

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

S.O., Appellant)	
)	
and)	Docket No. 19-0917
)	Issued: December 19, 2019
DEPARTMENT OF THE ARMY, U.S. ARMY)	
GARRISON, Fort Bliss, TX, Employer)	

Appearances:
*Alan J. Shapiro, for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 25, 2019 appellant, through counsel, filed a timely appeal from a January 11, 2019 merit decision 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's occupational disease claim is barred by the applicable time limitation provisions of 5 U.S.C. § 8122(a).

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 April 2, 2018 appellant, then a 54-year-old police officer, filed an occupational disease claim (Form CA-2) alleging that on January 1, 2008 he first became aware of his severe arthritis in both shoulders and of its relation to his federal employment duties. He explained that he performed several repetitive movements as a part of his duties as a defensive tactics instructor for several years. Appellant noted that his shoulders became worse over time and eventually he was pulled from his duties due to his doctor noting the very limited mobility in both of his shoulders. On the reverse side of the claim form the employing establishment indicated that it had no knowledge of appellant's injuries and could not confirm that he was injured while performing his employment duties because the claimed injury occurred 10 to 16 years prior to his filing and when he was employed by another organization in another state. Appellant was subsequently placed on light duty as a result of being unable to pass his medical examination.

In a statement received on April 11, 2018, appellant explained that he began working with Fort Bliss Department of Emergency Services as a police officer in August 2003. He noted that he completed multiple training courses and was assigned to teach combative training courses to a department of approximately 300 personnel. The combative training courses consisted of repetitive shoulder manipulations, arm bars, throws, clinches, hand-to-hand combat, and baton-to-baton combat. Appellant recounted that, in October 2008, he was transferred to the White Sands Missile Range in New Mexico, where he completed additional training. He explained that he first noticed pain in his shoulders in 2008 and that his shoulders gradually got worse over time. In January 2018 his weapon was pulled because he could no longer raise his arms above his head. Appellant underwent total left shoulder replacement surgery on January 24, 2018 and indicated that he would undergo total right shoulder replacement surgery in June 2018. He also provided a brief training manual on combative level 1.

In a development letter dated April 18, 2018, OWCP advised appellant of the factual and medical deficiencies of his claim. It provided him with a questionnaire for completion and requested that he submit a narrative medical report from his treating physician, which provided a diagnosis and the physician's rationalized medical explanation as to how the alleged employment incident caused the diagnosed condition. OWCP afforded appellant 30 days to submit the necessary evidence. In a separate development letter of even date, it notified the employing establishment of his occupational injury claim. OWCP requested additional information regarding appellant's employment factors and afforded it 30 days to submit the requested information.

In medical notes dated between June 7, 2017 and January 17, 2018, Dr. Keith Johnson, a Board-certified orthopedic surgeon, diagnosed bilateral shoulder osteoarthritis and bilateral shoulder pain due to active duty in the police department. He indicated that appellant's date of injury was in 2012. Dr. Johnson noted appellant's work limitations and provided a treatment history of heat and cortisone injections.

On January 9, 2018 appellant underwent magnetic resonance imaging (MRI) scans of his both of his shoulders, performed by Dr. Ankur Patel, a Board-certified musculoskeletal radiologist. Dr. Patel noted several conditions related to appellant's shoulders, including osteoarthritis of the shoulders.

In response to OWCP's questionnaire, appellant submitted an April 23, 2018 statement. He provided that he performed the work duties he previously alleged four to six times a month from 2004 to 2008 for four to eight hours a day. Appellant also noted that he exercised outside of work in order to stay in shape as a condition of his employment.

In an April 30, 2018 attending physician's report (Form CA-20), Dr. Tyler Hinshaw, a Board-certified resident physician, noted appellant's employment history performing combative instruction from 2004 to 2008. He diagnosed primary osteoarthritis and checked a box marked "yes" indicating that the medical condition was caused or aggravated by appellant's employment duties.

On May 1, 2018 appellant provided multiple certificates, dated from November 29, 2004 to December 15, 2008, indicating his completion of various control force training courses.

Appellant was seen by Dr. Johnson on May 16, 2018 for another follow-up appointment. Dr. Johnson's medical note indicated that appellant's osteoarthritis was due to three years of advanced combat training that caused multiple injuries to the cartilage of both of his shoulders.

By decision dated July 5, 2018, OWCP denied appellant's claim, finding that he failed to file a timely claim within the requisite three years under section 8122(a) of FECA. It found that the date of injury was January 1, 2008 and that he had not filed a claim for compensation until April 11, 2018,³ more than 10 years after the date of injury. OWCP further found that there was no evidence that appellant's immediate supervisor had actual knowledge within 30 days of the date of injury and that appellant was employed by a different employing establishment on the date of injury.

On August 3, 2018 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. At the December 11, 2018 telephonic hearing, appellant testified that he provided January 1, 2008 as the date he first noticed his injury because he could not identify a specific date his injury occurred and he had been instructed to select a date for purposes of completing his Form CA-2. He explained that he experienced discomfort in his shoulders during his training in Fort Bliss and that the pain became more prominent around the time he was transferred to White Sands Missile Range. The hearing representative noted that appellant was diagnosed with osteoarthritis of his shoulders in 2017. Appellant further explained that he believed the reason for his shoulder injuries was the continuous defensive tactics training and handcuffing he performed from 2005 to 2008, as well as the continuous physical training, weapons training, defensive tactics training, and handcuffing he has performed as a part of his duties as a police officer. The hearing representative held the case record open for 30 days for the submission of additional evidence. No additional evidence was received.

By decision dated January 11, 2019, the hearing representative affirmed the July 5, 2018 decision, again finding that appellant's occupational disease claim was untimely filed.

³ As indicated above, the Board notes that appellant's occupational disease claim form was dated and signed on April 2, 2018.

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes a determination on the merits of the claim.⁴

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.⁵ 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.⁶ 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.⁷ It is the employee's burden, not the employing establishment, to file a claim within three years.⁸

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 8119.⁹ The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.¹⁰

ANALYSIS

The Board finds that appellant's occupational disease claim was timely filed pursuant to 5 U.S.C. § 8122(a).

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.¹¹

⁴ *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002).

⁵ *Larry E. Young*, 52 ECAB 264 (2001).

⁶ *Id.*

⁷ 5 U.S.C. § 8122(b).

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

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

¹⁰ *B.H.*, Docket No. 15-0970 (issued August 17, 2015); *Willis E. Bailey*, 49 ECAB 511 (1998).

¹¹ *See supra* note 5; *see also S.G.*, Docket No. 16-0976 (issued August 12, 2016); *R.A.*, Docket No. 16-0090 (issued March 21, 2016).

At the December 11, 2018 telephonic hearing, appellant explained that he provided January 1, 2008 as the date he first noticed his injury because he could not identify a specific date his injury occurred and he had been instructed to select a date for purposes of completing his Form CA-2. He provided that he had undergone continuous physical training, defensive tactics training, handcuffing training, and weapons training while stationed at Fort Bliss, White Sands Missile Range, and at his current position. The record provides that he continuously performed these duties until his weapon was pulled in January 2018 due to his inability to lift his arms over his head. As appellant continued to be exposed to the implicated employment factors until January 2018, the Board finds that his April 2, 2018 claim was timely filed.¹² The case will, therefore, be remanded to OWCP to address the merits of the claim. After such further development as is deemed necessary, OWCP shall issue a *de novo* decision.

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 January 11, 2019 decision of the Office of Workers' Compensation Program is reversed and the case remanded for further action consistent with this decision of the Board.

Issued: December 19, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹² See *M.B., Order Remanding Case*, Docket No. 14-1567 (issued August 13, 2015).