

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

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C.L., Appellant )

and )

DEPARTMENT OF ENERGY, NATIONAL )  
NUCLEAR SECURITY ADMINISTRATION, )  
Washington, DC, Employer )

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**Docket No. 16-0854  
Issued: August 24, 2016**

*Appearances:*

*Stephen Domenic Scavuzzo, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 13, 2016 appellant, through counsel, filed a timely appeal of a September 15, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e) (2014). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney's or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292 (2006). Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant timely filed an occupational disease claim for compensation under 5 U.S.C. § 8122(a).

On appeal appellant's counsel contends that OWCP failed to follow the Board's instructions as it failed to review the merits of the claim.

## **FACTUAL HISTORY**

This case has previously been before the Board. In a May 18, 2015 decision, the Board found that OWCP had improperly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).<sup>3</sup> The Board set aside the May 24, 2014 OWCP decision denying reconsideration and remanded the case for OWCP to conduct a merit review of the case. The facts and circumstances of the case as set forth in the Board's prior decisions are hereby incorporated by reference. The relevant facts from the prior appeal are set forth below.

On November 7, 2012 appellant, then a 48-year-old budget analyst, filed an occupational disease claim (Form CA-2) alleging that on May 4, 2009 he first became aware of his nonischemic cardiomyopathy and lymphoma condition. He noted that he also became aware that the condition was due to his work on this date. On the back of the form, appellant's supervisor stated that appellant had abandoned his position and was removed from his position on April 29, 2012 due to inability to perform his work duties.

In statement dated November 7, 2012, appellant related that, as a budget analyst, his job required that funding be appropriately aligned to field and site locations. It also required that he meet deadlines on requests for financial data. Appellant claimed that this caused considerable stress and pressure. He alleged that working on budgets which were managed under congressional continuing resolutions added to stress of his position. While under these conditions, appellant was asked by directors and program managers to move or realign funding, which further increased his stress level. He also experienced stress from being routinely contacted by employees from other departments, who demanded "that their funding be obligated." Appellant related that the constant stress impacted his ability to sleep as he was only able to sleep three or four hours a night and woke up exhausted.

On March 1, 2013 appellant completed OWCP's questionnaire. He stated that he first exhibited symptoms of his condition on May 9, 2009 when he was admitted to the emergency room after having difficulty walking from the metro to work and was diagnosed with heart failure. In August 2010 a defibrillator was implanted in appellant's chest. During the next two years following the implantation of the defibrillator he continued experiencing his heart racing, chest tightness and difficulty breathing at work. On November 28, 2011 the symptoms culminated in a diagnosis of decompensated congestive heart failure. Appellant alleged that his heart condition was aggravated by the performance of his duties, stressful work events as well as worrying about his work. He noted his disagreement with OWCP's statement that his claim was

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<sup>3</sup> Docket No. 14-1904 (issued May 18, 2015).

untimely as he continued to experience heart problems while working and was not aware of the connection to his employment until his second cardiac catheterization on December 8, 2011.<sup>4</sup>

On March 5, 2013 OWCP received a March 28, 2012 removal letter from the employing establishment. It noted that appellant had not performed the duties of his position since December 11, 2011 and that his treating physician, on a Family and Medical Leave Act request form, indicated that he was disabled due to medical and emotional stress and due to his medical conditions. Based on his inability to perform the duties of his position, the employing establishment removed him from his position in order to promote the efficiency of the organization.

In an October 2, 2012 claim (Form CA-7) appellant claimed wage-loss compensation for the period December 12, 2011 and continuing. On the form he noted the date of his injury as November 28, 2011 and his last workday as April 29, 2012.

In a February 8, 2014 statement, appellant related that on his original CA-2 form he had incorrectly identified the date when he realized his employment had aggravated or caused his illness. He stated that it was not until Dr. David Pearle told him that he was disabled from performing the duties of his job on December 8, 2011 that he became aware of the causal connection between his condition and his employment. Lastly, appellant noted that he would have quit his job if he had been informed in May 2009 by Dr. Pearle that his work exacerbated or contributed to his diagnosed heart condition.

On February 11, 2014 OWCP received a corrected CA-2 form with a revised date of December 6, 2011 and appellant's February 8, 2014 statement explaining that he had incorrectly identified the date on his original CA-2 regarding when he first realized his employment had caused or aggravated his illness.

By decision dated September 15, 2015, OWCP denied appellant's claim on the basis that he failed to timely file his occupational disease claim.

### **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>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.<sup>6</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 condition and his employment. Such awareness is competent to start the limitation

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<sup>4</sup> The record reflects that this procedure actually took place on December 6, 2011.

<sup>5</sup> *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002).

<sup>6</sup> *W.L.*, 59 ECAB 362 (2008); *Gerald A. Preston*, 57 ECAB 270 (2005); *Laura L. Harrison*, 52 ECAB 515 (2001).

period even though the employee does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.<sup>7</sup> 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 federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.<sup>8</sup> 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.<sup>9</sup> The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.<sup>10</sup>

### ANALYSIS

The Board finds that appellant has established that he filed a timely claim for compensation under the three-year time limitation of section 8122 of FECA.

In his notice of occupational disease on November 7, 2012, appellant advised that he became aware of his condition and its relation to his federal employment on May 4, 2009. However, in subsequent statements and claims for wage-loss compensation he notes the date of November 28, 2011 as the date he first became aware of the connection between his heart condition and his employment. In subsequent statements, a corrected CA-2 form and CA-7 forms, appellant reported either November 28 or December 8, 2011 as the date he first became aware of the connection between his heart condition and his work. He also stated that he continued to be exposed to the duties he alleged aggravated his condition until he stopped work. The employing establishment noted that appellant's last work date was December 11, 2011 and that he was removed from his position on April 29, 2012 due to his inability to perform his work duties. Although the date appellant initially provided on his CA-2 as the date of his injury was more than three years later than the date he filed the claim, he continued his work as a budget analyst until stopping work on December 11, 2011. Appellant claimed that the performance of his duties as a budget analyst, worrying about his work, and stressful work events duties aggravated his heart condition.

OWCP found the claim untimely under 5 U.S.C. § 8122(a) because appellant initially indicated that he first was aware that his heart condition had been aggravated by his employment duties on May 4, 2009 and did not file a claim until November 17, 2012. It, however, failed to acknowledge that his claim is an occupational disease claim based on continuing exposure to the identified work factors. The time limitation does not begin to run until appellant is no longer exposed to the identified factors alleged to have contributed to an employment injury.<sup>11</sup> As the

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<sup>7</sup> *Larry E. Young*, 52 ECAB 264 (2001).

<sup>8</sup> *Id.*

<sup>9</sup> 5 U.S.C. § 8122(b).

<sup>10</sup> *Gerald A. Preston*, 57 ECAB 270 (2005); *Debra Young Bruce*, 52 ECAB 315 (2001).

<sup>11</sup> *James W. Beavers*, 57 ECAB 254 (2005).*Larry E. Young*, 52 ECAB 264 (2001); *Linda J. Reeves*, 48 ECAB 373 (1997).

Board has held, “if an employee continues to be exposed to injurious working conditions, the time limitation begins to run on the last date of this exposure.”<sup>12</sup> The date of last exposure in the current case was December 11, 2011, the date appellant last worked for the employing establishment. Appellant’s claim was therefore timely filed under 5 U.S.C. § 8122(a).

Because appellant has filed a timely claim for compensation, the case is remanded to OWCP to further develop and adjudicate the merits of the claim. Following any other development that it deems necessary, OWCP shall issue a *de novo* decision in the case.

### **CONCLUSION**

The Board finds that appellant timely filed an occupational disease claim for compensation under 5 U.S.C. § 8122(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers’ Compensation Programs dated September 15, 2015 is reversed and the case is remanded to OWCP for further proceedings consistent with this decision and order.

Issued: August 24, 2016  
Washington, DC

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

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

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

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<sup>12</sup> *R.A.*, Docket No. 16-0090 (issued March 21, 2016); *id.*