

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

M.R., Appellant)	
)	
and)	Docket No. 18-0164
)	Issued: May 23, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Tampa, FL, Employer)	
)	

Appearances:
Victor A. Walker, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 30, 2017 appellant, through counsel, filed a timely appeal from an August 18, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated July 1, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.³

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.*

³ 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 9, 2015 appellant, then a 50-year-old retired manual clerk and automation operator, filed an occupational disease claim alleging that she developed bilateral carpal tunnel syndrome (CTS) as a result of her repetitive employment duties. She reported that she first became aware of her condition on July 25, 2013 and of its relationship to her federal employment on April 15, 2015. Appellant first received medical care for her condition on April 16, 2015. On the reverse side of the claim form, the employing establishment reported that she retired on disability as of March 26, 2001 and first notified her supervisor of the claim on August 11, 2015.

In a June 16, 2015 narrative statement, appellant reported her date of injury as April 14, 2015, the date that her physician diagnosed her with bilateral CTS. She noted that her condition developed over years of working for the employing establishment and was aggravated over time. Appellant reported that she first began having problems with her hands on July 25, 2013, but was not conclusively diagnosed with bilateral CTS until April 15, 2015. Her physician informed her that her bilateral CTS was related to her repetitive work activities at the employing establishment. Appellant described her repetitive employment duties as a letter sorter machine operator which involved pushing and pulling heavy containers weighing approximately 600 pounds, using her hands to remove trays from letter cages, dropping mail on the ledge, pulling mail down from reaching overhead, and pulling trays down. She also described her employment duties as a clerk which involved casing mail, moving containers, grasping handfuls of mail and magazines, bundling mail, filling trays, pushing and pulling cages, throwing bundles of magazines in zip code bins weighing 15 to 25 pounds, and picking up and throwing sacks weighing in excess of 120 pounds. Appellant reported that she worked for the employing establishment for about 13 years and the repetitive use of her hands, wrists, arms, and fingers caused her condition to develop over time. She submitted an official position description for a distribution clerk in support of her claim.

A March 26, 2001 notification of personnel action indicated that appellant's last day in active pay status was March 15, 1999, signifying disability retirement with the Office of Personnel Management (OPM).

In an April 16, 2015 diagnostic report, Dr. Walter E. Afield, a Board-certified neurologist, reported that a nerve conduction velocity (NCV) study of the upper extremities revealed abnormal findings of delayed peak latency readings involving both the median sensory nerves. He reported that findings were suggestive of bilateral carpal tunnel syndrome.

By development letter dated August 17, 2015, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It informed her of the type of medical and factual evidence needed and also advised her that the evidence was insufficient to establish that she timely filed her claim. OWCP provided a development questionnaire for her completion and requested that she submit such evidence within 30 days. In another letter dated August 17, 2015, it requested

the employing establishment provide information pertaining to appellant's occupational disease claim and employment duties. Neither appellant nor the employing establishment responded.

By decision dated September 24, 2015, OWCP denied appellant's claim finding that it was untimely filed. It advised her that the date of last exposure was March 15, 1999, the date she retired from the employing establishment and was last exposed to the work factors alleged to have caused her condition. OWCP further reported that the case was reviewed to see if the employing establishment was given notice within 30 days of the injury or within 30 days of the last date of exposure on March 15, 1999. However, no confirmation was provided by the employing establishment.

On April 12, 2016 appellant requested reconsideration of OWCP's decision. In an accompanying narrative statement, she reported that she stopped working for the employing establishment on March 15, 1999. Appellant noted that she notified OWCP and the employing establishment of her injury as soon as Dr. Scott diagnosed her with carpal tunnel syndrome around June 25, 2015.

By decision dated July 1, 2016, OWCP denied modification of its September 24, 2015 decision, finding that appellant's occupational disease claim was untimely filed. It noted that she stopped work on March 15, 1999 and retired on March 26, 2001. Therefore, appellant had until March 15, 2002 or March 26, 2004 to timely file an occupational disease claim.

On June 23, 2017 appellant, through counsel, requested reconsideration of OWCP's July 1, 2016 decision. Counsel argued that OWCP erroneously interpreted a point of law. He noted that OWCP did not dispute that appellant filed an occupational disease claim on July 9, 2015, nor did it dispute that she first became aware of her injury on July 25, 2013 and of its relationship to her federal employment on April 15, 2015. Appellant argued that OWCP erroneously interpreted the law by finding that the three-year time limitation began on March 15, 1999, the date she was last exposed to the injurious working conditions. Counsel reported that appellant was not aware of her injury at that time, and was also not aware of her injury when she retired on March 26, 2001. Appellant reported that she first became aware of her injury on July 25, 2013 and of its relationship to her employment on April 15, 2015, both of which were within the three-year time limitation to file her claim. Counsel argued that OWCP should have relied on case law which provides that in cases involving an occupational illness, the time limitation does not begin to run until the claimant is aware, or reasonably should have been aware of the causal relationship between her employment and the compensable disability.

By decision dated August 18, 2017, OWCP denied appellant's request for reconsideration, finding that she neither raised substantive legal questions, nor included relevant and pertinent new evidence sufficient to warrant a merit review. It noted that counsel's arguments were duplicative and substantially similar to evidence or documentation already of file.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal

argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁵

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.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.⁷ 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.⁸ 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.⁹ Even if a claim is not filed within the three-year period of limitation, it would still be regarded as timely under section 8122(a)(1) if the immediate superior had actual knowledge of his or her alleged employment-related injury within 30 days or written notice of the injury was provided within 30 days pursuant to section 8119.¹⁰ The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.¹¹

ANALYSIS

The Board finds that this case is not in posture for decision.¹²

In its August 18, 2017 denial of appellant's reconsideration request, OWCP noted that counsel's arguments were cumulative and substantially similar to allegations previously considered. Thus, it denied merit review of appellant's claim finding that she failed to submit any

⁴ *D.K.*, 59 ECAB 141 (2007).

⁵ *K.H.*, 59 ECAB 495 (2008).

⁶ *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002).

⁷ *W.L.*, 59 ECAB 362 (2008); *Gerald A. Preston*, 57 ECAB 270 (2005); *Laura L. Harrison*, 52 ECAB 515 (2001).

⁸ 5 U.S.C. § 8122(b).

⁹ See *Linda J. Reeves*, 48 ECAB 373 (1997).

¹⁰ 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); see also *Larry E. Young*, 52 ECAB 264 (2001).

¹¹ *Willis E. Bailey*, 49 ECAB 511 (1998); *B.H.*, Docket No. 15-0970 (issued August 17, 2015).

¹² *J.W.*, Docket No. 13-1666 (issued August 18, 2014).

relevant and pertinent new evidence addressing whether her occupational disease claim was timely filed.¹³

The underlying issue in this case is whether the claim was timely filed.

Counsel's June 23, 2017 request for reconsideration argued that appellant's claim was timely filed as she was not aware of her condition until July 25, 2013 and of its relationship to her federal employment on April 15, 2015, citing Board case law in support of his assertion that OWCP did not apply the correct standard when denying appellant's claim. OWCP denied the claim because appellant was last exposed to her employment exposure alleged to have caused injury on March 15, 1999, and failed to submit sufficient evidence that her supervisor had actual knowledge of her injury within 30 days of the date of injury or within 30 days of her retirement on March 26, 2001. It did not consider, however, when appellant was aware or should have been aware, of the causal relationship between the employment and the compensable disability. Therefore, the Board finds that counsel's argument raised on reconsideration was a relevant legal argument which was not previously considered. As such, OWCP's refusal to reopen appellant's case for further consideration of the merits of her claim constituted an abuse of discretion.¹⁴

For these reasons, the Board will set aside OWCP's August 18, 2017 decision and remand the case for merit review. After such further development as necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹³ *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

¹⁴ *L.N.*, Docket No. 12-1326 (issued November 21, 2012).

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2017 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion.

Issued: May 23, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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