

federal employment. He indicated that he first became aware of his claimed condition on September 21, 2005 and realized its relation to his federal employment on October 10, 2010. Appellant related that he had not filed his claim within 30 days of October 10, 2010 because management had failed to inform him that he could file a claim. The employing establishment indicated that appellant first reported his condition to his supervisor on March 30, 2018.

In reports dated February 1, 2010 and October 14, 2011, Dr. Steven R. Hoer, a Board-certified orthopedic surgeon, related that he was treating appellant for degenerative conditions of the lower extremities, including bilateral knee patellofemoral chondromalacia and osteoarthritis. He advised that his work duties strained his lower extremities, and that squatting “particularly would aggravate his knees.”

On March 20, 2018 Dr. Evelyn P. Padre, who specializes in family medicine, provided a list of appellant’s military service-connected medical conditions, including lumbosacral or cervical strain, and limited motion of the knee and ankle.

A notification of personnel action (Standard Form 50-B) indicated that appellant had retired from the employing establishment on disability effective April 21, 2012.

In an April 10, 2018 letter, the employing establishment controverted appellant’s claim, contending that it was untimely filed. It advised that he was last exposed to the conditions alleged to have caused his condition on October 10, 2010 and had retired on April 21, 2012.

OWCP, in a development letter dated April 12, 2018, informed appellant that the evidence submitted was insufficient to establish that he had timely filed a claim under section 8122(a). It requested that he submit additional factual and medical evidence in support of his claim and afforded him 30 days to respond. By letter of even date, OWCP also requested information from the employment establishment relative to the circumstances of the claimed injury.

On April 18, 2018 P.A., a flight chief with the employing establishment, advised that none of appellant’s supervisors were still working at the employing establishment.

In a May 14, 2018 statement, appellant related that he wanted to change the date that he first became aware of the relationship between his work duties and his bilateral knee, ankle, and lumbar conditions.² He advised that he had noted the date he first believed that there was a correlation between his condition and his federal employment instead of when he learned in November 2016 of his right to file a claim for compensation. Appellant described the work factors to which he attributed his condition. He related that he underwent a total knee replacement and subsequently filed for disability retirement in 2011 after his physician had informed him that the knee replacement would not last if he continued in his current occupation. Appellant advised that he had retired in March 2012.

² In a statement dated May 14, 2018, a Department of Veterans Affairs health clinic provided appellant’s diagnoses and attributed his lumbar spondylolisthesis, degenerative disc disease, and bilateral degenerative knee disease to his employment. In a May 14, 2018 report, Dr. Hoer advised that his employment had exacerbated his preexisting conditions and contributed to his knee pain.

By decision dated June 20, 2018, OWCP denied appellant's claim, finding that it was untimely filed pursuant to 5 U.S.C. § 8122 as it was not filed within three years of the date of injury and that there was no evidence that his immediate supervisor had actual knowledge of the claim within 30 days of the injury.

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.³ 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.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 their federal 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.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 of proof to establish that a claim is timely filed.⁸

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 employing establishment indicated that appellant was last exposed to the work factors implicated as causing his condition on October 10, 2010. Appellant retired from employment effective April 21, 2012. He filed his occupational disease claim in April 2018, which is outside the three-year time limitation period set forth in section 8122(a) of FECA.⁹

³ See *G.M.*, Docket No. 18-0768 (issued October 4, 2018).

⁴ 5 U.S.C. § 8122(a).

⁵ See *supra* note 3.

⁶ *Id.*

⁷ *J.E.*, Docket No. 16-1493 (issued May 7, 2018).

⁸ *Id.*

⁹ See *B.J. (W.H.)*, Docket No. 18-0910 (issued December 21, 2018).

In cases of latent disability, the time for filing a claim does not begin to run until the claimant is aware, or by exercise of reasonable diligence, should be aware of the causal relationship between his condition and his employment.¹⁰ Appellant has alleged that he first became aware of his condition in September 2005 and attributed it to his federal employment later in October 2010. He subsequently advised that he wanted to change the date of awareness as the employing establishment did not notify him that he could file a claim for compensation. Appellant related that he had believed that the question referred to when he became aware of a correlation between the injury and his duties, rather than the date he learned that he could file an occupational disease claim. In discussing the degree of knowledge required by an employee prior to filing a claim, the Board has emphasized that he need only be aware of a possible relationship between his condition and his employment to commence the statute of limitations.¹¹ The Board has not required that appellant have definite evidence of a condition and causal relationship on the date the claim is filed.¹² Appellant indicated that he first became aware of the relationship between his condition and employment factors in October 2010. In a report dated February 1, 2010, Dr. Hoer advised that appellant's employment activities aggravated his lower extremity conditions. The Board finds that, given the existence of this doctor's visit and report, appellant knew or reasonably should have known of a relationship between his condition and his employment by October 2010.¹³ Appellant's lack of awareness of his ability to file a claim does not excuse his failure to file a timely claim.¹⁴

Appellant's claim would still be regarded as timely under FECA if his immediate supervisor had actual knowledge of his injury within 30 days or if written notice of injury was given to his immediate supervisor within 30 days of injury as specified in section 8119. The employing establishment indicated that he had reported his claimed condition on March 30, 2018. Appellant has not submitted evidence supporting that his supervisor had actual knowledge of his injury within 30 days or that he provided written notice of his injury to his immediate supervisor within 30 days of injury.¹⁵

On appeal appellant argues that the employing establishment failed to inform him of his eligibility to file a claim for workers' compensation. Section 8122(d)(3) of FECA provides that the time limitations for filing a claim do not run against an individual whose failure to comply is excused by the Secretary when such notice could not be given because of exceptional circumstances.¹⁶ None of the exceptions relating to appellant's ability to file a claim apply in this case. Appellant was not a minor, he has not alleged that he was incompetent, and he has not provided evidence of an exceptional circumstance that would excuse his failure to timely file a

¹⁰ *J.T.*, Docket No. 18-0220 (issued July 27, 2018).

¹¹ *Id.*

¹² *Id.*

¹³ *See J.Y.*, Docket No. 16-0332 (issued June 8, 2016).

¹⁴ *Supra* note 9.

¹⁵ *Supra* note 10.

¹⁶ 5 U.S.C. § 8122(d)(3).

claim.¹⁷ As previously noted, the Board has held that an employee's ignorance or misunderstanding of his or her ability to file a claim does constitute exceptional circumstances that could excuse a failure to file a timely claim.¹⁸ Appellant has not established that he was prevented from filing a timely claim by exceptional circumstances as that term is used in section 8122(d)(3) of FECA. The Board thus finds that he has not established that he timely filed a claim for compensation.¹⁹

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 claim for compensation was not filed within the applicable time limitations provisions of 5 U.S.C. § 8122(a).

¹⁷ See *G.V.*, Docket No. 14-0876 (issued May 27, 2014).

¹⁸ *Supra* note 9.

¹⁹ See *L.G.*, Docket No. 16-0535 (issued February 6, 2017).

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 15, 2019
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