United States Department of Labor
Employees' Compensation Appeals Board

L.H., Appellant	)	
and	)	**Docket No. 19-0818**
	)	**Issued: December 9, 2019**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Detroit, MI, Employer	)	

Appearances:
Shelley K. Coe, Esq., 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
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 4, 2019 appellant, through counsel, filed a timely appeal from a February 19, 2019 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.

[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.*

ISSUE

The issue is whether appellant filed a timely claim for compensation pursuant to 5 U.S.C. § 8122(a).

FACTUAL HISTORY

On September 29, 2016 appellant, then a 61-year-old retired mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral plantar fascial fibromatosis. She indicated that she first became aware of her claimed conditions on September 4, 2002, and their relationship to her federal employment on March 1, 2015. In an attached statement, appellant implicated extended periods of walking and standing as being the allegedly causative factors of employment. On the reverse side of the Form CA-2, the employing establishment indicated that it informed them of her condition on September 4, 2002, and listed the date of last exposure as December 8, 2007. A Form SF-50 Notice of Personnel Action indicated that appellant retired effective January 21, 2010, and that her last day in pay status was December 8, 2007.

In an attached September 9, 2016 signed statement, appellant indicated that her work duties largely consisted of standing on hard cement floors to case letters, flats, and handling heavy sacks of letters, mail and parcels weighing up to 70 pounds. When casing letters, she would also stand and sit on a metal rest bar that was tilted in such a position that it would cause pressure on the bottoms of both of her feet. Appellant noted that, after a transfer in 1977, she stood on her feet constantly, throwing letters and packages, and that this task required a great deal of continuous standing and walking, mostly on concrete floors. She noted that she began to experience symptoms, but continued to come to work. However, appellant subsequently began to take leave without pay (LWOP) due to the pain. Upon her return to work, the symptoms would also return, requiring her to take additional significant periods of leave. Appellant was eventually issued a letter of separation, after which she filed a complaint to the Equal Employment Opportunity Commission (EEOC) for discrimination based on physical disability. She noted that the EEOC claim was terminated via settlement agreement dated February 23, 2005.[3] From November 2007 through September 2009, appellant was on leave without pay, and on March 25, 2009, the employing establishment offered her disability retirement. She explained that in 2013, she worked for a grocery chain, but she required a leave of absence from this position in 2014. When she was on leave, appellant realized her symptoms were similar to what developed while she was working for the employing establishment. She indicated that she and her treating physician discussed the possibility that there was a work relationship for the first time, to the best of her recollection, in 2015. Appellant stated that she was unaware of the possible connection with, or contribution by, her federal work activities and work conditions to her bilateral foot conditions until 2015, and that it was not until 2016 that a physician explained how her employment related to her conditions.

With her claim form, appellant submitted various treatment records, physical therapy notes, and diagnostic imaging reports, including magnetic resonance imaging (MRI) scan studies. She also submitted multiple out of work notes from Dr. Laran Lerner, a physical medicine and

[3] The settlement agreement and order dismissing the complaint are contained in the record.

rehabilitation specialist. In a note dated November 30, 2007, Dr. Lerner diagnosed bilateral plantar fasciitis, and indicated that appellant would be totally disabled from work from November 27 through December 28, 2007. As series of treatment notes from Dr. Lerner spanning from late 2007 through mid-2009 followed the November 30, 2007 note, each listed the diagnoses and the projected period of total disability.

A November 2, 2007 venous doppler imaging report revealed: (1) no definite evidence of deep venous thrombosis in bilateral lower extremity deep veins, and (2) no reflux was identified in bilateral greater saphenous veins. An October 29, 2008 nuclear bone scan revealed, as it relates to appellant's foot, that the activity along the lateral aspect of the left mid foot was slightly more prominent than expected for degenerative change, which might have indicated a subtle fracture. An April 4, 2014 MRI scan of appellant's feet demonstrated mild degenerative changes involving the first metatarsophalangeal joint bilaterally, without evidence of acute fracture or dislocation deformity.

In October 7, 2015 and January 13, 2016 reports, Dr. Syed Moosavi, a physical medicine and rehabilitation specialist, indicated that appellant presented with complaints of knee pain and foot nerve pain. Appellant stated that she was diagnosed in 2014 with osteoarthritis and neuropathy of her feet by Dr. Lerner.

An August 23, 2016 report from Dr. Neil Allen, a Board-certified internist and neurologist, was made for the limited purpose of determining whether a causal relationship existed between appellant's bilateral foot injuries and work-related trauma sustained on or prior to September 4, 2009. Dr. Allen noted that appellant was employed as a distribution clerk, which required her to stand on concrete floors for eight to twelve hours per day, five to seven days per week, and that after approximately 25 years in this position, she began to notice worsening pain in both of her feet. His examination revealed a bilateral altered and unstable gait along with range of motion findings. Dr. Allen opined that appellant's diagnosis of bilateral plantar fascial fibromatosis was work related because she was required to stand for extended periods of time on concrete.

By development letter dated October 17, 2016, OWCP notified appellant of the deficiencies of her claim. It advised her of the type of additional factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

In an October 26, 2016 statement, appellant indicated that when she worked at the employing establishment, approximately every six months after returning from a leave of absence, her feet would begin to throb, tingle, and feel numbness and a burning sensation. The pain required her to be off work for "close to a year or longer" before she felt relief, and when she returned to work, the symptoms would return, sometimes worse than before. On November 8, 2007 appellant went on leave again and was eventually separated from the employing establishment. In 2013, she began a job at a grocery store, and within a few months, she felt the same symptoms, and this was when she made the connection with her federal employment. She asserted that her injuries were causally related to factors of her federal employment.

By decision dated November 21, 2016, OWCP denied appellant's occupational disease claim, finding the medical evidence of record was insufficient to establish causal relationship between the diagnosed conditions and the accepted factors of her federal employment.

In an April 5, 2017 addendum[4] to his August 23, 2016 report, Dr. Allen objected to OWCP's decision, stating that the claims examiner was unqualified to review medical evidence. He quoted medical literature, and noted the correlation between his objective findings during his physical examination and the diagnosis. Dr. Allen stated that the daily prolonged standing, walking, and stair climbing required by appellant's position lead to the development of bilateral plantar fasciitis/fibromatosis over the course of her employment.

In a July 10, 2017 report, Dr. Jiab Suleiman, a Board-certified orthopedic surgeon, noted that appellant reported a history of chronic foot pain and multiple visits for her bilateral foot conditions. He reviewed her work history and the reports of Drs. Lerner and Allen. Dr. Suleiman agreed with the reports of Dr. Allen, and opined that appellant's long service at the employing establishment, which included significant standing and/or walking on concrete flooring and climbing steps, contributed to the development of her bilateral plantar fibromatosis and bilateral foot pain.

On September 19, 2017 appellant, through counsel, requested reconsideration.

On December 19, 2017 OWCP issued a second development letter notifying appellant that the evidence of record indicated that the claim may have been untimely filed. It advised appellant of the type of additional evidence needed to establish the timeliness element of her occupational disease claim, including evidence establishing the date on which written notice was provided to the employer, the date on which her supervisor was made aware of the injury, and the date on which she reasonably should have been aware of a relationship between her work and her conditions.

OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Louis Radden, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether she sustained a work-related injury.

In a January 15, 2018 second opinion report, Dr. Radden diagnosed bilateral plantar fasciitis, and stated that appellant's federal employment aggravated the condition.

In a signed April 25, 2018 statement, appellant explained that she did not have a copy of the EEOC complaint, only the settlement agreement. To the best of her recollection, she stated that she mentioned the issue of nerve damage in her feet as part of that complaint. Appellant indicated that her work supervisor was B.O., who recorded her attendance. She stated that B.O. knew about her feet, and that she told him that her feet hurt constantly. In 2009, A.D. became appellant's supervisor, and in a March 25, 2009 meeting, she discussed her work-related foot problems with A.D. during the course of her disability retirement discussions. Regarding Dr. Lerner, appellant stated that she was unable to obtain all of Dr. Lerner's records, as Dr. Lerner was no longer practicing. Appellant clarified that she first became aware of a link between her

[4] Another addendum, dated April 27, 2017, is nearly identical to the April 5, 2017 report.

federal employment and her foot conditions sometime after April 2014, and that the first time she recalled discussing any relationship between her federal employment and her conditions was in 2015 with Dr. Lerner.

Appellant submitted a letter dated March 26, 2009 from herself to Supervisor A.G. The letter memorialized a meeting concerning her return and work status.

In a Statement of Disability (OPM Form 3112A) timestamped on July 16, 2009, appellant indicated that she had, inter alia, nerve damage and weakness in both feet.

By decision dated April 25, 2018, OWCP reviewed the evidence and modified its previous decision, and instead denied the claim on the first element, timeliness, in accordance with 5 U.S.C. § 8122. It noted that appellant had not sufficiently responded to the December 19, 2017 development letter, and that the existing evidence was inconsistent as to when appellant became aware that her condition(s) were employment related.

On January 19, 2019 appellant, through counsel, requested reconsideration.

In a signed January 16, 2019 statement, appellant indicated that both of her supervisors, B.O. and A.G., were aware that she had a medical condition with her feet, and they were made aware she had a medical condition with her feet every time she submitted medical information to support her "many absences from work." She further wrote that it was in the time period shortly before or shortly after returning to work at the grocery store in January 2015 that she made the connection between work conditions at the employing establishment and her feet. Appellant stated that she realized a pattern of worsening foot symptoms that were somewhat alleviated when off work, but would again become disabling after returning to work for some length of time. She stated it was the similarity of the pattern that made her realize the link in 2014. Appellant also stated she realized that the work conditions were similar, as she was standing and walking on a concrete surface at both the employing establishment and at the grocery store.

By decision dated February 19, 2019, OWCP reviewed the merits of the claim, but denied modification of the prior decision, finding the evidence submitted remained insufficient to establish that the claim was timely filed, in accordance with 5 U.S.C. § 8122.

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

[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).

between his or her condition and the factors of 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.[7] Where the employee continues in the same employment after the employee 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] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[10]

ANALYSIS

The Board finds that appellant's claim for compensation was not filed within the applicable time limitation provisions of 5 U.S.C. § 8122(a).

The documentary evidence establishes that appellant was last exposed to the allegedly causative factors of employment on December 8, 2007. She filed her occupational disease claim on September 29 2016, which is outside the three-year time limitation period set forth in section 8122(a) of FECA.[11]

Appellant stated on her Form CA-2 that she first became aware of her foot conditions on September 4, 2002, and of their relationship to her federal employment on March 1, 2015. The earliest record containing a diagnosis of bilateral plantar fasciitis is Dr. Lerner's note of November 30, 2007. The Board finds that, given the existence of the diagnosis and the recommendation of total disability, appellant knew or reasonably should have known of a relationship between her diagnosed conditions and her federal employment by December 8, 2007, at the latest.

In *C.S.*, the Board found that a claimant with a respiratory condition should have been aware of a relationship to her employment if the respiratory symptoms would alleviate when off-work, only to resurface every time she returned to work.[12] The Board notes that while appellant stated that she had been aware of this condition since 2002, she did not submit any medical reports predating November 2007; therefore, the record is incomplete as to why appellant would not have known that these diagnoses were related to the factors of her federal employment. As the Board has previously noted, when an employee becomes aware or reasonably should have become aware,

[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).

[11] *R.T.*, Docket No. 18-1590 (issued February 15, 2019).

[12] *C.S.*, Docket No. 18-0009 (issued March 22, 2018).

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.[13] In discussing the degree of knowledge required by the employee prior to filing a claim, the Board 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.[14] As appellant stated, she took multiple long-term leaves of absence from her employment to treat her bilateral foot conditions prior to the date of her final exposure, and while she may have had some doubt as to a definitive diagnosis or cause, the Board finds that she knew, or reasonably should have known, of possible work-relatedness when her plantar fasciitis was diagnosed in late 2007.[15]

Appellant's claim would still be regarded as timely under FECA if her immediate supervisor had actual knowledge of her injury within 30 days, or if written notice of injury was given to her immediate supervisor within 30 days of injury.[16] 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. In her statements, appellant indicated that her supervisors were aware of her "foot conditions." The record also contains an EEOC settlement agreement, and on the employer's side of the occupational disease claim form, the employing establishment indicated that it had been aware of the condition since September 2002. However, the case record does not contain evidence demonstrating that an immediate superior either had actual knowledge of or received written or verbal notification about her bilateral foot conditions and the conditions' possible relationship to her employment within 30 days of its occurrence. Although the record contains evidence that she filed an EEOC complaint and a representative from the employing establishment indicated on the Form CA-2 that appellant reported the condition to her supervisor on September 4, 2002, neither document substantiates that appellant's supervisor(s) had actual knowledge that her injury was possibly work related.[17] 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.[18] 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

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *E.B.*, Docket No. 19-0036 (issued May 21, 2019).

[18] *C.S.*, Docket No. 18-0009 (issued March 22, 2018).

written notice of her work-related injury within 30 days. The exceptions to the statute have not been met, and thus, she has not established that she timely filed her claim.

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 did not timely file a claim for compensation pursuant to 5 U.S.C. § 8122(a).

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 9, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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