United States Department of Labor
Employees' Compensation Appeals Board

J.E., Appellant	)	
and	)	**Docket No. 16-1493**
	)	**Issued: May 7, 2018**
DEPARTMENT OF HEALTH & HUMAN SERVICES, CLAREMORE INDIAN HOSPITAL, Claremore, OK, Employer	)	

Appearances:
Appellant, pro se
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 July 12, 2016 appellant filed a timely appeal from a February 24, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 occupational disease claim is barred by the applicable time limitation provisions of 5 U.S.C. § 8122(a).

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted new evidence on appeal. The Board's review jurisdiction is limited to the evidence which was t before OWCP at the time it issued its final decision. Therefore, the Board is precluded from reviewing this new evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On October 26, 2015 appellant, then a 61-year-old former nurse aide/scrub technician, filed an occupational disease claim (Form CA-2) alleging that, on April 1, 2015, she first realized that her bilateral calcaneal spurs and bilateral plantar fasciitis were caused by performing her work duties for 16 years on concrete and hard surface floors.[3] She explained that her claim was not filed within 30 days of her claimed injury because she had only recently realized the extent and cause of her bilateral foot pain and discomfort after a discussion with her physician. In an accompanying undated narrative statement, appellant again alleged that she sustained a work-related bilateral foot injury. She described her work schedule and work duties and listed the physicians who treated her bilateral foot pain. Appellant indicated that she first sought medical treatment for her bilateral foot pain in 2002 from a Dr. Neville. She noted that she was also treated by Dr. Margiotta and Dr. Jones. In 2013 appellant was treated by Dr. Lashley, Dr. Green, and Dr. Burke.[4] She related that Dr. Jones and Dr. Lashley performed injections to treat her bilateral foot pain. Appellant further related that she was provided with inserts and referred to physical therapy for ultrasound treatment of her feet by Dr. Green.

A notification of personnel action (Form SF-50) dated August 4, 2009 indicated that appellant was removed from the employing establishment effective July 10, 2009 due to her medical inabilty to perform her work duties.

In a December 1, 2015 medical report, Dr. John W. Ellis, a Board-certified family practitioner, noted that he initially examined appellant regarding her foot conditions on October 14, 2015. He provided her history and reviewed medical records noting that she began having pain in the bottom of both feet in 2006 for which she was diagnosed with plantar fasciitis and had physical therapy for the condition until April 2015, after which she stopped treatment due to the death of her mother and having to attend to matters associated with this. Dr. Ellis reported findings on examination of both feet and diagnosed right and left plantar fasciitis and right and left calcaneal spurs. He opined that, based on his examination, review of the medical records and other records, his education, training, and experience, and upon reasonable medical certainty, it was more probable than not that the diagnosed conditions were caused or aggravated by appellant's federal employment. Dr. Ellis explained that many years of standing as a nurse's aide and especially as a scrub technician, which required standing in one position for prolonged periods, had caused the plantar fascia in her feet to become inflamed which caused plantar fasciitis. He further explained that prolonged standing also had contributed to the calcaneal spurs in both feet. Dr. Ellis noted that the calcaneal spurs were a normal process of aging. He related that they were aggravated by prolonged standing in appellant's noted positions. Dr. Ellis indicated that calcaneal spurs did not necessarily cause plantar fasciitis. He concluded that plantar fasciitis was separate from calcaneal spurs and aging process.

[3] The Board notes that appellant filed a second Form CA-2 on December 27, 2015 for the same bilateral foot conditions as requested by OWCP because she did not submit the first Form CA-2 through her employing establishment.

[4] The Board notes that the professional qualifications of Drs. Neville, Margiotta, Jones, Lashley, Green, and Burke are not contained in the case record.

In a January 22, 2016 development letter, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It informed her that the evidence was not sufficient to show that she timely filed her claim and also advised her of the medical and factual evidence needed to establish her claim. Appellant was afforded 30 days to submit such evidence. She did not submit additional evidence within the allotted time.

In a February 24, 2016 decision, OWCP denied appellant's claim for compensation, finding that she failed to file a timely claim within the requisite three years under section 8122 of FECA. It found that the date of injury was July 10, 2009, the date she last worked at the employing establishment, and that her claim for compensation was not filed until October 26, 2015. OWCP further found that there was no evidence that appellant's immediate supervisor had actual knowledge within 30 days of the day of injury.

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.[5] 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.[6]

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 or her condition and his or her employment. Such awareness is competent to start the time 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.[7] Where the employee continues in the same employment after he or she reasonably should have been aware that he or 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.[8] 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.[9] It is the employee's burden to establish that a claim is timely filed.[10]

ANALYSIS

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

[5] *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002).

[6] *W.L.*, 59 ECAB 362 (2008); *Gerald A. Preston*, 57 ECAB 270 (2005); *Laura L. Harrison*, 52 ECAB 515 (2001).

[7] *Larry E. Young*, 52 ECAB 264 (2001).

[8] *Id.*

[9] 5 U.S.C. § 8122(b).

[10] *Gerald A. Preston*, 57 ECAB 270 (2005); *Debra Young Bruce*, 52 ECAB 315 (2001).

The record establishes that appellant's last exposure to the implicated factors of her federal employment occurred on July 10, 2009. She filed her occupational disease claim on October 26, 2015, more than three years after the date of last exposure. Consequently, appellant filed her claim outside the three-year time limitation period.[11]

Appellant has alleged that she did not become aware of the connection between her bilateral calcaneal spurs and bilateral plantar fasciitis and factors of her federal employment until April 1, 2015, when she had a discussion with her physician regarding the extent and cause of her conditions. The Board notes that appellant did not specify the precise date of the discussion with her physician that led to her awareness of the cause of her conditions. Appellant submitted Dr. Ellis' December 1, 2015 report, which was based on an October 14, 2015 initial examination and referenced treatment appellant had for her foot conditions in April 2015. Dr. Ellis diagnosed right and left plantar fasciitis and right and left calcaneal spurs. He opined that the diagnosed conditions were aggravated or caused by appellant's nurse aide and scrub technician work duties. The Board finds, however, that Dr. Ellis' December 1, 2015 report is insufficient to establish that appellant was aware of her bilateral foot conditions only as of April 1, 2015. A review of the record shows that she was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between her employment exposure and her bilateral foot conditions as early as 2002. Appellant's own statements confirm that she knew or reasonably should have known of the relationship between her bilateral foot conditions and the factors of her federal employment in 2002, prior to her initial evaluation by Dr. Ellis on October 14, 2015. In her undated statement, appellant noted that she sought medical treatment from six physicians beginning in 2002 for her bilateral foot pain which she attributed to her nurse aide and scrub technician work duties and claimed caused her to stop working in July 2009. She related that she first sought medical treatment in 2002 from a Dr. Neville. Appellant related that she was also treated by Dr. Margiotta and Dr. Jones. She reported that in 2013 she was treated by Dr. Lashley, Dr. Green, and Dr. Burke. Appellant indicated that Dr. Jones and Dr. Lashley performed injections to treat her bilateral foot pain and Dr. Green provided her with inserts and referred her to physical therapy for ultrasound treatment of her feet.

Because appellant stated that she sought treatment for her bilateral foot condition on dates prior to consulting Dr. Ellis in October 2015, it is her burden to prove that her claim was filed within three years of the date she first became aware, or should have been aware, that she had a bilateral foot condition.[12] Appellant contended that she was not aware that her bilateral foot conditions were due to her employment until April 1, 2015. The Board notes that while specific bilateral foot diagnoses were not made until December 15, 2015 by Dr. Ellis, appellant reported receiving medical treatment for her bilateral foot pain which she attributed to her work duties as early as 2002 with Dr. Neville. As the Board has previously noted, when an employee becomes aware or reasonably should have become aware, that he or she has a condition which has been adversely affected by factors of his or her employment, such awareness is competent to start the running of the time limitations period, even though he or she does not know the precise nature of the impairment, or whether the ultimate result of such adverse effect would be temporary or

[11] *See J.Y.*, Docket No. 16-0332 (issued June 8, 2016); *R.V.*, Docket No. 10-1776 (issued April 1, 2011); *James W. Beavers*, 57 ECAB 254 (2005).

[12] *See* cases cited, *supra* note 10.

permanent.[13] In discussing the degree of knowledge required by the employee prior to filing a claim, the Board has emphasized that he or she need only be aware of a possible relationship between his or her condition and the 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.[14]

Appellant experienced and was treated on multiple occasions for ongoing bilateral foot problems, which she attributed to her work activities, by six different physicians beginning in 2002 during her period of employment and continued to receive treatment after she stopped working at the employing establishment in 2009. The Board finds, therefore, that the totality of the factual circumstances of record establish that appellant was aware or should have been aware as early as 2002 that her claimed bilateral foot injury was due to federal employment factors.[15]

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 injury or death.[16] Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days.[17]

In the present case, the record contains no evidence that appellant's supervisor had actual knowledge of an employment injury or that written notice of the injury was given within 30 days. Appellant failed to submit any information to substantiate that management was aware that her bilateral foot conditions were causally related to her federal employment. There was no statement from a supervisor establishing knowledge of a work-related injury.[18] 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.[19] Therefore, the Board finds that appellant has not established actual knowledge by her supervisors of her work-related conditions within 30 days, and therefore, has not established a timely claim. Further, the

[13] *Larry E. Young*, *supra* note 7.

[14] *See Edward Lewis Maslowski*, 42 ECAB 839 (1991). *See also William A. West*, 36 ECAB 525 (1985).

[15] *C.S.*, Docket No. 18-0009 (issued March 22, 2018); *S.I.*, Docket No. 08-0095 (issued May 14, 2008).

[16] 5 U.S.C. § 8122(a)(1); *see Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

[17] *Id.* at § 8122(a)(1) and (2).

[18] *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 was not sufficient to establish that her immediate superior had actual knowledge of a work-related injury as the statement only made a vague reference to her health and did 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).

[19] *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).

Board finds that 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, appellant has failed to establish that she filed a timely claim on October 26, 2015.[20]

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).

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 7, 2018
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

[20] *See* cases cited *supra* note 15.