

FACTUAL HISTORY

On February 17, 2015 appellant, then a 54-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that, as a result of an “original injury sustained on December 18, 1988,” she had worsening pain. She indicated that her physician, a Dr. Johnson, ordered an x-ray on September 5, 2011 which she believed substantiated that the original injury still existed. Appellant contended that on May 3, 2013 she reopened her previous injury claim and in October 2013 she became aware that her injury was permanent and was the result of repetitive heavy lifting.³ She claimed that she developed repetitive strain injuries, musculoskeletal injuries, lumbar degenerative disc disease, spondylosis, L4-5 disc bulge and an annular tear as a result of repetitive heavy lifting required in her job. Appellant subsequently stated that she became aware of her condition on December 27, 2014 and realized that it was caused or aggravated by her employment on September 15, 2011. On the reverse of the form, the employing establishment indicated that she was terminated in 1998.

The employing establishment noted in a separate statement that appellant’s last day of work and the last day she was exposed to work conditions was March 18, 1993 and thereafter she was in leave-without-pay status. It advised that on December 24, 1997 she was issued a notice of removal that became effective after 30 days. Appellant’s removal was for failure to meet the requirements of her position. The employing establishment noted that she was separated from the employing establishment 17 years prior to filing this claim and that there was no information on the employing establishment rolls or from a supervisor who had knowledge of her.

In a statement dated February 17, 2015, appellant contended that she developed an occupational disease as a result of repetitive lifting, bending, stooping, carrying, stretching, and walking over a period of time. She noted that she was unable to perform repetitive work duties.

On July 1, 2015 the employing establishment controverted appellant’s claim as it was untimely filed. It further noted that there was no rationalized medical evidence linking her degenerative conditions to her employment. The employing establishment noted that appellant was issued a notice of removal on December 24, 1997 and that prior to that she had been in a nonwork status since March 19, 1993.

Appellant submitted reports from Dr. Ross G. Stone, an orthopedist, from May 19 to October 14, 1992, who treated her for work-related shoulder, lower back, and neck injuries. In attending physician reports (Forms CA-20) dated May 19 to October 14, 1992, Dr. Stone diagnosed cervical and lumbar spine strain, headaches, and shoulder and neck impingement. He noted by checking a box marked “yes” that appellant’s condition was causally related to her employment. In reports dated September 16 to October 14, 1992, Dr. Stone noted that she sustained a work-related cervical and lumbar injury, nerve damage to the leg, and bulging discs in December 1988. He further noted that appellant sustained a work-related shoulder and upper

³ The record reveals that appellant filed a traumatic injury claim (Form CA-1) on December 18, 1988 which was accepted by OWCP for lumbar strain, right shoulder strain, cervical strain, rotator cuff syndrome, and lateral epicondylitis, claim number xxxxxx013. On November 2, 1990 appellant filed a claim for compensation for a right collarbone and right shoulder injury, which was accepted by OWCP, claim number xxxxxx045. These claims are not before the Board on the present appeal.

extremity injury in November 1990. Dr. Stone diagnosed cervical spine strain, shoulder impingement, and chronic pain syndrome. He returned appellant to work with restrictions.

By letter dated August 13, 2015, OWCP requested additional information from appellant noting that the evidence submitted was insufficient to establish her claim. It requested the employing establishment provide a copy of the notice of removal and her position description.

Appellant submitted her traumatic injury claim (Form CA-1) dated December 18, 1988, in which she asserted that she was lifting trays at work and injured her low back. She also submitted a notice of traumatic injury on November 8, 1990 alleging that performing repetitive duties caused her right collarbone, right shoulder, and low right back injuries. A September 15, 2011 x-ray of the right hip revealed inflammatory erosion in the right acetabulum and degenerative change in the lower lumbar spine.

Appellant was treated by Dr. Timothy Olson, an orthopedist, on September 25 and October 10, 2013, for low back pain and left leg radiation that began years earlier. Dr. Olson reported that she had a longstanding work injury and was on disability since 1988. He diagnosed disorder of the muscle ligament, rotator cuff tear, sciatica, lumbosacral spondylosis, chronic low back pain with left lower extremity radiation, and lumbar degenerative disease. Dr. Olson noted that appellant had multiple pain complaints that she related to a significant work injury in 1988. He opined that it was certainly possible that a history of severe trauma would predispose her to more prominent degenerative changes as she aged and noted that degenerative changes could also occur in normal aging. In an August 22, 2015 report, Dr. Olson treated appellant for chronic low back and left leg radiculopathy. He diagnosed lumbar disc degeneration, sciatica, and muscle pain. Dr. Olson indicated that appellant's claim involved work injuries that took place 25 years ago with no imaging or assessment performed at that time which made causation difficult to state with certainty. Recent imaging showed degenerative disc and facet changes that could contribute to her symptoms, but it was possible that earlier trauma, repetitive work injury or continued activity after the injury accelerated the degenerative disc and joint disease. A magnetic resonance imaging (MRI) scan dated October 4, 2013 revealed disc bulge at L4-5 with an annular tear and mild central stenosis.

The employing establishment submitted a September 14, 2015 letter and again controverted appellant's allegation that her medical conditions were related to her job as an optical character reader (OCR) operator. It noted that she did not work 22 years as an OCR operator as alleged. The employing establishment submitted two job offers dated October 26, 1992 and January 15, 1993 for a clerical position in the marketing business office, which had been accepted by appellant. Also submitted was a job description for a mail processing clerk and a copy of the December 24, 1997 notice of removal.

In an undated statement appellant indicated that she developed a work-related medical condition on December 18, 1988 and experienced physical restrictions, which prevented her from working. She noted that 2011 x-rays revealed degenerative arthritis which she believed was caused by performing her work duties. Appellant claimed that the original injury deteriorated over time and evolved into another occupational disease. In an undated statement she, through her husband, advised that on November 2, 1990 she was reassigned to a job that

violated her restrictions and aggravated her December 18, 1988 work injury. Appellant asserted that she was required to reach above her shoulders, stretch and twist.

By decision dated September 22, 2015, OWCP denied appellant's claim as the evidence of record was insufficient to establish the events occurred as alleged.

On October 6, 2015 appellant requested reconsideration. In a statement dated September 30, 2015, she asserted that she developed degenerative changes years after the December 18, 1988 and November 2, 1990 work injuries.

By decision dated November 30, 2015, OWCP denied appellant's claim as the evidence of record failed to demonstrate that her claim was timely filed in accordance with 5 U.S.C. § 8122. It found that she first became aware of her condition on December 22, 2014 and became aware of the relationship between her employment and the claimed condition on September 15, 2011 as set forth in her claim form. OWCP advised that appellant was terminated on December 24, 1997 effective December 24, 1998, and that her last day of work and last date she was exposed to the work conditions was March 18, 1993. Appellant did not file her claim until February 17, 2015, which was over three years after she was last exposed to work factors. OWCP further noted that there was no evidence that appellant's supervisor had knowledge of the employment-related injury within 30 days.

LEGAL PRECEDENT

Section 8122(a) of FECA states that “[a]n original claim for compensation for disability or death must be filed within three years after the injury or death.”⁴ 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.⁵ 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.⁶

Appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA if her immediate supervisor had actual knowledge of her alleged employment-related injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of her injury.⁷ An employee must show not only that his or her 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.⁸

⁴ 5 U.S.C. § 8122(a).

⁵ *Id.* at § 8122(b).

⁶ *Mitchell Murray*, 53 ECAB 601 (2002); *Alicia Kelly*, 53 ECAB 244 (2001); see *Larry E. Young*, 52 ECAB 264 (2001); *Garyleane A. Williams*, 44 ECAB 441 (1993).

⁷ 5 U.S.C. § 8122(a)(1); see also *Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(a)(3) (March 1993).

⁸ *Charlene B. Fenton*, 36 ECAB 151 (1984).

ANALYSIS

In its November 30, 2015 decision, OWCP denied appellant's claim for compensation as the evidence of record failed to demonstrate that her claim was timely filed in accordance with 5 U.S.C. § 8122.

The Board finds that appellant's claim was untimely filed. The evidence shows that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between her employment and the lumbar degenerative disc disease, spondylosis, L4-5 disc bulge, and annular tear as early as September 15, 2011. In her February 17, 2015 claim form, appellant acknowledged that she first became aware that her claimed condition was caused or aggravated by her employment on September 15, 2011. She alleged that, as a result of an "original injury sustained on December 18, 1988," she had worsening pain. Appellant indicated that her physician, Dr. Johnson ordered an x-ray on September 15, 2011 which substantiated that the original injury still existed. She stated that she developed repetitive strain injuries, musculoskeletal injuries, lumbar degenerative disc disease, spondylosis, L4-5 disc bulge, and an annular tear as a result of repetitive heavy lifting required in her job. Appellant further stated on the CA-2 form that she became aware of her condition on December 27, 2014 and realized it was caused or aggravated by her employment on September 15, 2011. However, her statements show that she was aware of the relationship of her claimed conditions and her employment at least as early as September 15, 2011.

Appellant submitted a September 15, 2011 x-ray of the right hip, which revealed inflammatory erosion in the right acetabulum and degenerative change in the lower lumbar spine. In an undated statement she indicated that she developed a work-related medical condition on December 18, 1988 and experienced physical restrictions which prevented her from working. Appellant noted having x-rays done in 2011, which revealed degenerative arthritis which she believed that was caused by performing her work duties. She noted that the original injury deteriorated over time and evolved into another occupational disease. The Board finds that the evidence shows that appellant was aware or should have been aware as early as September 15, 2011 that her claimed injury was due to work factors.

Therefore, the time limitations began to run on September 15, 2011, when appellant stated that she was first aware that her condition was attributable to her employment. Since she did not file a claim until February 17, 2015 her claim was filed outside the three-year time limitation period under section 8122(b).⁹

Appellant's claim, however, would still be regarded as timely under section 8122(a)(1) of FECA if her immediate supervisor had actual knowledge of the injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job

⁹ *J.P.*, 59 ECAB 178 (2007).

injury or death.¹⁰ Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days.¹¹

In the present case, the record contains no evidence that appellant's supervisor had actual knowledge of the injury or that written notice of the injury was given within 30 days. The employing establishment noted on the February 17, 2015 CA-2 form that appellant was terminated in 1998 and they could not locate information on the employing establishment rolls or from a supervisor who had knowledge of her or her claim of injury. Additionally, appellant failed to submit any information to substantiate that management was aware that she had lumbar degenerative disc disease, spondylosis, L4-5 disc bulge, and annular tear causally related to her employment. There was no statement from a supervisor establishing knowledge of a new work-related injury.¹² Knowledge merely of an employee's illness is not sufficient to establish actual knowledge and timeliness, 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.¹³ Therefore, the Board finds that appellant has not established actual knowledge by her supervisors of her work-related condition within 30 days and therefore has not established a timely claim. The record is devoid of any indication that appellant's immediate supervisors had written notice of her work-related injury within 30 days. The exceptions to the statute have not been met, and thus, she has failed to establish that she filed a timely claim on February 17, 2015.

On appeal appellant asserts that the claims examiner incorrectly noted that she was aware of her condition on September 15, 2011 rather, appellant indicated that she did not become aware of her condition until September 25, 2013 when her physician read the results of her MRI scan report. As explained, she clearly stated on her claim form that she first realized her condition was caused by her employment on September 15, 2011. The claim form also advises that, as a result of an "original injury sustained on December 18, 1988," appellant had worsening pain. Her arguments of later awareness are unsubstantiated. Appellant has not otherwise explained how, by the exercise of reasonable diligence, she would not have been aware of the relationship between her condition and her employment. She further asserts that the employing establishment stipulated knowledge of her lumbar injuries sustained in the performance of duty because they were included in the notice of removal issued in 1997. The Board notes that the notice of

¹⁰ 5 U.S.C. § 8122(a)(1); see *Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

¹¹ *Id.* at § 8122(a)(1) and (2).

¹² 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).

¹³ 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).

removal dated December 24, 1997 did reference appellant's traumatic injury claim on December 18, 1988 which had been accepted by OWCP for lumbar strain, right shoulder strain, cervical strain, rotator cuff syndrome, and lateral epicondylitis, in claim number xxxxxx013. It is unclear how this evidence reference, however, would satisfy the requirement that appellant's immediate superior had actual knowledge of a separate occupational disease claim within 30 days of the claimed injury. Based on the findings and reasons set forth above, the Board finds that appellant'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. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant's occupational disease claim is barred by the applicable time limitation provisions of FECA.

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 6, 2017
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