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

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| **I.W., Appellant** | ) | |
| **and** | ) | **Docket No. 17-0958** |
| | ) | **Issued: November 13, 2017** |
| **U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer** | ) | |

*Appearances:*
*Stephen Larkin*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On April 2, 2017 appellant, through her representative, filed a timely appeal from a January 25, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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's occupational disease claim is timely pursuant to 5 U.S.C. § 8122(a).

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

This case has previously been before the Board.[3] The facts of the case, as set forth in the prior decision, are incorporated herein by reference. The relevant facts are as follows.

On March 19, 2015 appellant, then a 49-year-old letter carrier, filed an occupational disease claim (Form CA-2) for an injury to her lumbar back and both legs.[4] She indicated that she first became aware of her disease or illness on October 12, 2008. The employing establishment advised that appellant stopped work on October 12, 2008. Before she stopped work, appellant explained that she had been working full duty for eight months including repetitive lifting, bending, and standing. As of March 19, 2015, she had not yet resumed work.

Appellant had previously sustained a work-related traumatic injury (Form CA-1) on June 13, 2006, which OWCP accepted for cervical sprain, left shoulder sprain, and lumbar sprain, under OWCP File No. xxxxxx157.[5]

With respect to her current occupational disease claim, appellant submitted an undated statement in which she indicated that while working on June 13, 2006 she fell backwards, landing first on her buttocks, and then on her back. She further stated that she returned to work on February 18, 2008. Appellant indicated that both her treating physician and an OWCP referral physician provided work restrictions, but appellant's supervisor reportedly told her that she would not comply with these restrictions. Appellant's union filed a grievance and an Equal Employment Opportunity (EEO) complaint while appellant returned to full-duty work. Appellant further explained that she worked full duty until October 12, 2008 when she had to stop work because her condition had worsened. She stated that she was advised to see Dr. Deborah Eisen, a Board-certified family practitioner, who saw her on August 6, 2014 and informed her that her condition was an occupational disease.

In a March 2, 2015 report, Dr. Eisen stated that appellant presented on August 6, 2014 for evaluation and treatment of an unresolved employment-related condition. She diagnosed aggravation of a bulging disc into a herniated lumbar disc. Dr. Eisen explained that appellant's condition was actually an occupational disease that occurred over an eight-month period, as well as anterolisthesis at L4-5, and lumbar sprain. She further indicated that the aggravated injury occurred because restrictions were not followed, and that appellant's duties from February 18 to October 12, 2008 caused her current diagnosed conditions.

[3] Docket No. 15-1691 (issued February 11, 2016).

[4] Appellant signed the claim form on March 4, 2014. However, elsewhere on the Form CA-2 she identified a subsequent date, August 6, 2014, as the date she first realized her condition was employment related. The employing establishment completed its portion of the Form CA-2 on March 19, 2015, and advised that appellant first reported her condition on March 17, 2015.

[5] As discussed *infra*, OWCP also accepted an October 16, 2008 recurrence of disability under File No. xxxxxx157. The complete case record associated with appellant's June 13, 2006 traumatic injury claim is not currently available to the Board.

On April 15, 2015 the employing establishment controverted appellant's claim on the basis of causal relationship and timely filing. It noted that she did not file the claim within three years of October 12, 2008; the date she reportedly became aware of her condition. The employing establishment also argued that appellant had not established a causal relationship between her condition and factors of employment. Lastly, it noted that she had been receiving compensation under OWCP File No. xxxxxx157 that was terminated on August 17, 2012 because the condition was not injury related. The employing establishment represented that appellant was again claiming the "same condition."

In a May 7, 2015 letter, OWCP advised appellant of the deficiencies in her claim and afforded her 30 days to submit additional evidence and respond to its inquiries.

Appellant submitted a narrative statement and reports dated February 23 through June 2, 2015 from Dr. Eisen who diagnosed anterolisthesis at L4-5, herniated lumbar disc, and lumbar strain and advised that appellant was totally disabled for work.

On January 31, 2014 Dr. Vadim Kushnerik, a pain management specialist, diagnosed herniated discs causing nerve compression and opined that appellant's employment injury on June 13, 2006 and exacerbation in 2008 caused her lumbar condition.

By decision dated July 7, 2015, OWCP denied appellant's occupational disease claim because it was untimely filed.

In its decision dated February 11, 2016, the Board affirmed OWCP's July 7, 2015 decision on the basis that appellant's claim was untimely filed under 5 U.S.C. § 8122. The Board found that the three-year time limitation for filing her claim began to run on October 12, 2008 and expired on October 12, 2011. As such, appellant's March 19, 2015 occupational disease claim was untimely. The Board further found that there was no evidence that appellant's immediate superior had actual knowledge or was reasonably put on notice within 30 days of October 12, 2008. The Board specifically found that there was no evidence that "written notice of injury was given within 30 days." Additionally, the Board found that there were no exceptional circumstances within the meaning of FECA that would excuse appellant's untimely filing.

On August 28, 2016 appellant's representative requested reconsideration and submitted a copy of an October 24, 2008 claim for a recurrence of disability (Form CA-2a) that appellant filed under OWCP File No. xxxxxx157. She claimed to have sustained a recurrence of total disability on October 16, 2008, which was related to her June 13, 2006 original injury. Appellant stated that there was a limited-duty agreement in place, but it was not honored and her condition had been aggravated while working full duty for a period of seven months. Her immediate supervisor signed the Form CA-2a on October 24, 2008. Additionally, the employing establishment indicated that appellant had been offered a limited-duty assignment and when her doctor requested that her limitations be modified, it accommodated the new restrictions.

On reconsideration, appellant's representative argued that her uncertainty as to the appropriate claim to file (recurrence or new occupational disease) did not mean that management was unaware of the worsening of appellant's condition over a period of time. He further argued

that the Form CA-2a had been submitted within 30 days of the date of injury, and as such, the claim was timely.

By decision dated January 25, 2017, OWCP denied modification of its prior decision finding that appellant's occupational disease claim was untimely filed and the Form CA-2a failed to substantiate that appellant's supervisor had knowledge of her employment-related lumbar and bilateral leg conditions within 30 days of the date of injury. It further found that a claim for a recurrence sustained on October 16, 2008 was filed and accepted under File No. xxxxxx157. Considering the acceptance of the recurrence under the other claim number, OWCP found that it was unclear how appellant's immediate superior would have had actual knowledge or was reasonably put on notice within 30 days of the October 12, 2008 date of injury that she had developed an "occupational disease" from performing her employment duties.

## ***LEGAL PRECEDENT***

An original claim for compensation for disability or death must be filed within three years after the injury or death.[6] A claim filed outside this time frame must be disallowed unless the immediate superior had actual knowledge of the injury or death within 30 days.[7] Knowledge by the immediate superior, another official at the employing establishment, or any employing establishment physician or dispensary that an employee has sustained an injury, alleges that an injury has been sustained, or alleges that some factor of the employment has resulted in a physical condition constitutes actual knowledge.[8]

In a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware or by the exercise of reasonable diligence should have been aware of the causal relationship of the compensable disability to his employment.[9] An employee with actual or constructive knowledge of her employment-related condition, who continues to be exposed to injurious working conditions, must file a claim within three years of the date of last exposure to the implicated conditions.[10]

[6] 5 U.S.C. § 8122(a).

[7] *Id.* at § 8122(a)(1).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3a(3) (March 1993). Such knowledge or notification must be such as to put the employing establishment reasonably on notice of an on-the-job injury or death. *See* Chapter 2.801.3a(3)(c). It is not sufficient that the immediate superior, official or dispensary worker at the employing establishment was aware that the employee complained of back pain, suffered a myocardial infarction, etc. *Id.* To constitute actual knowledge, it must be found that the immediate superior, other official, or dispensary worker was aware that the employee related the back pain, MI, etc. to an injury sustained while in the performance of duty or to some factor of the employment. *Id.*

[9] 5 U.S.C. § 8122(b).

[10] *E.g., James A. Sheppard*, 55 ECAB 515, 518 (2004); *supra* note 8 at Chapter 2.801.6.

## ***ANALYSIS***

On the March 19, 2015 Form CA-2, appellant represented that she first became aware of her claimed condition on October 12, 2008. Additionally, the employing establishment represented that October 12, 2008 was the date that she was last exposed to the conditions that allegedly caused her disease or illness. Appellant had stopped work on that date and had not since returned as of the March 19, 2015 date of filing.

In its prior decision, the Board found that the three-year period for filing a timely claim commenced on October 12, 2008 and ended October 12, 2011. Because appellant waited until March 19, 2015 to file her Form CA-2, the Board found that the claim was untimely filed. The Board further found that there was no evidence that appellant's immediate superior had actual knowledge or was reasonably put on notice within 30 days of October 12, 2008. The Board specifically found that there was no evidence that "written notice of injury was given within 30 days." Thus, the Board affirmed OWCP's denial of the claim as untimely pursuant to 5 U.S.C. § 8122.

Appellant was previously injured in a work-related fall on June 13, 2006, addressed in OWCP File No. xxxxxx157. Her accepted conditions under that prior traumatic injury claim included cervical, left shoulder, and lumbar sprains. On reconsideration, appellant's representative submitted a copy of an October 24, 2008 Form CA-2a that appellant filed in connection with OWCP File No. xxxxxx157. An employing establishment representative -- "official superior" -- signed and dated the Form CA-2a on October 24, 2008.

In its January 25, 2017 decision, OWCP acknowledged that under File No. xxxxxx157 it previously accepted a recurrence of disability beginning October 16, 2008. Although the employing establishment received the Form CA-2a within 30 days of the claimed October 2008 occupational disease, the senior claims examiner found that the October 24, 2008 Form CA-2a was insufficient to place appellant's immediate superior on notice of her claimed October 12, 2008 "occupational disease." The Board agrees.

The October 24, 2008 Form CA-2a noted that there was a limited-duty agreement in place but it was not honored by management, and consequently, appellant's condition had been aggravated while working full duty for a period of seven months. An employing establishment representative signed the Form CA-2a on October 24, 2008. Appellant's representative essentially argued that the uncertainty as to which claim form to file (Form CA-2 or Form CA-2a) did not negate the fact that the employing establishment had been notified that appellant believed her claimed condition was employment related.

The Board finds that the October 24, 2008 Form CA-2a was insufficient to establish the immediate superior's actual knowledge of appellant's claimed lumbar and bilateral leg condition within 30 days of the injury (*i.e.*, October 12, 2008 date of awareness of condition). The recurrence claim, which OWCP ultimately accepted, only provided notice of a worsening of the June 13, 2006 traumatic injury under OWCP File No. xxxxxx157. The Form CA-2a did not provide notice that appellant had developed an occupational disease due to factors of her federal employment.

The Board further finds that appellant's March 19, 2015 occupational disease claim was an improper duplicate claim of her June 13, 2006 traumatic injury claim. Appellant did not allege any new work factors or exposure. As such, the occupational disease claim should not have been created and OWCP should not have undertaken development with respect to this duplicate claim.[11]

## ***CONCLUSION***

The Board finds that appellant's occupational disease claim was untimely pursuant to 5 U.S.C. § 8122. Furthermore, the Board finds that the claim was an improper duplicate of appellant's June 13, 2006 traumatic injury claim under OWCP File No. xxxxxx157.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the January 25, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 13, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy 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

[11] *See S.W.*, Docket No. 16-0219 (issued April 5, 2016).