United States Department of Labor
Employees' Compensation Appeals Board

D.J., Appellant	)	
and	)	**Docket No. 14-1397**
	)	**Issued: November 14, 2014**
DEPARTMENT OF DEFENSE, DEFENSE CONTRACT MANAGEMENT COMMAND -- INTERNATIONAL, Fort Riley, KS, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 3, 2014 appellant filed a timely appeal of a February 24, 2014 decision of the Office of Workers' Compensation Programs (OWCP) affirming the denial of his claim as being untimely filed. Pursuant to the Federal Employees' Compensation Act[1] (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's claim for compensation was filed within the applicable time limitation provisions of FECA.

FACTUAL HISTORY

On June 24, 2013 appellant, then a 77-year-old retired quality assurance specialist, filed a traumatic injury claim alleging that on August 15, 2000 he sustained a left eye macular hole OS

[1] 5 U.S.C. § 8101 *et seq.*

with a positive Watzke sign.[2] He stated that he did not know the cause of the injury, but that his left eye pulled left and refocused in about a minute after entering his office and turning the computer on. In an attached statement, appellant indicated that he informed his team leader, Ronald Davenport about the left eye incident the day it occurred. He also provided details of his medical treatment and diagnosis.

In e-mail correspondence dated May 23, 2013, Sheryl K. Miyamoto, Human Capital Field Support Center, noted that appellant retired in 2002 and that he had contacted the Office of Personnel Management (OPM) regarding sick leave used while he was stationed in Saudi Arabia for a work-related detached retina injury. Appellant wanted OPM to reinstate the sick leave he had used.

By letter dated July 31, 2013, OWCP informed appellant that the evidence of record was insufficient to establish his claim. Appellant was advised as to the evidence required to establish his claim. OWCP also informed him that the evidence submitted was insufficient to establish that he had timely filed his claim.

In response, appellant submitted medical and factual evidence as set forth below.

An October 21, 2000 ophthalmology clinic report indicated that appellant was seen for complaints of decreased vicual acity and pain and that he had seen an optician for this problem three weeks previously. Diagnoses included a macular hole and esotropia.

In an October 22, 2000 report, Dr. Albert S. Khouri, an examining Board-certified ophthalmologist, provided eye examination findings and diagnosed full thickness macular hole with a positive Watzke sign.

In an Octotber 30, 2001 report, Dr. Lawrence C. Chao, a treating Board-certified ophthalmologist, provided eye examination findings and medical history. Diagnoses included left eye cataract, blepharitis with rosacea, history of left eye macular hole and left eye detachment, left eye esotropia and conjunctivitis.

A February 1, 2001 eye examination report from UCI Healthsystem revealed a sealed macular hole with a smal residual gas bubble that was beginning to break up.

In a February 15, 2001 report, Dr. Baruch D. Kupperman, an attending Board-certified ophthalmologist, related that he had treated appellant since December 12, 2000 for a full thickness macular hole. He stated that appellant underwent eye surgery on December 12, 2000 and that he is unable to fly until the gas bubble has resolved.

In an August 7, 2012 report, Dr. Kupperman stated that appellant was seen for complaints of a black spot and that he had eye surgery in Decmeber 2000. He reported that appellant had a history of esotropia and macular hole and provided eye examination findings. Diagnoses included macular cyst hole or retina pseudohole. Epi-retinal membrane, vitreous degeneration, after cataract obscured vision, lens replacement and esotropia.

[2] Appellant retired from the employing establishment in 2002.

In a November 26, 2012 report, Dr. Danli Xing, an examining Board-certified ophthalmologist, reported that on December 12, 2000 appellant had a left eye retina macular hole and underwent repair on December 12, 2000. She stated an August 7, 2012 examination revealed good vision and that the macular hole was stable and closed.

In a June 18, 2013 report, Dr. Kupperman diagnosed macular cyst hole or retina pseudohole, December 12, 2000 eye surgery, esotropia and epi-retinal membrane.

In an August 12, 2013 statement, appellant responded to OWCP's questions. He stated that he first became knowledgable about his condition on August 7, 2012, when a physician and a technician stated that he had a macular hole injury.

By decision dated August 28, 2013, OWCP denied appellant's claim on the grounds that it was not timely filed. It found no evidence that his immediate supervisor had actual knowledge of his injury within 30 days of the injury date or that the claim had been filed within three years of the injury date.

On September 12, 2012 appellant requested reconsideration.

By decision dated September 19, 2013, OWCP denied reconsideration.

On December 8 and 29, 2013 appellant requested reconsideration and submitted medical and factual evidence in support of his request. In his December 8, 2013 letter, he contended that his claim had been timely filed and that he was entitled to have the sick leave he used credited towards computation of his retirement annuity. Appellant noted that on August 15, 2000 he informed his supervisor, Mr. Davenport, regarding the incident with his eye. He also provided a history of the medical treatment received for his eye condition. Appellant submitted medical and factual evidence in support of his reconsideration request. He submitted a copy of a funded EML leave request for the period December 11, 2000 through January 29, 2001. The leave request did not indicate the reason for the leave and was approved by appellant's supervisor, Mr. Davenport.

On February 24, 2014 OWCP denied modification.

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.[3] 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.[4] Compensation

[3] *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002).

[4] *W.L.*, 59 ECAB 362 (2008); *Gerald A. Preston*, 57 ECAB 270 (2005); *Laura L. Harrison*, 52 ECAB 515 (2001).

for diability 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."[5]

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 supervisor or 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 person giving the notice.[6] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[7] 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.[8]

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.[9] 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.[10] Section 8122(b) of FECA 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.[11]

---

[5] 5 U.S.C. § 8122(a). *See J.M.*, Docket No. 09-1563 (issued February 26, 2010); *J.P.*, 59 ECAB 178 (2007); *Cory W. Davis*, 57 ECAB 674 (2006).

[6] 5 U.S.C. § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

[7] *Laura L. Harrison*, *supra* note 4.

[8] *Delmont L. Thompson*, 51 ECAB 155 (1999).

[9] *Emma L. Brooks*, 37 ECAB 407 (1986).

[10] *Delmont L. Thompson*, *supra* note 8.

[11] 5 U.S.C. § 8122(b).

ANALYSIS

Appellant did not file his traumatic injury claim until June 24, 2013, more than three years after the August 15, 2000 incident. Therefore, his claim was filed outside the three-year time limitation period which ended August 15, 2003.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate superior or another employing establishment official had actual knowledge of the injury within 30 days of the date of injury.[12] The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.[13] There is no supporting evidence that appellant's immediate superior or another employing establishment official had actual or written knowledge of the August 15, 2000 injury within 30 days of the date of injury, other than appellant's statement that he immediately informed Mr. Davenport of his eye problem on August 15, 2000. Appellant also submitted an approved funded EML leave request. The leave request, while signed by Mr. Davenport, contains no reason for the leave or type of leave used. This evidence does not substantiate an immediate supervisor's knowledge that appellant sustained a work-related eye injury within 30 days of the injury.[14] Knowledge merely of an employee's illness is not sufficient to establish actual knowledge and timeliness; it must be shown that the circumstances were such as to put the supervisor on notice that the alleged injury was actually related to the employment or that the employee attributed it thereto.[15]

The Board finds that appellant has not established actual knowledge by his supervisors of his work-related condition within 30 days and, therefore, has not established a timely claim. The record is void of any indication that his immediate supervisor had written notice of his work-related injury within 30 days. The exceptions to the statute have not been met and, thus, appellant has failed to establish that he filed a timely claim. Consequently, appellant has not met his burden of proof as he has not established that he filed a timely notice of traumatic injury and claim for compensation under the applicable time limitation provisions of FECA

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

---

[12] *Larry E. Young*, *supra* note 6. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

[13] *Kathryn A. Bernal*, 38 ECAB 479 (1987).

[14] *See Linda J. Reeves*, 48 ECAB 373 (1997) (where the Board held that while appellant submitted a statement from a former supervisor that established that he had some knowledge of appellant's complaints, this statement was not sufficient to establish that her immediate supervisor had actual knowledge of a work-related injury as the statement only made a vague reference to appellant's health and did not indicate that she sustained any specific employment-related injury such that the knowledge would put the immediate supervisor reasonably on notice of an on-the-job injury or death).

[15] *See id.; Roseanne S. Allexenberg*, 47 ECAB 498 (1996) (where the Board held that knowledge of an employee's illness is not sufficient to establish actual knowledge and timeliness of a claim. It must be shown that the circumstances were such as to put the supervisor on notice that the alleged injury was actually related to the employment or that the employee attributed it thereto.

CONCLUSION

The Board finds that appellant failed to file a claim for compensation within the applicable time limitation provisions of FECA.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 24, 2014 is affirmed.

Issued: November 14, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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