and (2).

<sup>13</sup> *See Ralph L. Dill*, 57 ECAB 248 (2006) (appellant's statement on his claim form that he reported his injury to his supervisor was insufficient to show that his supervisor was on notice in the absence of other evidence that his supervisor had actual knowledge of a work injury within 30 days of his last workplace exposure).

<sup>14</sup> 5 U.S.C. § 8122(d)(3).

<sup>15</sup> *E.B., claiming as widow of N.B.*, 58 ECAB 629 (2007).

entitlement,<sup>16</sup> lack of access to information<sup>17</sup> and ignorance of the law or of one's obligations under it<sup>18</sup> do not constitute exceptional circumstances that could excuse a failure to file a timely claim.<sup>19</sup> Thus, appellant did not establish that he was prevented from filing a timely claim by exceptional circumstances as that term is used in section 8122(d)(3) of FECA. The Board finds that he has not established that he timely filed a claim for compensation within three years after his retirement April 1, 1997.

### **LEGAL PRECEDENT -- ISSUE 2**

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>20</sup> Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>21</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his November 20, 2013 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument. Appellant's argument was that the employing establishment never presented him with the option to file a workers' compensation claim and he was receiving disability retirement beginning April 1, 1997. As previously noted, unawareness of possible entitlement, lack of access to information and ignorance of the law or of one's obligations under it do not constitute exceptional circumstances that could excuse a failure to file a timely claim.<sup>22</sup> As such, appellant's arguments fail to establish a basis for review of the merits of his claim.

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<sup>16</sup> See *supra* note 12.

<sup>17</sup> *Kathryn L. Cornett (Elmer Cornett)*, 54 ECAB 812 (2003).

<sup>18</sup> *George M. Dickerson*, 34 ECAB 135 (1982).

<sup>19</sup> *Michael Thomas Plante*, 44 ECAB 510 (1993).

<sup>20</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>21</sup> *K.H.*, 59 ECAB 495 (2008).

<sup>22</sup> *M.D.*, Docket No. 10-938 (issued January 10, 2011).

The underlying issue in this case was whether appellant's claim for compensation was barred by the applicable time limitation provisions of FECA. Appellant filed his July 29, 2013 occupational disease claim more than three years after the April 1, 1997 date of last exposure when he retired from his federal employment. The relevant issue, therefore, was whether his immediate superior had knowledge of a work injury within 30 days of April 1, 1997 or whether written notice of the April 1, 1997 injury, as specified in section 8119, was given within 30 days.<sup>23</sup> While appellant submitted new evidence in support of his claim, the evidence was irrelevant and immaterial to the issue at hand.<sup>24</sup>

The Board notes that the February 3, 1998 OCC letter, March 31, 1998 CSRS application for immediate retirement and April 23, 1998 OPM letter welcoming appellant to CSRS all fail to establish that the employing establishment had knowledge of an employment-related back injury within 30 days of April 1, 1997. The Board has held that disability and factual determinations made by other agencies pursuant to other statutory schemes are not binding on OWCP or the Board with respect to whether the individual is disabled under FECA.<sup>25</sup> The documents establishing appellant's disability retirement beginning in April 1997 have no bearing on this claim as they fail to establish a supervisor's knowledge of a work-related employment injury within 30 days of April 1, 1997.<sup>26</sup> Medical reports are not relevant because it is premature to consider causal relationship between a condition and appellant's employment duties until it is established that a claim is timely filed.<sup>27</sup>

The CSRS "supervisor's statement form" also fails to establish that appellant's claim was timely filed and is immaterial to the issue at hand. The form does not contain a legible date to determine if it was signed within 30 days of April 1, 1997. Moreover, while appellant's supervisor indicates that appellant could not perform his employment duties due to a back injury, the supervisor makes no indication that he knew or reasonably should have known that appellant's back injury was caused by his federal employment duties.<sup>28</sup> The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>29</sup> Claimant may obtain a merit review of an OWCP decision by submitting new and relevant evidence. In this case, while appellant submitted new evidence, it was not relevant in the issue in this case.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a

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<sup>23</sup> *Supra* note 1. See also *D.S.*, Docket No. 11-1498 (issued February 15, 2012).

<sup>24</sup> *Van Frachen*, Docket No. 03-925 (issued June 20, 2003).

<sup>25</sup> See *Stephen R. Lubin*, 43 ECAB 564, 568 (1992); *Hazelee K. Anderson*, 37 ECAB 277, 283 (1986).

<sup>26</sup> *Nancy J. Yost*, Docket No. 00-1992 (issued February 27, 2002).

<sup>27</sup> See *L.W.*, Docket No. 11-331 (issued September 6, 2011); *Louis Alterisio*, 32 ECAB 378, fn. 6 (1980) (where a claim is not timely filed, it is unnecessary to address the issue of causal relationship).

<sup>28</sup> *D.H.*, Docket No. 11-2130 (issued May 11, 2012).

<sup>29</sup> *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.<sup>30</sup>

**CONCLUSION**

The Board finds that appellant's occupational disease claim was untimely filed. OWCP properly denied his request for reconsideration without a merit review.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decisions dated February 20, 2014 and October 29, 2013 are affirmed.

Issued: May 27, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>30</sup> *Gene E. Harris*, Docket No. 94-162 (issued July 11, 1995).