

on the claim form that appellant first informed her supervisor she had this condition on December 2, 2013, asserting that “The repetitive motion in using my shoulders/arms as well as the overhead activities that I perform during my job at the (employing establishment) has continued to escalate in pain and discomfort. I spend the majority of my day at work and as the day progresses, my pain and discomfort level (increase).” She further asserted that “my supervisor was informed of my conditions and the need for light duty on several occasions.”

By letter dated May 5, 2014, the employing establishment controverted the claim, contending that it was not filed in a timely manner. It noted that she reported on her CA-2 that she became aware of the disease and the alleged relationship to her employment on October 9, 2003. The employing establishment asserted that, as appellant filed her Form CA-2 on April 30, 2014, it was beyond the statutory time limit to file this claim.

In a narrative statement received by OWCP on May 7, 2014, appellant asserted that she consulted her treating physician because she was experiencing continued problems with her right shoulder, arm, neck, and wrist. She underwent diagnostic testing which indicated that she had vascular thoracic outlet syndrome. Appellant related that her pain was exacerbated by her employment duties, which included lifting 50 to 70 pounds of mail/packages and driving most of the day. She reported that her doctor called her supervisor and informed him that she would need to be placed on light duty, with no lifting more than 20 to 25 pounds for two to three weeks and no driving for two weeks. Appellant asserted that her duties at the employing establishment were physically demanding and included moderate-to-heavy lifting, carrying, prolonged standing, walking, and reaching and that these conditions led to her lower back pain, shoulder pain, and wrist pain. She further related that, when she was at work, she was required to load and unload bulk mail, move heavy mail containers, empty mail from a variety of mail containers such as bags or hampers which required a lot of repetitive reaching, and sort/place mail into post office boxes. Appellant concluded that these activities resulted in her experiencing pain in her shoulder, back, arms, wrists, knees, and legs.

By letter dated May 21, 2014, OWCP advised appellant that she needed to submit additional factual and medical evidence in support of her claim. It further advised appellant that she apparently did not file her claim in a timely manner. OWCP noted that the date of her injury, which is the date she became aware or reasonably should have been aware of a possible relationship between her condition and her employment, was October 9, 2003, and she filed her claim on April 30, 2014. It noted that, pursuant to 5 U.S.C. § 8122, an original claim for compensation must be filed within three years of the date of injury unless the immediate supervisor had actual knowledge of a work-related medical condition within 30 days of the injury. Appellant was afforded 30 days to submit additional evidence.

In response to OWCP’s May 21, 2014 questionnaire, appellant advised that the repetitive activities she described in her Form CA-2 occurred on a daily basis while she was on duty as a mail carrier and a mail clerk. She reported that she performed these activities from 6 to 10 hours per day for the entire period she was scheduled to work. Appellant related that she had been performing these duties since she was hired in October 1995.

Appellant submitted progress notes dated November 5, 2013, received by OWCP on July 6, 2014, from Phillip A. Contino, her treating physician assistant, in which he reported that he examined her on September 24, 2003 for positional right shoulder and right arm arthralgia and

myalgia, which were increasing over the past several years.² He opined that the pain in appellant's neck and anterior chest was exacerbated by her employment duties, which required her to lift up to 50 to 70 pounds. Mr. Contino related that appellant had increasing grip loss because of this and that she experienced severe right hand pain, especially at night, which radiated to her fingers. He diagnosed thoracic outlet syndrome, symptomatic with right shoulder and hand pain, and noted that he called her boss at the employing establishment and also placed her on light duty, with restrictions of no driving and no lifting more than 20 to 25 pounds for two to three weeks.

On July 6, 2014 OWCP also received a May 15, 2014 report from Dr. Jesse L. West, IV, a Board-certified orthopedic surgeon. Dr. West noted that appellant was seen for complaints of right shoulder pain, which had worsened. He noted that appellant was currently working for the employing establishment. Dr. West diagnosed right shoulder biceps tendinitis, acromioclavicular degeneration, and impingement. He explained that appellant had failed various conservative treatments for 10 years, her temporary improvement with steroid injections indicated that most of her pain was coming from her shoulder and not her neck.

By decision dated August 4, 2014, OWCP denied appellant's claim, finding that she failed to file a timely claim. It noted that the date of injury was October 9, 2003, and that she filed her claim for compensation on April 30, 2014. OWCP further determined that there was no evidence that her immediate supervisor had actual knowledge within 30 days of the date of injury.

By letter dated July 12, 2015, received by OWCP on July 20, 2015, appellant requested reconsideration. She asserted that she provided her immediate supervisor with numerous work excuses and/or requests for limited duty and requests for time off to attend physical therapy due to her claimed thoracic outlet syndrome, beginning on October 9, 2003 and mostly recently on November 13, 2014. Appellant reiterated that her immediate supervisor was notified within the 30-day requirement several times, including by her physician assistant, Mr. Contino, who advised management that he needed to be placed on light duty with no lifting more than 20 to 25 pounds for two to three weeks and no driving for two weeks.

Appellant advised that she began to experience symptoms in her neck, which she believed were causally related to her thoracic outlet syndrome. She reported that her physician referred her to Carolina Spine and Neurosurgery for treatment of right cervical radiculopathy, which she also believed was directly related to her thoracic outlet syndrome. Appellant noted that she had pain from cervical radiculopathy radiating into her right arm, neck, chest, upper back, and right shoulder and advised that she was submitting documentation to support that Carolina Spine and Neurosurgery scheduled her for an anterior cervical discectomy and fusion procedure on September 15, 2014. She asserted that her physician recommended this procedure because physical therapy, medications, and right shoulder surgery³ had failed to completely

² See *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

³ Appellant underwent a magnetic resonance imaging (MRI) scan on July 3, 2014. She indicated on the admission form that she underwent arthroscopic surgery on her right shoulder on June 4, 2014.

relieve her neck pain. Appellant indicated that she did not return to work until after January 1, 2015 and was currently on limited duty with restrictions of no lifting exceeding over 50 pounds.

In support of her request, appellant submitted medical reports dated July 3 to November 13, 2014 which documented that she was undergoing treatment for cervical radiculopathy.

Appellant underwent a July 3, 2014 right shoulder magnetic resonance imaging (MRI) scan. She indicated on the admission form that she underwent arthroscopic surgery on her right shoulder on June 4, 2014.

In a September 15-16, 2014 report from Mission Hospital, appellant was provided with instructions in preparation to undergo cervical fusion surgery.

In addition, appellant resubmitted Mr. Contino's November 5, 2003 progress notes, along with an April 25, 2015 report in which he noted that he personally contacted her supervisor and told him that appellant needed to be placed on light duty with restrictions. In his April 25, 2015 letter, Mr. Contino also noted that he personally called appellant's supervisor at the employing establishment on November 5, 2003 and requested that she be placed on light duty for two to three weeks. He also outlined work restrictions. Mr. Contino believed that appellant's employment duties were exacerbating her symptoms. He reported that he referred her to an orthopedic surgeon for long-term management of her condition. Mr. Contino also expressed concern about appellant exacerbating her orthopedic problem in the future.

By decision dated July 29, 2015, OWCP denied appellant's request for further consideration of the merits of her claim as she neither raised substantive legal questions nor included relevant and pertinent new evidence sufficient to require OWCP to review its prior decision.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right. It vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁴ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP's regulations provide that a claimant may obtain review of the merits of his or her claim by showing that OWCP erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not considered by OWCP, or by submitting relevant and pertinent evidence not previously considered by OWCP.⁶ Evidence that repeats or duplicates evidence

⁴ 5 U.S.C. § 8128(a).

⁵ See *Annette Louise*, 54 ECAB 783 (2003).

⁶ 20 C.F.R. § 10.606(b)(3); see generally, 5 U.S.C. § 8128(a).

already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁷

Section 8122(a) of FECA⁸ provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.⁹ Section 8122(b) provides that, 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.¹⁰ The Board has held that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.¹¹ Even if a claim is not timely filed within the three-year period of limitation, it would still be regarded as timely under section 8122(a)(1) if the immediate superior had actual knowledge of her alleged employment-related injury within 30 days or written notice of the injury was provided within 30 days pursuant to section 8119.¹² The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.¹³

ANALYSIS

The Board finds that the case is not in posture for decision.

The underlying issue in this case is whether the claim was timely filed. As noted above, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.¹⁴ In appellant's July 17, 2015 letter requesting reconsideration, she indicated that she continued working with the employing establishment until the time she filed her claim on April 30, 2014. The Board finds that in denying appellant's claim as untimely filed, OWCP erroneously interpreted a point of law. OWCP denied the claim because appellant acknowledged that she became aware of her condition in 2003 and because appellant had not submitted sufficient evidence that her supervisor had actual knowledge of her injury within 30 days of the date of injury. It did not consider, however, the date of last exposure to the alleged employment factors.

Appellant had previously noted on her questionnaire form received by OWCP on July 6, 2014 that she continued to be exposed to the factors of employment allegedly causing injury. In her July 12, 2015 request for reconsideration, she related that she continued to work for the employing establishment and that her alleged condition continued to worsen causing disability

⁷ *Howard A. Williams*, 45 ECAB 853 (1994).

⁸ 5 U.S.C. § 8101 *et seq.*

⁹ *Id.* at § 8122(a).

¹⁰ *Id.* at § 8122(b).

¹¹ *See Linda J. Reeves*, 48 ECAB 373 (1997).

¹² 5 U.S.C. §§ 8122(a)(1), 8122(a)(2); *see also Larry E. Young*, 52 ECAB 264 (2001).

¹³ *Willis E. Bailey*, 49 ECAB 509 (1998).

¹⁴ *See Linda J. Reeves*, *supra* note 11.

and the need for medical treatment. OWCP, however, did not discuss or consider this relevant legal argument which was not previously considered. Therefore, the Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim constituted an abuse of discretion.¹⁵

Moreover, the Board further finds that appellant submitted relevant and pertinent new evidence in support of her reconsideration request. On July 20, 2015 OWCP was provided with a copy of an April 25, 2015 note from Mr. Contino in which he confirms he personally called appellant's supervisor on November 5, 2013 to provide notice of her work injury. Mr. Contino further cites to contemporaneous medical notes confirming this contact. For these reasons, the Board will set aside the July 29, 2015 OWCP decision and remand the case for merit review of appellant's claim that she sustained a thoracic outlet condition in the performance of duty as of October 9, 2003, pursuant to section 8128. After such further development as necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2015 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this opinion.

Issued: August 4, 2017
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

¹⁵ *L.N.*, Docket No. 12-1326 (issued November 21, 2012).