United States Department of Labor
Employees' Compensation Appeals Board

F.F., Appellant	)	
and	)	**Docket No. 19-1594**
	)	**Issued: March 12, 2020**
DEPARTMENT OF THE ARMY, U.S. ARMY MEDICAL COMMAND, Fort Riley, KS, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On July 22, 2019 appellant filed a timely appeal of a June 18, 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 May 15, 2018 appellant, then a 60-year-old retired referral management assistant, filed a traumatic injury claim (Form CA-1) alleging that on February 25, 2011 she injured her right shoulder, elbow, arm, wrist, and hand while in the performance of duty. She explained that she slipped on ice while exiting a vehicle and fell on her right side. Appellant noted that she believed that, when she fell on her right side, she further aggravated an "on-and-off again" pain she had experienced since a previous injury she suffered on March 1, 2004.[3] On the reverse side of the claim form appellant's supervisor noted that appellant was not in the performance of duty when the injury occurred and indicated that she was unsure if it was related to appellant's employment duties as the injury had occurred in February 2011. Appellant retired on September 30, 2016.

In a May 17, 2018 letter, the employing establishment controverted appellant's claim asserting that it should be denied because it was untimely filed, that appellant was not in the performance of duty when the injury occurred, and that she failed to establish causal relationship. The injury compensation specialist argued that appellant's injury was not new, but rather related to a previously accepted claim that had since been closed.[4] She also provided that appellant voluntarily retired on September 30, 2016.

In a development letter dated May 17, 2018, OWCP informed appellant that it had not received any evidence in support of her claim and advised her of the deficiencies of her claim and instructed her as to the factual and medical evidence necessary to establish her claim. It provided her a questionnaire for completion and requested that she submit a narrative medical report from her treating physician, which provided a diagnosis and the physician's rationalized medical explanation as to how the alleged employment incident caused the diagnosed condition. Appellant was afforded 30 days to submit the necessary evidence. OWCP did not receive additional evidence.

By decision dated June 18, 2018, OWCP denied appellant's claim finding that she 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 February 25, 2011 and that she had not filed a claim for compensation until May 15, 2018. OWCP further found that there was no evidence that appellant's immediate supervisor had actual knowledge within 30 days of the date of injury.

On April 30, 2019 appellant requested reconsideration of OWCP's June 18, 2018 decision.

[3] Appellant previously filed a claim under a separate file number, OWCP File No. xxxxxx399, which OWCP accepted for a right forearm strain due to a March 1, 2004 traumatic injury. The Board notes that appellant's claim was retired effective September 30, 2016.

[4] *Id*.

In a February 25, 2011 medical report, Elizabeth Henkemeyer, a nurse practitioner, recounted that appellant presented to the emergency department with pain in her right shoulder, elbow, and knee after she slipped and fell on ice in a parking lot. She diagnosed joint pain in appellant's right shoulder, elbow, and knee and contusions on her right elbow and upper arm.

In a February 25, 2011 diagnostic report, Dr. Sean Keenan, a Board-certified diagnostic radiologist, noted multiple diagnostic examinations of appellant's right side after noting pain in her right shoulder, knee, and elbow after falling on ice and landing on her right side. In a magnetic resonance imaging (MRI) scan of her right shoulder, he found no acute injuries, but noted some degenerative changes. An x-ray of appellant's right knee and right elbow both were read as unremarkable. A computerized tomography (CT) scan of her neck also returned as unremarkable.

Appellant provided therapy notes dated from October 5 to November 12, 2012 from Megan McCain, a physical therapist, detailing treatment for her right upper extremity pain.

In an October 16, 2012 diagnostic report, Dr. Julie Farrell, a Board-certified diagnostic radiologist, performed a right shoulder MRI scan. She noted evidence of a chronic degenerative rotator cuff tear, biceps tenosynovitis, and a tear of the anterior labrum.

In a December 11, 2012 medical report, Dr. Adam Chase, a Board-certified orthopedic surgeon, noted that appellant presented with right shoulder pain. He also noted that she had a history of right shoulder pain that recently increased in August 2012. A right shoulder MRI scan revealed a partial thickness tear of the supraspinatus and infraspinatus tendons. Dr. Chase diagnosed right shoulder adhesive capsulitis.

In medical reports dated from January 10 to June 14, 2013, Dr. Chase noted that he saw appellant for a follow-up appointment in relation to her right shoulder adhesive capsulitis and a partial thickness rotator cuff tear. He noted that she was still experiencing some pain, treated her with a lidocaine injection, and discussed a surgical procedure to treat her injuries. Appellant underwent a right shoulder arthroscopy with debridement of a degenerative labral tear and a subacromial decompression with acromioplasty on May 31, 2013.

In a June 30, 2016 medical report, Dr. Nanda Kumar, a Board-certified neurologist, noted that appellant presented with pain in her right wrist and hand that had been present for a year. An electromyography of both of her wrists revealed no evidence of carpal tunnel syndrome or ulnar neuropathy. Dr. Kumar opined that appellant's pain was due to overuse.

An August 1, 2016 medical note, Dr. Kumar indicated that appellant was unable to "do anything" with her hands at work until an orthopedic consultation with Dr. Chase on August 10, 2016.

Dr. Chase noted in an August 10, 2016 medical report, that appellant presented with pain in her right hand and wrist that had been going on for some time. Appellant reported that she injured her hand 12 years prior to her visit. Upon evaluation, Dr. Chase provided a diagnosis of other synovitis and tenosynovitis in her right forearm.

In an August 16, 2016 medical report, Teresa Chandler, a nurse practitioner, noted that appellant presented with right wrist pain that had been constant for the past four months and

prevented appellant from typing or working. Her report also provided a diagnosis of radial styloid tenosynovitis.

In August 23 and 30, 2016 medical reports, Dr. Betsey Bean, a Board-certified orthopedic surgeon, indicated that appellant presented with pain in her right wrist and hand that she had experienced for the last few years which began after a fall while she was holding a heavy bag. She noted that it was difficult to pinpoint the etiology of appellant's pain, but it seemed to be related to overuse. Dr. Bean also noted that she seemed to have a component of de Quervain's tenosynovitis.

In an April 24, 2019 letter, appellant described the events of the alleged February 25, 2011 employment incident. She indicated that she slipped and fell on ice when she was exiting her vehicle in the parking lot of the employing establishment. Appellant's husband helped her up and into the building. She reported the incident to the safety personnel who had her complete a safety report. Appellant provided that she gave the report to a supervisor before she left the building to seek treatment at the emergency department. She explained that she filled out a leave form for the remainder of the day, but could not remember which of her supervisors signed off on her form, although she was certain her leave form was approved and signed. Appellant therefore asserted that a supervisor had been made aware of her injuries that day.

In a series of e-mails dated April 4 and 9, 2019, appellant contacted the U.S. Army Combat Readiness Center seeking records of an incident report and a statement she provided in relation to the alleged February 25, 2011 employment incident.

In an April 24, 2019 response to OWCP's May 17, 2018 questionnaire, appellant explained that she was in the lower level of a parking lot owned, controlled, and managed by the employing establishment and that she was not performing her regular duties when her injuries occurred on February 25, 2011. She also explained that on the date of the accident the employing establishment was operating on a two-hour delay due to inclement weather so that she reported to work at 9:30 a.m. rather than her scheduled start time of 7:30 a.m.

In e-mail correspondence dated from May 24 to June 12, 2019, an OWCP claims examiner contacted the employing establishment requesting documentation to support appellant's statement that she filed a report and notified her supervisor of her injury on February 25, 2011. In response, the employing establishment indicated that, due to the amount of time that had passed since the injury occurred, it was unable to obtain hard evidence or information regarding the events surrounding the claimed incident. It was only able to confirm that appellant worked a total of 80 hours that pay period, but was unable to verify what days or hours she worked during that period.

By decision dated June 18, 2019, OWCP affirmed its June 18, 2018 decision, finding that appellant failed to submit sufficient evidence to support that she timely filed her claim within three years, that her immediate supervisor had actual knowledge of the injury within 30 days, or that written notice was given within 30 days of the alleged injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation in claimed is causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes a determination on the merits of the claim.[7] 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.[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 has not met her burden of proof to establish that she filed a timely claim for compensation pursuant to 5 U.S.C. § 8122(a).

On her Form CA-1 appellant indicated that her alleged injury occurred on February 25, 2011. She filed her Form CA-1 on May 15, 2018, over seven years after the alleged date of injury. Because she did not file her traumatic injury claim until May 15, 2018, appellant has filed her claim outside the three-year time limitation.[11]

The Board also finds that there is no evidence of record that appellant's immediate supervisor had actual knowledge, within 30 days of the alleged injury, or that appellant provided written notice of injury within 30 days of the injury.[12] In her April 24, 2019 letter, appellant

[5] *Supra* note 2.

[6] *D.J.*, Docket No. 18-0620 (issued October 10, 2018).

[7] *R.T.*, Docket No. 18-1590 (issued February 15, 2019); *see Charles W. Bishop*, 6 ECAB 571 (1954).

[8] *Id*.

[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] *Supra* note 7.

[12] *Supra* note 9.

indicated that she completed a February 25, 2011 incident report and leave form that was approved and signed by her supervisor. She explained that, while she could not remember which of her supervisors signed the form, she was certain the form was signed, thereby putting her supervisor on notice. However, appellant produced no evidence to substantiate that a supervisor was aware or signed a form as alleged. In response to the inquiry from OWCP requesting information regarding alleged injury, other than substantiating that appellant worked 80 hours that pay period, it indicated it was also unable to obtain evidence or information regarding the events surrounding her claimed injury. Appellant, therefore, has not met her burden of proof to establish that the traumatic injury claim was timely 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 has not met her burden of proof to establish that she filed a timely claim for compensation pursuant to 5 U.S.C. § 8122(a).

ORDER

IT IS HEREBY ORDERED THAT the June 18, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 12, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board