

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

C.S., Appellant	)	
	)	
and	)	<b>Docket No. 18-0009</b>
	)	<b>Issued: March 22, 2018</b>
<b>DEPARTMENT OF ENERGY, UPPER GREAT PLAINS, Watertown, SD, Employer</b>	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 2, 2017 appellant, through counsel, filed a timely appeal from a July 31, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant's occupational disease claim is barred by the applicable time limit provisions of 5 U.S.C. § 8122(a).

On appeal counsel argues that appellant's claim was timely filed as the statute of limitations did not begin until appellant became aware that her condition was occupationally related.

## **FACTUAL HISTORY**

On October 11, 2016 appellant, then a 57-year-old power system dispatcher, filed an occupational disease claim (Form CA-2) alleging that her pulmonary disease was employment related. She noted that she first became aware of her condition on August 1, 2009, but did not realize the relationship to her temporary duty in Kirkuk, Iraq until December 10, 2015. On the back of the form, the employing establishment noted January 28, 2010 as the date of last exposure to the conditions appellant alleged to have caused her condition.

Accompanying appellant's claim was an undated statement detailing the history of her condition. She related that during the spring of 2009 she developed a serious cold which eventually settled into her lungs which she thought was bronchitis and laryngitis. When the condition did not resolve after two weeks, appellant sought medical care from a base physician who recommended a visit to her treating physician when she returned to the United States (U.S.). Shortly thereafter she returned to the U.S. and was diagnosed and treated for bronchitis. Over the following year appellant developed bronchitis and laryngitis every four to six weeks, which continued until the end of her temporary detail to Iraq in 2010. She stated that during her last two weeks in Iraq her supervisor wanted to confine her to her quarters because he thought her illness was contagious. In 2010 appellant was seen in the emergency room as she had coughed up blood. Diagnostic testing was performed, but nothing was found. In 2011 appellant again developed breathing problems and felt like she was getting the flu. She saw specialists who diagnosed and treated her for chronic obstructive pulmonary disease (COPD) and asthma. However, appellant did not get better and after three years she was referred by an internist to a cardiologist and pulmonologist. The cardiologist attributed appellant's lung condition to her 20-month detail to Iraq and her exposure to fire pit fumes, petroleum fuels, chemical residues, asbestos, radioactive material, and sand particles. Appellant noted that she traveled to various locations in Iraq where she was exposed to irritants, chemicals, and smoke at each location. Since returning from her detail in Iraq in 2010, she stated she had intermittent time loss due to the injury she sustained while on her detail to Iraq.

Appellant submitted diagnostic testing from March 7 to September 24, 2016 and medical reports from Dr. Silpa Krefft, a Board-certified pulmonologist, occupational medicine physician, and internist, Dr. Cecil Rose, a Board-certified pulmonologist, occupational medicine physician, and Dr. Stephen Savran, a Board-certified cardiologist, cardiologic disease, and internist. The testing included blood gas studies, chest and arteriography computerized tomography scans, echocardiograms (EKG), x-ray interpretations, measurement of substance levels, and stress test results.

In a January 11, 2016 report, Dr. Savran, based upon medical and employment histories and physical examination, diagnosed breathing abnormalities and COPD. Dr. Savran, subsequently in a February 8, 2016 report, further diagnosed hypoxemia, and COPD.

On May 24, 2016 appellant was seen by Dr. Krefft and Dr. Rose for respiratory complaints. She related having no health problems prior to her detail to Iraq in 2008, that she was deployed there from 2008 to 2010, and that she traveled around Iraq although she was stationed in Kirkuk. Approximately 90 percent of appellant's work was administrative and she also spent time visiting various outdoor sites, where she was exposed to sand storms, chemical fumes, and other irritants. Between 2009 and 2010 appellant developed laryngitis and bronchitis which was treated with cough syrup by base medical personnel. When her symptoms continued she again sought treatment in Iraq and was told there were limitations as to what could be done, but it was recommended she see her treating physician when she returned home. During a brief trip home, her treating physician prescribed medicine which resolved her symptoms. However, following her return to Iraq the symptoms returned and continued following her return home in 2010. A summary of her current work duties, medical history, and physical examination findings were detailed. Diagnoses included dyspnea, lightheadedness and dizziness due to the dyspnea, frequent loss of voice and throat irritation, sleep-related symptoms, and chest pain.

Appellant was seen for a follow-up visit on May 26, 2016 by Dr. Krefft and Dr. Rose. Medical reports were reviewed and test results were noted and discussed with appellant. Dr. Krefft and Dr. Rose diagnosed asthma and laryngeal dysfunction which was attributed to appellant's Iraq detail.

By development letter dated October 12, 2016, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It further advised that the evidence did not establish that her claim had been timely filed. Appellant was afforded 30 days to submit additional evidence to establish her claim.

In response to OWCP's request for additional information appellant submitted a December 1, 2016 chemical test result and December 1, 2016 treatment notes from Dr. David Carlson, a treating Board-certified anatomic and clinical pathologist, in which he diagnosed deployment syndrome lung disease.

By decision dated December 12, 2016, OWCP denied appellant's claim as it had not been filed within the applicable time limits of 5 U.S.C. § 8122. It noted that she first was aware of her condition in 2009 and she did not file her claim until October 11, 2016, which was more than three years later.

In a letter dated January 9, 2017, appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on June 22, 2017.

By decision dated July 31, 2017, the hearing representative affirmed the December 12, 2016 decision. He found appellant should have reasonably been aware of the connection between her respiratory condition and her temporary-duty assignment on or about January 28, 2010.

## LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.<sup>3</sup> 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.<sup>4</sup>

In a case of occupational disease, the time for filing a claim begins to run when the employee first becomes aware, or reasonably should have been aware, of a possible relationship between his condition and his employment. Such awareness is competent to start the limitation period even though the employee does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.<sup>5</sup> Where the employee continues in the same employment after she reasonably should have been aware that she has a condition which has been adversely affected by factors of federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.<sup>6</sup> Section 8122(b) of FECA provides that the time for filing in latent disability cases 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.<sup>7</sup> The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.<sup>8</sup>

## ANALYSIS

The Board finds that appellant's claim was untimely filed.

The record establishes that appellant's last exposure to the alleged toxins during her detail to Iraq occurred on January 28, 2010. Because appellant filed this claim on October 11, 2016 it was not filed within three years of the date of last exposure.

Appellant has alleged that she did not become aware of the connection between her respiratory condition and factors of her federal employment until December 10, 2015. A review of the record, however, shows that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between her employment exposure and her respiratory condition by 2011, when she relates she was diagnosed with COPD and asthma. Appellant's statements and the medical reports by Dr. Krefft and Dr. Rose confirm that she knew or reasonably should have known of the relationship between her respiratory condition and the factors of her employment by 2011, at the latest. In her statement appellant noted that her symptoms from her deployment appeared to have been treated by medicine upon her return home

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<sup>3</sup> *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002).

<sup>4</sup> *W.L.*, 59 ECAB 362 (2008); *Gerald A. Preston*, 57 ECAB 270 (2005); *Laura L. Harrison*, 52 ECAB 515 (2001).

<sup>5</sup> *Larry E. Young*, 52 ECAB 264 (2001).

<sup>6</sup> *Id.*

<sup>7</sup> 5 U.S.C. § 8122(b).

<sup>8</sup> *Gerald A. Preston*, 57 ECAB 270 (2005); *Debra Young Bruce*, 52 ECAB 315 (2001).

in 2010, but resurfaced following her return to Iraq. In addition, the medical reports from Dr. Krefft and Dr. Ross note appellant had no respiratory problems prior to her deployment, her exposure to various irritants including sand, asbestos, gas vapors, and other irritants during her deployment to Iraq, the development of bronchitis and laryngitis in 2009, that she was coughing up blood following her return from Iraq in early 2010, and medication was prescribed for shortness of breath in 2011. These facts were followed by the diagnosis of COPD and asthma in 2011.

Appellant alleged that she was not aware that her respiratory condition was due to her exposure to toxins during her deployment to Iraq until December 10, 2015, when her cardiologist attributed her condition to her deployment. She argued that, although she had respiratory complaints for which she was treated, she did not realize that it had been caused by her toxin exposure in Iraq. The Board notes that while appellant's COPD and asthma were diagnosed in 2011, she did not submit any medical reports until 2015; therefore, the record is incomplete as to why appellant would not have known that these diagnoses were related to her exposures in Iraq. As the Board has previously noted, when an employee becomes aware or reasonably should have become aware, that she has a condition which has been adversely affected by factors of her employment, such awareness is competent to start the running of the time limitations period, even though she does not know the precise nature of the impairment, or whether the ultimate result of such adverse effect would be temporary or permanent.<sup>9</sup> In discussing the degree of knowledge required by the employee prior to filing a claim, the Board has emphasized that she need only be aware of a possible relationship between her condition and her employment to commence the statute of limitations. The Board has not required that appellant have definitive evidence of a condition and causal relationship on the date the claim is filed.<sup>10</sup> Appellant experienced and was treated on multiple occasions for ongoing respiratory problems including coughing up blood during her deployment to Iraq and continued to receive treatment for respiratory problems following her return on January 28, 2010. Although she may have had some doubt as to a definitive diagnosis, the Board finds that she knew or reasonably should have known, of a relationship between her condition and her employment when her COPD and asthma were diagnosed in 2011.<sup>11</sup>

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

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<sup>9</sup> See *Edward Lewis Maslowski*, 42 ECAB 839 (1991). See also *Percy E. Rouse*, 26 ECAB 214 (1974).

<sup>10</sup> See *Edward Lewis Maslowski*, *id.* See also *William A. West*, 36 ECAB 525 (1985).

<sup>11</sup> Cf. *Willie Wade*, Docket No. 03-0425 (issued April 4, 2003) (where appellant experienced only minor symptoms of wrist pain during his period of employment and the medical evidence did not show that his condition was such that he was aware or should have been aware of a possible employment related cause for his condition at that time, the Board found that it was reasonable that he would not relate his claimed upper extremity condition to his employment at that time).

injury or death.<sup>12</sup> Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days.<sup>13</sup>

In the present case, the record contains no evidence that appellant's supervisor had actual knowledge of the employment injury or that written notice of the injury was given within 30 days. Appellant failed to submit any information to substantiate that management were aware that her respiratory problems were causally related to her employment. There was no statement from a supervisor establishing knowledge of a work-related injury.<sup>14</sup> Knowledge merely of an employee's illness is insufficient 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.<sup>15</sup> 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 October 11, 2016.

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 5 U.S.C. § 8122(a).

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<sup>12</sup> 5 U.S.C. § 8122(a)(1); *see Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

<sup>13</sup> *Id.* at § 8122(a)(1) and (2).

<sup>14</sup> *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).

<sup>15</sup> *See Roseanne S. Allexenberg*, 47 ECAB 498 (1996) (where the Board held that knowledge of an employee's illness is insufficient 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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 31, 2017 is affirmed.

Issued: March 22, 2018  
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