

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

A.S., Appellant	)	
	)	
and	)	<b>Docket No. 18-1094</b>
	)	<b>Issued: February 7, 2019</b>
	)	
DEPARTMENT OF JUSTICE, BUREAU OF	)	
PRISONS, METROPOLITAN	)	
CORRECTIONAL CENTER, New York, NY,	)	
Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On May 7, 2018 appellant filed a timely appeal from a March 29, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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).

**FACTUAL HISTORY**

On November 21, 2016 appellant, then a 56-year-old correctional officer, filed an occupational disease claim (Form CA-2) alleging that he developed depression, sleeplessness, shortness of temper, hypervigilance, and "self-consciousness of people from an Arabic background" due to his federal employment. He indicated that he first became aware of his claimed condition on September 11, 2001 and further related that he was working in an employing

establishment facility, possibly in the housing unit, when airplanes struck the World Trade Center (WTC) towers. Appellant noted that, after this event, he developed chest pains, which caused him to see a physician. He then went to the World Trade Center Health Program (WTCHP) who found that his depression, anger, sleeplessness, and alcohol issues were related to the September 11, 2001 incident and certified him with having post-traumatic stress disorder (PTSD). Appellant explained that he delayed in filing his claim because, during the time he experienced the described symptoms, he did not know they were related to his tour in the United States Marine Corps and his employment with the employing establishment until he sought treatment from WTCHP. He indicated that he first reported his condition to his supervisor on November 21, 2016.

OWCP received a November 9, 2016 letter in which the WTCHP informed appellant that he had been certified with having a mental health condition covered by treatment benefits as of October 25, 2016. It subsequently received medical reports dated August 15 through November 23, 2016, including an October 7, 2016 report by Dr. Sarah Caraisco, a Board-certified psychiatrist, who examined appellant, diagnosed chronic PTSD and single episode of moderate major depressive disorder. Dr. Caraisco opined that the diagnosed conditions were caused by appellant's military and work trauma and exacerbated by the September 11, 2001 incident and continuing work trauma.

OWCP, by development letter dated February 3, 2017, notified appellant of the deficiencies of his claim and afforded him 30 days to submit additional medical and factual evidence. Appellant was also provided a questionnaire for his completion regarding the factual circumstances of his injury. In a separate development letter dated February 3, 2017, OWCP requested that the employing establishment respond to appellant's allegations and provide information regarding his work activities and job description.

Neither appellant, nor the employing establishment responded to OWCP's requests for additional factual information.

OWCP received progress notes dated January 30, 2013 through March 1, 2017 by various psychiatrists and psychologists who diagnosed: impulse control disorder, not otherwise specified; intermittent explosive disorder; adjustment disorder with depressed mood; and PTSD.

By decision dated March 6, 2017, OWCP denied appellant's occupational disease claim as it was untimely filed. It found that appellant reasonably became aware of the relationship between his condition and his federal employment on September 11, 2001, but did not file a claim until November 21, 2016. Additionally, OWCP noted that he had not responded to its February 3, 2017 development letter.

On March 24, 2017 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on September 18, 2017. During the hearing, he advised that, although he suffered from depression, missed work, and had personal problems and sleeplessness, after the September 11, 2001 incident, he was not aware of their origin. Appellant further advised that he had not notified the employing establishment or his supervisor about his symptoms because he was trying to deal with them. He related that he had not become aware that his symptoms were related to the September 11, 2001 incident until he was examined and diagnosed by a physician in July 2015. Appellant noted that, prior to being treated by WTCHP, he received treatment for his depression and marital problems at a Veterans Administration (VA) medical facility.

Following the hearing, appellant submitted an undated narrative statement in response to OWCP's February 3, 2017 development letter. He related that he was diagnosed with PTSD due to his exposure to the events of September 11, 2001. After the airplanes hit the WTC towers, appellant had to secure the jail during a loss of communication by telephone and computer. He noted that the area around the WTC towers was locked down and smoldering. Appellant was unable to go home and was concerned about the safety of his wife and children.

Appellant also attributed his claimed conditions to other work events. He escorted and physically fought with terrorist suspects who were housed in various secure units in his facility following their involvement in the bombing of one of the WTC towers on February 26, 1993 and United States embassies in Africa on August 7, 1998. On the day following the February 26, 1993 event, appellant physically removed a reluctant suspected terrorist from his cell and escorted him to court. In court, the suspect alleged that he was physically abused by appellant. Following an investigation of the allegation by the employing establishment's office of inspector general, he was cleared of any wrongdoing.

Appellant also related that, on November 1, 2000, an employing establishment officer was taken hostage and stabbed in an eye by two suspected terrorists housed in his unit. He and other first responders fought the suspects with their bare hands, as they were not allowed to carry weapons at work, to secure the release of the officer. Following the stated incidents, appellant maintained that he experienced hypersensitivity, trouble sleeping, angry outbursts, and heavy drinking, which resulted in his divorce and criminal charges. He contended that being directly involved in three traumatic international terrorist attacks caused his conditions. Appellant further contended that having to report to work on the next day following Hurricane Sandy in 2012, resulted in the development of his shortness of breath and tightening chest sensation. He noted that he had no power at home and Manhattan, New York was shutdown. At work, appellant was outside in the rain and when he jogged back to work to get out of the rain, he experienced the above-noted symptoms. He further related that, this "was another traumatic event at work and I began showing signs of hypersensitivity now, physical ailments, rapid heartbeat and shortness of breath." Appellant noted that he was treated at a VA medical facility for his continuing depression.

In 2015, appellant underwent a physical and mental examination as a result of his reaction to Hurricane Sandy and was diagnosed with PTSD. He filed his claim in 2016 when the WTCHP officially certified him with PTSD related to his employment from 1991 until the present. Appellant claimed that he was never told by the employing establishment to seek assistance due to his exposure to terrorist incidents leading up to the September 11, 2001 terrorist attack or after Hurricane Sandy in 2012. He related that his medical records showed that he was receiving treatment, but it was not until he sought treatment for a possible physical issue due to Hurricane Sandy and was given a psychiatric screening by the WTCHP in 2015 that the connection was made to his September 11, 2001 experience and diagnosis of PTSD, which he reported promptly in 2016 after receiving certification of his condition by WTCHP.

By decision dated December 4, 2017, an OWCP hearing representative set aside the March 6, 2017 decision and remanded the case for further development. She directed OWCP to issue an appropriate development letter to the employing establishment to review and respond to appellant's factual statement.

On remand, by letter dated December 6, 2017, OWCP requested that the employing establishment respond to appellant's factual statement within 30 days. The employing establishment did not respond.

By decision dated March 29, 2018, OWCP again denied appellant's occupational disease claim as untimely filed. It found that his date of last exposure was in 2012, the date of Hurricane Sandy, and he should have been aware of a relationship between his employment and the claimed conditions by that date. OWCP reported that the employing establishment had not responded to its December 6, 2017 development letter. It further found that the medical evidence of record did not contain a diagnosed medical condition causally related to the work event.

### **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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> It is the employee's burden, not the employing establishment, to file a claim within three years.<sup>6</sup>

### **ANALYSIS**

The Board finds that appellant's occupational disease claim is barred by the applicable time limitation provisions of 5 U.S.C. § 8122(a).

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<sup>1</sup> *C.S.*, Docket No. 18-0009 (issued March 22, 2018); *C.D.*, 58 ECAB 146 (2006); *David R. Morey*, 55 ECAB 642 (2004); *Mitchell Murray*, 53 ECAB 601 (2002).

<sup>2</sup> *C.S.*, *id.*; *W.L.*, 59 ECAB 362 (2008); *Gerald A. Preston*, 57 ECAB 270 (2005); *Laura L. Harrison*, 52 ECAB 515 (2001).

<sup>3</sup> *Larry E. Young*, 52 ECAB 264 (2001).

<sup>4</sup> *Id.*

<sup>5</sup> 5 U.S.C. § 8122(b).

<sup>6</sup> *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 his federal employment occurred in 2012. Appellant filed his occupational disease claim on November 21, 2016, more than three years after the date of last exposure. Consequently, he filed his claim outside the three-year time limitation period.<sup>7</sup>

Appellant has alleged that he did not become aware of the connection between his emotional condition and factors of his federal employment until July 2015, when he had a discussion with his WTCHP physician regarding the extent and cause of his emotional condition. The Board notes that appellant did not specify the precise date of the discussion with his physician that led to his awareness of the cause of his condition. Moreover, appellant did not submit a medical report from this physician indicating that he had an emotional condition caused or aggravated by his federal employment exposure. He submitted Dr. Caraisco's October 7, 2016 report in which she diagnosed chronic PTSD and single episode of moderate major depressive disorder. Dr. Caraisco opined that the diagnosed conditions were caused by appellant's military and work trauma and exacerbated by the September 11, 2001 incident and continuing work trauma. The Board finds, however, that Dr. Caraisco's October 7, 2016 report is insufficient to establish that appellant was aware of his emotional conditions only as of July 2015. A review of the record shows that he was aware, or by the exercise of reasonable diligence, should have been aware, of the causal relationship between his employment exposure and his emotional condition as early as 2012.

Appellant's own statements confirm that he knew or reasonably should have known of the relationship between his emotional condition and his work exposure in 2012, if not before. In his undated statement, he noted that he experienced shortness of breath and tightening chest sensation following his work exposure in 2012 to Hurricane Sandy. Appellant related that, this "was another traumatic event at work and I began showing signs of hypersensitivity now, physical ailments, rapid heartbeat and shortness of breath."

Appellant expressed an awareness that his work exposure to Hurricane Sandy in 2012 caused his emotional and physical conditions, which demonstrates that, at that time, more than three years prior to filing his claim, he became aware, or should have been aware, that he had an emotional condition related to his employment.<sup>8</sup> Appellant contended that he was not aware that his emotional condition was due to his employment until July 2015. The Board notes that, while no specific emotional condition diagnosis was made in July 2015, appellant attributed his emotional condition to his work exposure as early as 2012. 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 permanent.<sup>9</sup> 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

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<sup>7</sup> 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).

<sup>8</sup> See cases cited *supra* note 6.

<sup>9</sup> *Larry E. Young*, *supra* note 3.

limitations. The Board has not required that appellant have definitive evidence of a condition and causal relationship on the date the claim is filed.<sup>10</sup>

Appellant experienced an emotional condition, which he attributed to his work exposure, beginning in 2012 during his period of employment. 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 2012 that his claimed emotional condition was due to federal employment exposure.<sup>11</sup>

Appellant's claim, however, would still be regarded as timely under section 8122(a)(1) of FECA if his 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.<sup>12</sup> Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days.<sup>13</sup>

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 information to substantiate that management was aware that his emotional condition was causally related to his federal employment. There was no statement from a supervisor establishing knowledge of a work-related injury.<sup>14</sup> 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.<sup>15</sup> Therefore, the Board finds that appellant has not established actual knowledge by his supervisors of his work-related condition within 30 days and, therefore, has not established a timely claim. Further, the Board finds that the record is devoid of any indication that appellant's immediate supervisors had written notice of his work-related injury within 30 days. The exceptions to the statute have not been met, and thus, appellant has failed to establish that he filed a timely claim on November 21, 2016.<sup>16</sup>

On appeal appellant contends that his claim was timely filed, as he filed it immediately after being diagnosed with PTSD causally related to his September 11, 2001 exposure. However,

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<sup>10</sup> See *Edward Lewis Maslowski*, 42 ECAB 839 (1991). See also *William A. West*, 36 ECAB 525 (1985).

<sup>11</sup> C.S., Docket No. 18-0009 (issued March 22, 2018); *S.I.*, Docket No. 08-0095 (issued May 14, 2008).

<sup>12</sup> 5 U.S.C. § 8122(a)(1); see *Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

<sup>13</sup> *Id.* at § 8122(a)(1) and (2).

<sup>14</sup> 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).

<sup>15</sup> 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).

<sup>16</sup> See cases cited *supra* note 11.

based on the reasons set forth above, the Board finds that appellant's November 21, 2016 occupational disease claim was untimely filed.

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 March 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2019  
Washington, DC

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

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

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