United States Department of Labor
Employees' Compensation Appeals Board

I.W., Appellant	)	
and	)	**Docket No. 15-1691**
	)	**Issued: February 11, 2016**
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer	)	

Appearances:
Stephen Larkin, for the appellant
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 1, 2015 appellant, through her representative, filed a timely appeal from a July 7, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.[2]

ISSUE

The issue is whether appellant filed a timely claim for compensation under 5 U.S.C. § 8122.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the issuance of the July 7, 2015 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, appellant's representative contends that the claim was filed within three years of August 6, 2014, which he argues is the date appellant first became aware that her condition was an occupational disease.

FACTUAL HISTORY

On March 19, 2015 appellant, a 49-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained lumbar and bilateral leg conditions due to factors of her federal employment, including repetitive lifting, bending, and standing. She stated that she first became aware of her condition on October 12, 2008 and first related her condition to her employment on August 6, 2014, the date her doctor explained that her condition had been caused by working full duty for a period of eight months. The employing establishment advised that appellant stopped work on October 12, 2008 and was also last exposed to conditions alleged to have caused her condition on that date.

In an undated narrative statement appellant indicated that she was working on June 13, 2006 when she fell backward, landed on her buttock, and fell on her back. She returned to work on February 18, 2008. Appellant stated that she was given work restrictions by both her treating physician and a second opinion doctor of OWCP, but the day she returned to work, her supervisor stated that she would not comply with these restrictions. Her union filed a grievance and an Equal Employment Opportunity complaint, but she was still required to work full duty. Appellant worked full duty from February 18 until October 12, 2008 when she had to stop working because her back and leg conditions had worsened. Dr. Deborah Eisen, a Board-certified family practitioner, saw appellant on August 6, 2014 and informed her that her condition was an occupational disease.

Appellant submitted a functional capacity evaluation dated January 22, 2015 and a March 2, 2015 report from Dr. Eisen who noted that appellant presented on August 6, 2014 for evaluation and treatment of an unresolved employment-related condition. Dr. Eisen opined that appellant's full-duty work from February 18 to October 12, 2008 aggravated her lower back condition.

On April 15, 2015 the employing establishment controverted appellant's claim as she did not file the claim within three years of October 12, 2008, the date she became aware of her condition.

In a May 7, 2015 letter, OWCP advised appellant of the deficiencies in her claim and afforded her 30 days to submit additional evidence and respond to its inquiries.

Appellant submitted a narrative statement and reports dated February 23 through June 2, 2015 from Dr. Eisen, who diagnosed anterolisthesis at L4-5, herniated lumbar disc, and lumbar strain and concluded that appellant was totally disabled from work.

On January 31, 2014 Dr. Vadim Kushnerik, a pain management specialist, diagnosed herniated discs causing nerve compression and opined that appellant's employing injury on June 13, 2006 and exacerbation in 2008 caused her lumbar condition.

By decision dated July 7, 2015, OWCP denied appellant's occupational disease claim as it was untimely filed. Appellant's claim was denied because the evidence did not support a finding that her claim was filed within three years of the date of injury or that her immediate supervisor had actual knowledge within 30 days of the date of injury.

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. 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."[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 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.[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]

In a case of an 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 the condition and his or her employment. When an employee becomes aware or reasonably should have been aware that she has a condition which has been adversely affected by factors of his or her federal 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 the ultimate result of such affect would be temporary or permanent.[7] Where the employee continues in the same employment after she reasonably should have been aware of a condition

[3] *See Charles Walker*, 55 ECAB 238 (2004).

[4] 5 U.S.C. § 8122(a).

[5] *Id.* at § 8119.

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

[7] *See Larry E. Young*, 52 ECAB 264 (2001).

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.[8] 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.[9] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[10]

ANALYSIS

Appellant had three years to file her occupational disease claim. An employee's ignorance or misunderstanding as to her ability to file a claim has never been accepted by the Board as sufficient cause to toll the time limitation.[11]

On her claim form, appellant stated that she first became aware of her condition on October 12, 2008, the last date of her employment. The time began to run when she had a compensable disability and was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to her federal employment. The Board finds that appellant knew or should have known that her lumbar condition was related to her employment at least by her last day of employment on October 12, 2008.[12] Appellant had a compensable disability and was reasonably aware that it was causally related to her federal employment. In her undated statement, she acknowledged that when she returned to work in February 2008 she performed full duty, when she felt that she should have worked within restrictions, and that by October 12, 2008 her condition became so bad that she had to stop working. This indicates that appellant should have reasonably known that her work duties contributed to her claimed condition. The time for filing her occupational disease claim began to run on October 12, 2008 the date of her last exposure to these work factors. The time limitation therefore expired on October 12, 2011 rendering her March 19, 2015 occupational disease claim untimely.

Appellant stated that her supervisor was aware of her work restrictions from her June 13, 2006 employment injury. This does not substantiate any knowledge of her employment-related

[8] *Id.*

[9] 5 U.S.C. § 8122(b); *see Luther Williams, Jr.*, 52 ECAB 360 (2001).

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

[11] *See Marcelo Crisostomo*, 42 ECAB 339 (1991).

[12] *See A.T.*, Docket No. 13-0611 (issued March 5, 2014) (where the Board found that the claimant knew or should have known that the tingling and numbness in his wrist, hands, and arms was related to his employment at least by his last day of employment on January 3, 2008; as he did not file his claim until June 13, 2011, over three years subsequent to that date, the Board held that his claim was not timely filed).

lumbar and bilateral leg conditions within 30 days of the injury.[13] Knowledge generally of an employee's illness is insufficient 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.[14]

There is no evidence that appellant's immediate superior had actual knowledge or was reasonably put on notice within 30 days of October 12, 2008 that she had developed an occupational disease from performing the duties of her position over time. There is no evidence that written notice of injury was given within 30 days. The time limitation was not tolled by reason of appellant's age or competency. There are no exceptional circumstances within the meaning of section 8122(d)(3) that would permit OWCP to excuse appellant's failure to comply with the time limitation. Because the time limitation for filing an occupational disease claim expired on October 12, 2011, the Board will affirm OWCP's July 7, 2015 decision affirming the denial of appellant's claim.[15]

On appeal, appellant's representative contends that the claim was filed within three years of August 6, 2014, which he argues is the date appellant first became aware that her condition was an occupational disease. The Board finds, however, that she stated on her claim form that she first became aware of her condition on October 12, 2008 and by August 6, 2014 Dr. Eisen was reporting that appellant's low back problems were employment related. Based on the findings and reasons set forth above, the Board finds that the representative's arguments are not substantiated.

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. §§ 10.604 through 10.607.

CONCLUSION

The Board finds that appellant has not filed a timely claim for compensation under 5 U.S.C. § 8122.

[13] *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 her complaints, this statement is not sufficient to establish that her immediate superior had actual knowledge of a work-related injury as the statement only makes a vague reference to her health and does not indicate that she sustained any specific employment-related injury, rather the knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death).

[14] *See 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).

[15] *See J.M.*, Docket No. 10-1937 (issued April 12, 2011).

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 11, 2016
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