

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

J.W., Appellant)
and) Docket No. 16-1131
U.S. POSTAL SERVICE, BULK MAIL) Issued: November 16, 2016
CENTER, Atlanta, GA, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 6, 2016 appellant filed a timely appeal from a February 24, 2016 merit decision and a March 23, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant's claim for compensation was timely filed under 5 U.S.C. § 8122; and (2) whether OWCP properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 11, 2016 appellant, then a 71-year-old retired distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on June 23, 1996 she was injured when her

¹ 5 U.S.C. § 8101 *et seq.*

supervisor asked her to lift a 70-pound sack of mail, which appellant alleged was outside of her work restrictions. A supervisor noted on the claim form that appellant had retired 15 years ago and that the alleged injury occurred 20 years ago.

By letter dated January 14, 2016, the employing establishment challenged appellant's claim. It noted that she had worked in a sedentary modified position from 1993 until her retirement on September 20, 2005.

By letter dated January 20, 2016, OWCP requested that appellant submit additional evidence to support her claim for compensation. It noted that she had not submitted sufficient evidence to establish that she provided timely notification of the alleged work-related injury. Appellant was afforded 30 days to submit the additional evidence.

On January 24, 2016 appellant responded to OWCP. She stated that she tripped and fell on December 4, 1993 while performing duties of her federal employment and that she had a prior condition of right carpal tunnel syndrome.² Appellant noted that she had an intervening work-related injury on June 23, 1996 when she was ordered by her supervisor to lift a 70-pound sack of mail. She stated that she had filed a timely claim for compensation on December 17, 1996, but that she had unknowingly filed it as a recurrence rather than a new claim.

In a statement dated February 5, 2016, appellant noted that on December 17, 1996 she had filed a written notice of recurrence of disability (Form CA-2a) and that she had evidence that her claim was timely filed. She stated that she had filed this as a notice of recurrence mistakenly but that she had an intervening injury on June 23, 1996.

In a memorandum dated March 19, 1997, OWCP noted that "the question for determination is whether the claimed condition is related to the injury of December 4, 1993."³ The memorandum noted that appellant had claimed a recurrence of temporary total disability on or after June 22, 1996, alleging right hand pain causally related to the original December 4, 1993 injury.

By decision dated February 24, 2016, OWCP denied appellant's current claim. It found that the claim was untimely filed, as the alleged date of injury was June 23, 1996, but the claim was not filed until January 20, 2016, which was beyond the three-year time limit. OWCP also found that appellant had not submitted evidence that her supervisor had actual knowledge within 30 days of the alleged injury.

On March 11, 2016 appellant requested reconsideration of OWCP's February 24, 2016 decision. With her request, she submitted a statement dated March 8, 2016. Appellant claimed that her claim had mistakenly been filed as a recurrence in 1996, noting "A new emotional injury on June 22 or 23, 1996 was timely filed. An intervening incident of June 22 or 23, 1996, when my supervisor ordered me to pick up a 70-pound sack of mail. The injury or exposure prior to

² OWCP file number (xxxxxx417).

³ The memorandum from OWCP was partly illegible and incomplete, as paragraphs were crossed out, and it only included one page from a multipage document.

December 4, 1993 occurred at the time, place, and in the manner alleged, and resulted in a left hand fracture and carpal tunnel syndrome right.”⁴ Appellant also submitted several medical reports with her request for reconsideration.

In a record of a telephonic conversation dated March 21, 2016, an OWCP representative spoke to appellant and explained that the memorandum of March 19, 1997 was referencing a different claim with a different date of injury. The representative explained that, because the memorandum was referencing a different claim, she could not use that memorandum to establish her current claim with a date of injury of June 23, 1996. Appellant mentioned an emotional condition under a prior claim, to which the representative replied that she could not revisit prior claims for other injuries under the current claim.

By decision dated March 23, 2016, OWCP denied appellant’s request for reconsideration. It noted that her statement dated March 8, 2016 was repetitious of her prior statements and contained no new argument or evidence that her claim had been timely filed.

LEGAL PRECEDENT -- ISSUE 1

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.⁵ 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 be allowed even if a claim is not filed within three years if the immediate superior had actual knowledge of the injury or death within 30 days such as to put the immediate superior reasonably on notice of an on-the-job injury or death, or written notice of injury or death as specified in section 8119 was given within 30 days.⁶

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.⁷ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.⁸ For actual knowledge of a supervisor to be regarded as timely filed, an employee must show not

⁴ The record indicates that appellant had filed a prior claim for a June 22, 1993 injury under OWCP file number (xxxxxx597). That claim was filed as an occupational disease claim (Form CA-2) for the conditions of depression and anxiety.

⁵ *Charles Walker*, 55 ECAB 238, 239 (2004); *see Charles W. Bishop*, 6 ECAB 571, 571 (1954).

⁶ 5 U.S.C. § 8122(a).

⁷ *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264, 266 (2001).

⁸ *Laura L. Harrison*, 52 ECAB 515, 517 (2001).

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.⁹

Where a traumatic injury definite in time, place, and circumstances is involved, the time for giving notice of injury and filing for compensation begins to run at the time of the incident, even though the employee may not have been aware of the seriousness or ultimate consequences of his injury.¹⁰ The Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the injury.¹¹

ANALYSIS -- ISSUE 1

In the present case, appellant filed a traumatic injury claim dated January 11, 2016, alleging that on June 23, 1996 she was injured when her supervisor asked her to lift a 70-pound sack of mail, which appellant alleged was outside of her work restrictions. She later indicated that she had unknowingly or mistakenly filed a claim for recurrence in relation to this alleged injury.

With respect to timeliness of the claim, the three-year time limitation begins to run on the date of injury, as noted above. Appellant would therefore have had three years from June 23, 1996 to timely file the claim. The Form CA-1 dated January 11, 2016 was not filed within three years of June 23, 1996.

The claim could still be considered timely if the 30-day notice provisions of 5 U.S.C. § 8122 were met, but in this case no probative evidence was presented that appellant provided notice of injury within 30 days. The only evidence provided in favor of appellant's providing notice of injury was a partly illegible and incomplete memorandum dated March 19, 1997 discussing a separate claim and noting that appellant had previously claimed a recurrence of temporary total disability on or after June 22, 1996. Whether appellant's claim for recurrence was mistaken or not, this memorandum does not constitute probative evidence that appellant had notified her immediate superior of a new employment injury on June 22 or 23, 1996, such that her immediate supervisor would have actual knowledge of this new injury within 30 days. Furthermore, there is no evidence that written notice of injury was given within 30 days.

For the above reasons, the Board finds that the claim in this case was untimely filed. The evidence of record does not establish that the claim was timely under the provisions of 5 U.S.C. § 8122.

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. §§ 10.605 through 10.607.

⁹ *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

¹⁰ *Emma L. Brooks*, 37 ECAB 407, 411 (1986).

¹¹ *Supra* note 7.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹² Section 10.608(b) of OWCP's regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹³

ANALYSIS -- ISSUE 2

On March 11, 2016 appellant requested reconsideration of OWCP's February 24, 2016 decision, finding that appellant had not timely filed her claim. With her request, she submitted a narrative statement, in which she reiterated her argument that her claim had been mistakenly filed as a recurrence.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of her claim. In her March 8, 2016 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new, pertinent, and relevant legal argument not previously considered. To the extent her statement could be construed as a legal argument, it had already been considered because she had put the same argument forward prior to OWCP's February 24, 2016 decision. Thus, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

The underlying issue is whether appellant timely filed her claim for compensation. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but appellant did not submit any new evidence in this case. Her March 8, 2016 statement merely reiterated arguments that OWCP had already considered in its February 24, 2016 decision. Appellant also submitted medical reports on reconsideration, which were irrelevant to the issue of whether her claim was timely filed. As such, appellant did not submit sufficient evidence to warrant reconsideration of her claim.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

¹² 20 C.F.R. § 10.606(b)(3); *D.K.*, 59 ECAB 141, 146 (2007).

¹³ 20 C.F.R. § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

CONCLUSION

The Board finds that appellant's claim for compensation was not timely filed under 5 U.S.C. § 8122. The Board further finds that OWCP properly denied appellant's request for reconsideration of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 23 and February 24, 2016 are affirmed.

Issued: November 16, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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