

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

R.A., Appellant	)	
	)	
and	)	<b>Docket No. 16-0090</b>
	)	<b>Issued: March 21, 2016</b>
<b>U.S. POSTAL SERVICE, PROCESSING &amp; DISTRIBUTION CENTER, Charlotte, NC, Employer</b>	)	
	)	

*Appearances:*  
Daniel Read, Esq., 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 October 21, 2015 appellant, through counsel, filed a timely appeal from May 5 and September 14, 2015 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 filed a timely occupational disease claim under 5 U.S.C. § 8122(a).

**FACTUAL HISTORY**

On March 27, 2015 appellant, then a 62-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that he had a back condition causally related to his federal employment. On the claim form he indicated that he had talked to a physician in

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

2014 and after returning to work each day his pain was getting worse. Appellant reported on the form that he first became aware of the condition in 1998 and realized that it was causally related to employment on June 16, 1998. The reverse of the claim form indicated that he had reported the condition to his supervisor on March 5, 2015 and had stopped working on February 13, 2015. Appellant submitted a brief note from Dr. Domagoj Coric, a Board-certified neurosurgeon, indicating that he was scheduled for spinal surgery on February 20, 2015.

By letter dated March 26, 2015, the employing establishment health and resource manager challenged the claim. The manager asserted that the claim was untimely, and also failed to establish causal relationship between a condition and federal employment. OWCP sent appellant a March 30, 2015 letter, stating that the evidence was insufficient to establish timely notification of injury, and insufficient to establish an alleged employment factor. Appellant was requested to submit additional evidence.

In a response received on April 24, 2015, appellant indicated that he started working at the employing establishment in 1989, and he described his job duties. He reported that he first noticed a twitch in his back in 1998, but he did not report it as little injuries often occur at work and he continued to work. Appellant indicated that he worked until March 3, 2015 and the work he was doing aggravated his back. According to appellant he did not want to have surgery but was told by his physicians he needed fusion surgery.

Appellant also submitted an April 20, 2015 statement received on April 27, 2015. He indicated that in 2006 he had undergone L4-5 decompression back surgery, and then had returned to work after six weeks in a light-duty position. Appellant indicated that he worked as a flat sorter, and then changed to a flat sorter position that did not involve as much lifting or heavy work. He still alleged that he had to lift trays, bend over, turn and twist, and work on concrete floors. Appellant reported that he finally saw Dr. Coric in 2015 and surgery was recommended.

By decision dated May 5, 2015, OWCP denied the claim for compensation, finding that it was untimely filed. It found that the date of injury was January 1, 1998 and appellant had not filed the claim within three years.

Appellant, through counsel, requested reconsideration on June 23, 2015. He submitted additional medical evidence and argued that the claim should be accepted.

By decision dated September 14, 2015, OWCP reviewed the case on its merits and denied modification. It again found the claim was untimely filed.

### **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>2</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>3</sup> Under this

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<sup>2</sup> *Charles Walker*, 55 ECAB 238, 239 (2004).

<sup>3</sup> 5 U.S.C. § 8122(a).

section, a claim must be filed within three years unless “the immediate superior had actual knowledge of the injury or death within 30 days” or written notice of the injury or death was provided, as specified under 5 U.S.C. § 8119, within 30 days.<sup>4</sup> Pursuant to 5 U.S.C. § 8122(b), in latent disability cases, 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.

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, 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.<sup>5</sup> If the employee continues to be exposed to the identified employment factors 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>6</sup>

### ANALYSIS

In the present case, appellant filed an occupational disease claim on March 27, 2015. The evidence of record indicates that he was claiming a back injury resulting from his work duties in federal employment. Appellant noted that he began work in 1989 at the employing establishment, and he discussed his continuing job duties until he stopped working. He identified such activity as lifting, bending, twisting, and working on concrete floors. The reverse of the claim form reported that appellant stopped working on February 13, 2015.

OWCP has found the claim untimely under 5 U.S.C. § 8122(a) because appellant indicated he was aware of an employment-related back injury in 1998 and did not file the claim until 2015. It, however, failed to acknowledge that appellant’s 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>7</sup> As the Board recently explained, “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>8</sup> The date of last exposure in this case was not until appellant stopped working on February 13, 2015. His claim was therefore timely filed under 5 U.S.C. § 8122(a).

Since OWCP has not properly considered the merits of the claim, the case will be remanded to OWCP. After such further development as is warranted, OWCP should issue a *de novo* decision.

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<sup>4</sup> 5 U.S.C. § 8119.

<sup>5</sup> *Larry E. Young*, 52 ECAB 264 (2001).

<sup>6</sup> *Id.*; *Linda J. Reeves*, 48 ECAB 373 (1997).

<sup>7</sup> *Id.*

<sup>8</sup> *J.C.*, Docket No. 15-1596 (issued November 5, 2015).

**CONCLUSION**

The Board finds that appellant's occupational disease claim was timely filed under 5 U.S.C. § 8122(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 14 and May 5, 2015 are reversed and the case remanded for further action consistent with this decision of the Board.

Issued: March 21, 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