

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

R.H., Appellant)	
)	
and)	Docket No. 17-0251
)	Issued: November 28, 2018
DEPARTMENT OF DEFENSE, CLEAR AIR)	
FORCE STATION, Denali, AK, Employer)	
)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 15, 2016 appellant, through counsel, filed a timely appeal from August 2 and November 8, 2016 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 filed a timely claim for compensation under 5 U.S.C. § 8122.

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

On November 2, 2015 M.W., a chief injury compensation official with the employing establishment, signed an occupational disease claim (Form CA-2) on behalf of appellant, then a 38-year-old retired firefighter. The form alleged that exposure to heavy lifting, pushing, and pulling up to 300 pounds, bending, stooping, etc., while working 100 fires and 400 emergency calls from 2000 to 2010, caused herniated discs at C4 to T1, L1-2, and L5-S1, bilateral carpal tunnel syndrome, and right scaphotrapezoidal (STT) joint arthritis of the thumb. The claim form indicated that appellant first became aware of the conditions on October 22, 2010 and realized they were caused or aggravated by employment on February 6, 2012, the date appellant stopped work. On the claim form M.W. indicated that appellant was separated by the employing establishment on December 19, 2012, and that disability retirement was approved on June 27, 2014. She related that the employing establishment initially received this claim for an October 2010 injury on February 3, 2015.³

The record before the Board also includes the first page of an occupational disease claim form, which was signed by appellant on January 13, 2015 and received by OWCP on May 28, 2015. On that claim form, appellant also alleged that exposure to heavy lifting, pushing, and pulling up to 300 pounds, bending, stooping, etc. while working 100 fires and 400 emergency calls from 2000 to 2010, caused herniated discs at C4 to T1, L1-2, and L5-S1, bilateral carpal tunnel syndrome, and right STT joint arthritis of the thumb. He stated that he first became aware of his claimed conditions on October 22, 2010 and of their relationship to his federal employment on February 6, 2012.

A number of documents were also submitted in November 2015, including correspondence from appellant's then-counsel, dated May 15, 2015, which notified OWCP that appellant was filing a new claim. On August 24, 2015 appellant's then-counsel wrote his congressional representative, seeking assistance. He indicated that he had submitted an occupational disease claim to a human resources coordinator at appellant's former employing establishment in February 2015, but had not received an acknowledgement. Appellant's then-counsel related that he thereafter submitted a claim to OWCP in Philadelphia in May 2015 and again, receipt was not confirmed.

Also submitted in November 2015 was a Notification of Personnel Action (Form 50-B), effective January 3, 2010, indicating that appellant was a firefighter at the employing establishment, a second Form 50-B, effective December 19, 2012, indicating that appellant was separated that day for being absent without leave since February 6, 2012, a June 27, 2014 notification from the Office of Personnel Management that appellant's disability retirement had been approved, and documentation showing a priority mail delivery from counsel's office to appellant.

³ The present claim was assigned OWCP File No. xxxxxx025. Appellant also has other claims before OWCP, including a traumatic injury claim under OWCP File No. xxxxxx877. That claim, which involved an incident that occurred on February 6, 2012, was denied by OWCP. OWCP File Nos. xxxxxx025 and xxxxxx877 have not been administratively combined.

The instant record, adjudicated by OWCP under File No. xxxxxx025, also includes a traumatic injury claim (Form CA-1) alleging that appellant injured his lower back at work on March 24, 2004. This claim, adjudicated by OWCP under File No. xxxxxx867, was accepted for lumbar sprain, strain. A second traumatic injury claim, adjudicated under File No. xxxxxx877, was filed on February 6, 2012, alleging that appellant injured his back when he slipped and fell at work that day. A December 23, 2013 nonmerit decision, issued under File No. xxxxxx877, indicates that the claim was denied.

In a statement dated October 24, 2014, appellant described his job duties and physical and mental conditions. In e-mails dated November 2, 2015, M.W. notified Mr. Pines' office that she had filed a Form CA-2 claim with the Department of Labor that day.

Appellant also submitted medical evidence dated October 22, 2010 to January 17, 2015. This included physician's treatment notes, operative reports for a February 7, 2011 right carpal tunnel release and an October 24, 2013 microdiscectomy and fusion at C4 through C7, various diagnostic studies including magnetic resonance imaging (MRI) scans of the cervical spine and right wrist, and an upper extremity electrodiagnostic study.

By letter dated November 18, 2015, OWCP informed appellant of the evidence needed to support his claim. It explained that it was unclear that his claim had been timely filed and asked for substantiating information. Appellant was given 30 days to respond. In a second November 18, 2015 letter, OWCP asked the employing establishment to furnish a statement from a knowledgeable supervisor and to describe appellant's job duties.

In a January 29, 2016 decision, OWCP noted that appellant's last exposure to work factors was on February 6, 2012, and his occupational disease claim was not filed until November 2, 2015. It indicated that, although the record included a copy of a Form CA-2 signed by appellant on January 13, 2015, placed into File No. xxxxxx877, there was no factual evidence to show that this was submitted to the employing establishment, noting that the second page of the Form CA-2 was the second page of a Form CA-1 for a February 6, 2012 injury.

On May 4, 2016 appellant, through counsel, requested reconsideration. Counsel asserted that an attached January 23, 2015 letter from appellant's prior counsel, Mr. Pines, supported that appellant's occupational disease claim was timely filed.⁴ U.S. Postal Service tracking documentation provided indicates that a first class letter, sent by certified mail, was delivered to Eielson Air Force Base, Alaska, on February 2, 2015.⁵

In a merit decision dated August 2, 2016, OWCP again found appellant's claim untimely, indicating that his claim should have been filed no later than February 6, 2015, and that it was not filed until November 2, 2015. It noted that, although it appeared that something was mailed and received, it was not clear what was sent.

⁴ A copy of a January 23, 2015 letter is not found in the case record.

⁵ Clear Air Force Station, where appellant was employed, is a subsidiary station of Eielson Air Force Base.

Appellant, through counsel, requested reconsideration on August 10, 2016. Counsel contended that, on the Form CA-2 forwarded to OWCP on November 2, 2015, M.W. indicated that appellant first reported his condition to a supervisor on February 3, 2015, thus making the claim timely, in accordance with section 2.801.4(a)(2) and (a)(5) of OWCP's procedures. A copy of the Form CA-2, filed on November 2, 2015, was attached.

In a merit decision dated November 8, 2016, OWCP again found appellant's claim untimely. It noted that appellant's supervisor did not have actual knowledge of his claimed injury within 30 days, and written notice was not given until the claim was filed on November 2, 2015, which was more than three years after February 6, 2012, the date of last exposure.

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.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 time limitation period, it would still be regarded as timely under section 8122(a)(1) if the immediate superior had actual knowledge of his 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 The Board has indicated that an employee need only be aware of a possible relationship between his or her condition and his or her employment to commence the running of the applicable statute of limitations.¹²

OWCP's procedures provide that, if the claimant did not file within the statutory time limitations after exposure to the employment factors ceased, the medical reports should be examined to determine whether the claimant was aware or reasonably should have been aware, of the illness and its possible relationship to employment. For example, the history obtained at the

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

⁷ 5 U.S.C. § 8122(a).

⁸ *Id.* at § 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 *Edward C. Hornor*, 43 ECAB 834, 840 (1992).

time of the first and subsequent examinations, the date when a definite diagnosis was made or the advice given by the physician to the claimant, may assist in determining the issue of possible awareness.¹³ The procedures further provide that the date a claim was filed can be established by entries on the claim form, the date of receipt noted by the employing establishment or by OWCP, the date the employing establishment transmitted it to OWCP, or a statement from the official superior confirming the date the claim was received by the employing establishment.¹⁴

ANALYSIS

The Board finds that appellant's occupational disease claim was timely filed pursuant to section 8122 of FECA.

Where an 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.¹⁵ Appellant's date of last exposure to the claimed employment factors alleged to have caused her injury was February 6, 2012. Thus, appellant had until February 6, 2015 to timely file her claim.

The case record reveals that, on May 28, 2015, OWCP received the first page of a Form CA-2 occupational disease claim, signed by appellant on January 13, 2015. It alleged injury due to extreme heavy lifting, pushing, and pulling (up to 300 pounds) and repetitive bending and stooping in the course of his federal employment. On November 2, 2015 OWCP received a nearly identical Form CA-2 occupational disease claim. It contained the same information alleged on the prior form, but included a second page and was submitted for appellant by M.W., an employing establishment injury compensation specialist, on November 2, 2015. The Board notes that M.W. reported on the second page of the claim form that the employing establishment initially received appellant's occupational disease claim on February 3, 2015. As appellant had until February 6, 2015 to timely file her claim, a claim form received on February 3, 2015 would have been timely filed. The case record does not include a claim form documenting receipt on February 3, 2015. However, as noted above, OWCP's procedures provide that the date of filing a claim can be established by entries on the claim form, the date of receipt noted by the employing establishment or by OWCP, or a statement from the official superior confirming the date the claim was received by the employing establishment.¹⁶ As M.W. confirmed on the November 2, 2015 claim form that the employing establishment initially received appellant's occupational disease claim on February 3, 2015, the Board finds that the claim was timely filed.

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6b (March 1993).

¹⁴ *Id.* at Chapter 2.801.4a.

¹⁵ *Id.* at Chapter 2.801.6.

¹⁶ *Supra* note 14.

CONCLUSION

The Board finds that appellant has filed a timely claim for compensation under 5 U.S.C. § 8122.

ORDER

IT IS HEREBY ORDERED THAT the November 8 and August 2, 2016 decisions of the Office of Workers' Compensation Programs are reversed.¹⁷

Issued: November 23, 2018
Washington, DC

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

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

¹⁷ Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.