

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

C.M., Appellant)
and) Docket No. 17-0519
DEPARTMENT OF HOMELAND SECURITY,) Issued: May 12, 2017
TRANSPORTATION SECURITY)
ADMINISTRATION, FEDERAL AIR)
MARSHAL SERVICE, Sunrise, FL, Employer)

)

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 9, 2017 appellant filed a timely appeal from a November 17, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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's claim for compensation was timely filed pursuant to 5 U.S.C. § 8122.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the November 17, 2016 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. Thus, the Board is precluded from reviewing this evidence on appeal. See 20 C.F.R. § 501.2(c)(1); see also Dennis E. Maddy, 47 ECAB 259 (1995).

On appeal appellant contends that he did not receive any notices regarding his claim because he was in the middle of his move from Miami, FL, to the Washington, DC, area. He asserts that he had all of his mail held at a post office from October 31, 2016, the date he moved into temporary quarters, until November 22, 2016,³ the closing date of his new home.

FACTUAL HISTORY

On September 1, 2016 appellant, then a 40-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that on February 2, 2013 he had constant ringing in his ears while on descent in a flight from Florida to Washington, DC. He alleged that his head and ears became clogged and were not able to clear and equalize the pressure.

On the reverse of the claim form, R.P., a supervisor, indicated that he did not receive notice of appellant's alleged injury until September 9, 2016.

By letter dated October 14, 2016, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It informed him of the medical and factual evidence needed and also advised him that the evidence was insufficient to show that he timely filed his claim. OWCP requested that appellant submit such evidence and respond to the provided questions within 30 days. The letter was mailed to his address provided on the September 9, 2016 Form CA-1. In another letter dated October 14, 2016, OWCP requested that the employing establishment submit evidence within 30 days regarding the timeliness of appellant's claim. Neither appellant nor the employing establishment responded to OWCP's factual inquiries.

In a November 17, 2016 decision, OWCP denied appellant's claim that he sustained an injury in the performance of duty on February 2, 2013. It found that he had established that he was a federal civilian employee who filed a timely claim and that the injury and/or event(s) occurred as described. However, OWCP further found that appellant had not established the medical component of the third basic element, fact of injury. It noted that he had not submitted any evidence containing a medical diagnosis in connection with the accepted February 2, 2013 work incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁴

³ It appears that appellant inadvertently stated that he had his mail held at the post office until November 22, 2017 rather than November 22, 2016 as he provided a new street address in Haymarket, Virginia, on his January 9, 2017 Application for Review (Form AB-1).

⁴ J.H., Docket No. 14-1219 (issued November 24, 2014).

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 The Board may raise the issue on appeal even if OWCP did not base its decision on the time limitation provisions of FECA.⁶

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.⁷

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.⁸ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.⁹ For actual knowledge of a supervisor to be regarded as timely filed, an employee must show not 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.¹⁰

When 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 or her injury.¹¹ 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.¹²

ANALYSIS

On September 1, 2016 appellant filed a traumatic injury claim alleging that on February 2, 2013 he sustained an injury to his ears as a result of the descent during a flight from

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

⁶ *Id.*

⁷ 5 U.S.C. § 8122(a).

⁸ *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264, 266 (2001).

⁹ *Laura L. Harrison*, 52 ECAB 515, 517 (2001).

¹⁰ *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

¹¹ *Emma L. Brooks*, 37 ECAB 407, 411 (1986).

¹² *Delmont L. Thompson*, *supra* note 10.

Florida to Washington, DC, while at work. The Board finds that his claim was not timely filed in a timely manner.

The time for appellant giving notice of injury and filing for compensation began to run at the time of the claimed incident on February 2, 2013.¹³ Appellant did not file his Form CA-1 for a work injury until September 1, 2016. Therefore, appellant's claim for this injury was not filed within the requisite three-year time limitation period.

Appellant's 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 he provided notice of injury within 30 days. R.P. reported that he did not receive notice of appellant's claimed injury until September 9, 2016. Further, appellant did not provide any evidence that his immediate superior had actual knowledge of an employment injury within 30 days, nor is there any evidence that written notice of injury was given within 30 days. He did not respond to OWCP's questionnaire and did not provide OWCP with additional factual evidence regarding the delay in filing his claim.

The Board finds, therefore, 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.

On appeal appellant contends that he did not receive any notices regarding his claim because he was in the middle of his move from Miami, FL, to the Washington, DC, area. He asserts that he had all of his mail held at a post office from October 31, 2016, the date he moved into temporary quarters, until November 22, 2016, the closing date of his new home, but the claim was already untimely at that time and, whether appellant had received notice or not, would not render timely the otherwise untimely claim.

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 claim for compensation was not timely filed pursuant to 5 U.S.C. § 8122.

¹³ See *supra* notes 10 and 11.

ORDER

IT IS HEREBY ORDERED THAT the November 17, 2016 decision of the Office of Workers' Compensation Programs is affirmed, as modified herein.

Issued: May 12, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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