

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

M.S., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
IMMIGRATION & CUSTOMS)
ENFORCEMENT, Falcon Heights, TX, Employer)

Docket No. 15-1771
Issued: December 23, 2015

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 24, 2015 appellant filed a timely appeal from a May 22, 2015 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 appellant timely filed his claim within the provisions of 5 U.S.C. § 8122.

FACTUAL HISTORY

On May 15, 2014 appellant, then a 59-year-old former senior special agent, filed an occupational disease claim (Form CA-2) alleging that he sustained right wrist and hand pain

¹ 5 U.S.C. § 8101 *et seq.*

causally related to factors of his federal employment. He indicated that he first became aware of his condition and its relationship to his employment on March 1, 1989. Appellant advised that while playing in a basketball game at a law enforcement training academy he experienced right hand and wrist pain. He related, "My injury was misdiagnosed as a wrist tendon injury instead of an actual wrist ligament tear that continued to worsen throughout my career. I did not know my tendon was torn. My job position required lifting large heavy bundles of marijuana on a continuous basis." On the reverse side of the claim form, the employing establishment indicated that appellant first reported the condition to a supervisor on April 29, 2014.

In a report dated April 21, 2014, Dr. Khaimchand Panday, a Board-certified orthopedic surgeon, discussed his treatment of appellant beginning on September 4, 2013 for right wrist primarily localized osteoarthritis. He related that appellant underwent an excision of the right scaphoid and a four-corner mid-carpal arthrodesis on October 24, 2013. Appellant had permanently reduced function of the right wrist.

By letter dated May 28, 2014, OWCP requested that appellant provide additional factual and medical information in support of his claim. It advised him that it appeared that his claim was untimely filed and asked that he submit evidence supporting that he timely filed his claim.

In a decision dated August 29, 2014, OWCP denied appellant's claim as untimely. It found that there was no evidence that he filed his claim within three years of March 1, 1989, the date of injury, or that his supervisor had actual knowledge of his injury within 30 days of that date.

On September 21, 2014 appellant requested a telephone hearing before an OWCP hearing representative. In an accompanying statement, he related that on approximately March 1, 1989, while at a training program, he hurt his right wrist playing in a basketball game. Appellant received treatment at the emergency room and a physician diagnosed wrist tendinitis. He reported the wrist injury and his medical bills were paid. Appellant continued working and in the course of his career lifted and carried large bundles of marijuana. He related:

"During the last year of my career I started experiencing severe pain in my right hand and wrist area. I did not know the cause of the pain and finished out my career retiring on January 2010. During my retirement the pain in my hand continued to worsen and I went to see a hand specialist. The specialist determined I did not have tendinitis but advised me I had suffered a traumatic injury to my hand and tore a ligament in the right wrist area. Since I did not have surgery back in 1989 to repair the ligament, it had completely dissolved which caused the hand bones to move around thus causing the severe pain in my hand and wrist area."

Appellant attributed his condition to being misdiagnosed in 1989 with tendinitis instead of a ruptured wrist tendon which was aggravated by heavy lifting for 20 years. He maintained that he filed his claim within three years of learning that it was related to his employment.

The record contains a description by the employing establishment of its law enforcement training facility. It indicated that students were in travel status while at the facility and that its student athletic programs, including basketball, were “strongly encouraged.”

Appellant submitted medical evidence from 1989, including a May 8, 1989 authorization for examination and/or treatment (Form CA-16). The form provided that he sustained an injury to his right wrist playing basketball. A physician diagnosed right wrist tendinitis.

On February 2, 2015 appellant requested reconsideration.

By letter dated March 3, 2015, OWCP requested that appellant clarify whether he wanted to request reconsideration or an oral hearing. On March 11, 2015 appellant informed OWCP that he wanted to pursue his reconsideration request. He submitted an emergency outpatient treatment record from an area hospital dated May 6, 1989, indicating that he was experiencing pain in his right wrist after playing basketball. The diagnosis was tendinitis and a splint was applied.

In a decision dated May 22, 2015, OWCP denied modification of its August 29, 2014 decision. It determined that appellant had not submitted sufficient evidence to establish that he timely filed his occupational disease claim. OWCP noted that he retired on January 2, 2010, but did not file his claim until more than three years later.

On appeal appellant asserts that he submitted medical evidence sufficient to show that his condition arose from his employment. He also contends that he timely filed his claim when he became aware of its relationship to his employment.

LEGAL PRECEDENT

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.² 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.”³

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 condition is causally related to the employment. For actual knowledge of a supervisor to be regarded as timely filing, an

² 5 U.S.C. § 8122(a).

³ *Id.*

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.⁴

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 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 person giving the notice.⁵ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.⁶ 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.⁷

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. 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, 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.⁸ Where the 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 the federal employment awareness, the time limitation begins to run on the date of the last exposure to the implicated factors.⁹ The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.¹⁰

ANALYSIS

The Board finds that appellant's occupational disease claim is barred by the applicable time limitation provisions of FECA. Appellant alleged that he first became aware of the relationship between his right wrist and hand condition and factors of his federal employment on May 1, 1989, the date that he injured his hand playing basketball at the employing establishment's training facility. He continued to work lifting heavy bundles of marijuana as part of his work duties until he retired in January 2010. Appellant filed an occupational disease

⁴ See *Duet Brinson*, 52 ECAB 168 (2000).

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

⁶ See *Laura L. Harrison*, 52 ECAB 515 (2001).

⁷ *Delmont L. Thompson*, 51 ECAB 155 (1999).

⁸ See *Larry E. Young*, *supra* note 5.

⁹ *Id.*

¹⁰ See *Debra Young Bruce*, 52 ECAB 315 (2001).

claim on May 15, 2014. He maintained that his May 1, 1989 injury was misdiagnosed as tendinitis rather than a ligament tear. Appellant performed lifting over the course of his 20-year career that aggravated the ligament tear.

As noted, if an employee continues to be exposed to injurious working conditions, the time limitation begins to run on the date of the last exposure.¹¹ Consequently, the time for filing appellant's claim began to run in January 2010, the date of his retirement. Appellant filed his occupational disease claim on May 15, 2014, more than three years after the date of last exposure. Consequently, he filed his claim outside the three-year time limitation period.¹²

Appellant's 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 or if he provided written notice within 30 days. There is no evidence, however, that a supervisor had knowledge of his occupational disease claim within 30 days or that he provided written notice of injury within 30 days. The employing establishment indicated that appellant first advised a supervisor of his condition on April 29, 2014. While there is evidence that the employing establishment knew that he sustained a right wrist injury at its training facility in May 1989, this does not establish that it was aware of his claim for an occupational disease to his right wrist as a result of heavy lifting over the course of his employment.

In cases of latent disability, 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 the employment and the compensable disability.¹³ Appellant related that he was not aware of his condition and its relationship to his employment until he was evaluated by a hand specialist, which was within three years of the date that he filed his occupational disease claim. He did not, however, provide the date of the examination of the hand specialist which led to his awareness of the cause of his condition. Instead, appellant generally related that he sought treatment from a hand specialist after his retirement, who told him that his original wrist injury was improperly treated. The only medical evidence of record after 1989 is an April 21, 2014 report from Dr. Panday. Dr. Panday discussed his treatment of appellant for primary localized osteoarthritis of the right wrist, including right wrist surgery performed on October 24, 2013. He did not discuss either the cause of appellant's condition or the implicated work factors. Appellant has not submitted any medical evidence showing the date that he became aware of the relationship between his condition and factors of his federal employment.

On appeal appellant argues that he submitted medical evidence addressing the cause of his wrist condition. The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.¹⁴

¹¹ See *R.V.*, Docket No. 10-1776 (issued April 1, 2011).

¹² *Id.*

¹³ 5 U.S.C. § 8122(b).

¹⁴ See *Charles Walker*, 55 ECAB 238 (2004).

Appellant further contends that he filed his claim when he became aware of the relationship between his condition and his employment. He did not, however, submit any factual or medical evidence showing when he knew that his condition arose from his work duties.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant's claim was untimely filed under the provisions of 5 U.S.C. § 8122.

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 23, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board