

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

J.J., Appellant

and

**DEPARTMENT OF HUMAN RESOURCES,
Washington, DC, Employer**

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**Docket No. 14-1205
Issued: September 26, 2014**

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 April 30, 2014 appellant filed a timely appeal from the February 6, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 OWCP properly denied appellant's emotional condition on the grounds that it was untimely filed.

FACTUAL HISTORY

On April 26, 2013 appellant, then a 63-year-old former workers' compensation program manager and acting chief of human resources, filed an occupational disease claim (Form CA-2) alleging that he sustained dystonia, torticollis, neck spasms and tilting of his neck due to

¹ 5 U.S.C. §§ 8101-8193.

exposure to a hostile work environment throughout his time at the employing establishment. He indicated that he first became aware of these conditions in the 1990s and that he first realized on September 1, 2012 that they were caused or aggravated by his employment. Regarding the relationship of these claimed conditions to his employment, appellant stated that he recently learned through research that stress from his hostile work environment aggravated his medical condition and led to his retirement in 2001. He indicated that he also was recently informed by a friend that the hostile work environment aggravated his medical condition and caused severe pain in the side of his neck. On the CA-2 form, an employing establishment official confirmed that appellant had retired in 2001.²

In a May 10, 2013 letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim.

In a May 16, 2013 statement, appellant discussed various incidents and conditions at work, which he alleged aggravated his cervical dystonia, including harassment by a supervisor, Valerie Grasso.³ He noted that Dr. N.K. Nikhar, an attending Board-certified neurologist, recommended that “my medical condition was incurable and the enormous stress that I was under at the Library of Congress supported my permanent disability and his rationale (sic) the severe stress continued (sic) worsen my condition and aggravated my pre-existing condition.” Appellant indicated that he provided numerous medical records regarding his neck problems to the health services office of the employing establishment.

In a June 18, 2013 decision, OWCP denied appellant’s claim on the grounds that it was untimely filed. It found that he was aware or should have been aware by the time he retired in 2001 of the possible relationship between his cervical dystonia condition and work factors but that he did not file his claim until April 26, 2013. OWCP further found that appellant’s supervisor did not have actual knowledge of a work injury within 30 days of appellant’s last exposure to potential work factors in 2001.

Appellant requested a telephone hearing with an OWCP hearing representative. During the November 21, 2013 hearing, he testified that he had experienced dystonia since the 1990s and indicated that the employing establishment attempted to accommodate him by allowing him to work in different positions. Appellant stated that his neck condition deteriorated significantly in early 2000. He discussed the medical treatment he received, including the treatment he received from Dr. Nikhar beginning in 2001. Appellant stated that Dr. Nikhar made some recommendations regarding ways to reduce stress in his work situation. He discussed incidents and conditions at work which he believed aggravated his medical condition. Appellant alleged that he was harassed by Ms. Grasso, the workers’ compensation program manager, who supervised him and stated that he was moved into her position after she was transferred. He asserted that his condition and the number of medications that he was taking caused his inability

² The precise date of appellant’s retirement in 2001 remains unclear from the record.

³ It appears from the record that Ms. Grasso was appellant’s immediate supervisor and that Dr. Sandra Charles was a higher level superior.

to function and resulted in his inability to recognize the requirement to file a compensation claim at the time of his 2001 retirement.⁴

Appellant submitted a May 18, 2001 report in which Dr. Nikhar stated that he had been treating appellant for spasmodic torticollis (cervical dystonia), a condition which was associated with involuntary and abnormal head turn and head position and at times intense pain due to muscle spasms.⁵ Dr. Nikhar indicated that appellant's condition had been steadily progressing and noted that photographs from as far back as January 2, 2000 revealed a prominent head tilt. He noted that appellant had recently been injected with a botulinum toxin for the cervical dystonia which offered some relief but noted that the relief from the injection was "overwhelmed by the excessive workload in his work scenario." Dr. Nikhar stated:

"This condition will persist regardless of the activities on and off the job. However, stress and prolonged positioning in one position is likely to aggravate the symptoms of the dystonia and, in particular, the pain. Periodic intermittent rest in a stress free environment is the most likely situation to offer relief to [appellant]."

* * *

"The emphasis is to recognize the symptoms and the difficulties that [appellant] faces in the current work environment. Anything that may be done to decrease the level of stress which is clearly an exacerbating factor is to be encouraged. In this context, if the work environment is stressful, both psychologically and physically demanding, then this may prove deleterious to the patient's ability to cope with symptoms."

In a June 1, 2001 report, Dr. Nikhar stated that he was providing an addendum to his May 18, 2001 report and noted:

"It is my opinion that [appellant] has a disorder of involuntary movement for which there is presently no cure, only treatment. It is a permanent condition, which is likely to be exacerbated by prolonged work situations. I would support [appellant's] application for permanent disability and would concur that he would be unable to perform his assigned duties as a workers' compensation program manager."

⁴ Appellant later submitted a copy of the hearing transcript in which he added notations to his testimony. He filled in a number of short gaps which appeared in the sentences contained in the transcript.

⁵ In a March 13, 2001 report, Dr. Nikhar detailed the first time he treated appellant's cervical dystonia condition. Appellant reported that he experienced pain in his neck since 1997 with a sudden increase in symptoms in December 2000. The record was also supplemented to include documents from the employing establishment, including several documents from the early to mid-1990s concerning fitness-for-duty examinations conducted during his employment. None of the documents show that appellant's immediate supervisor had actual knowledge of his possible work-related neck condition.

In a February 6, 2014 decision, the hearing representative affirmed OWCP's June 18, 2013 decision noting that appellant's emotional condition claim was properly denied on the grounds that it was untimely filed. She found that he was aware or should have been aware around the time of Dr. Nikhar's May 18, 2001 examination of the possible relationship between his cervical dystonia condition and work factors but that he did not file his claim until April 26, 2013. The hearing representative also found that appellant's supervisor did not have actual knowledge of a work injury within 30 days of appellant's last exposure to potential work factors in 2001. Appellant did not present evidence that there were compelling circumstances, such as his medical condition or use of medication, which prevented him from filing his claim in a timely manner.

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.⁶ 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.”⁷

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.⁸ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.⁹

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 condition and his 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

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

⁷ 5 U.S.C. § 8122(a).

⁸ *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

⁹ *Laura L. Harrison*, 52 ECAB 515 (2001).

the ultimate result of such affect would be temporary or permanent.¹⁰ 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.¹¹ 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.¹² The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.¹³

ANALYSIS

On April 26, 2013 appellant filed an occupational disease claim alleging that he sustained dystonia, torticollis, neck spasms and tilting of his neck due to exposure to a hostile work environment throughout his time at the employing establishment which ended when he retired in 2001.¹⁴ He indicated that he first became aware of these conditions in the 1990s and that he first realized on September 1, 2012 that they were caused or aggravated by his employment.

The evidence establishes that appellant was aware or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment and the compensable disability as early as May 2001. This awareness is shown, in part, by a May 18, 2001 report in which Dr. Nikhar, an attending Board-certified neurologist, stated that he had been treating appellant for spasmodic torticollis (cervical dystonia), a condition which was associated with involuntary and abnormal head turn and head position and at times intense pain due to muscle spasms. Dr. Nikhar noted that it was important for appellant to recognize that “[a]nything that may be done to decrease the level of stress which is clearly an exacerbating factor is to be encouraged. In this context, if the work environment is stressful, both psychologically and physically demanding, then this may prove deleterious to [appellant's] ability to cope with symptoms.” In a June 1, 2001 report, Dr. Nikhar noted, “It is my opinion that [appellant] has a disorder of involuntary movement for which there in presently no cure, only treatment. It is a permanent condition, which is likely to be exacerbated by prolonged work situations.”

Moreover, appellant's own comments support that he knew in May 2001 of the possible relationship between alleged work factors and his neck condition. In a statement submitted in support of his claim, he discussed various incidents and conditions at work which he felt aggravated his cervical dystonia, including harassment by his immediate supervisor, Ms. Grasso. Appellant noted that the recommendation of Dr. Nikhar was that “my medical condition was

¹⁰ *Larry E. Young, supra* note 8.

¹¹ *Id.*

¹² 5 U.S.C. § 8122(b); *see Luther Williams, Jr., 52 ECAB 360 (2001).*

¹³ *Debra Young Bruce, 52 ECAB 315 (2001).*

¹⁴ The precise date of appellant's retirement in 2001 remains unclear from the record.

incurable and the enormous stress that I was under at the Library of Congress supported my permanent disability and his rationale (sic) the severe stress continued (sic) worsen my condition and aggravated my pre-existing condition.” He made similar comments in his November 2013 hearing testimony regarding Dr. Nikhar’s linking of work stress with his neck condition. Appellant’s explicit linking of a claimed hostile work environment with his development of cervical dystonia and related conditions shows that he knew as early as May 2001 of the possible relationship between these employment incidents and his claimed medical conditions.

Appellant’s last possible exposure to the implicated employment factors, *i.e.*, the alleged hostile work environment, occurred no later than the time of his retirement in 2001. As noted above, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure. Therefore, the time limitation in appellant’s case began to run no later than the time of his retirement in 2001.¹⁵ Since appellant did not file a claim until April 26, 2013, his claim was not filed within the three-year period of limitation. He asserted that his condition and the number of medications he was taking caused his inability to function and resulted in his inability to recognize the timeliness requirements for filing a compensation claim, but he did not submit sufficient evidence to show that such compelling circumstances that prevented him from filing his claim in a timely manner.

On appeal, appellant alleged that the employing establishment had knowledge of his claimed injury due to his visits to the health services office of the employing establishment in 2000 and 2001. His claim would still be regarded as timely under section 8122(a)(1) of FECA if his 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 his immediate superior within 30 days as specified in section 8119. The record includes documents from the employing establishment, including several documents from the early to mid-1990s concerning fitness-for-duty examinations conducted during appellant’s employment. None of the documents show that his immediate supervisor had actual knowledge of his possible work-related neck condition. The evidence of record does not support a finding that appellant has satisfied either of the above-noted notice requirements.¹⁶

CONCLUSION

The Board finds that OWCP properly denied appellant’s emotional condition on the grounds that it was untimely filed.

¹⁵ If appellant continued to be exposed to injurious working conditions after the date he became aware of a possible employment-related cause of his claimed emotional condition, *i.e.*, May 2001 in the present case, the time limitation would begin to run on the last date of this exposure. It appears that he continued to work for the employing establishment after May 2001 and retired at some point thereafter in 2001. *See supra* note 11.

¹⁶ There is no indication in the record that appellant provided a statement to his immediate superior such that he satisfied the provisions of sections 8119 and 8122(a) of FECA. *See supra* notes 8 and 9.

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 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