

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

_____)	
H.M., Appellant)	
)	
and)	Docket No. 19-1898
)	Issued: October 23, 2020
GENERAL SERVICES ADMINISTRATION,)	
CHIEF FINANCE OFFICE, Kansas City, MO,)	
Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On September 13, 2019 appellant filed a timely appeal from a June 14, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish that she filed a timely claim for compensation pursuant to 5 U.S.C. § 8122(a).

FACTUAL HISTORY

On May 15, 2018 appellant, then a 66-year-old accounting technician, filed an occupational disease claim (Form CA-2) alleging that she developed “cancer (all) acute lymphoblastic leukemia” due to factors of her federal employment, including exposure to various hazardous chemicals. She noted that she first became aware of her condition in “early 2000” and “April 2004” and first realized its relation to her federal employment on November 3, 2014. Appellant did not stop work. On the reverse side of the claim form, the employing establishment controverted her claim on the basis that it was untimely filed.

Appellant submitted medical evidence in support of her claim. On November 3, 2014 she was admitted to the hospital after multiple episodes of vomiting and associated weight loss. Appellant underwent a biopsy and was diagnosed with acute B-cell lymphoblastic leukemia. She was treated with chemotherapy and subsequently discharged on December 1, 2014.

In a development letter dated June 21, 2018, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her of the type of medical and factual evidence necessary to support her claim and provided a questionnaire for her completion regarding whether her claim was timely filed. The questionnaire advised that appellant must submit evidence which establishes that her claim was filed within three years of the date she became aware of a relationship between her condition and her employment. By separate development letter of even date, OWCP requested additional information from the employing establishment, including comments from a knowledgeable supervisor on the accuracy of all statements provided by appellant relative to this claim. It afforded both parties 30 days to respond.

Appellant subsequently submitted evidence detailing her federal employment, including her roles as a shipment clerk and an accounting technician at the employing establishment for the period September 2, 1980 through December 30, 1989.

By decision dated September 6, 2018, OWCP denied appellant’s claim finding that she did not file a timely claim within the requisite three-year time limit provided under 5 U.S.C. § 8122. It found that her date of last exposure was December 30, 1989 and that she did not file her occupational disease claim until May 15, 2018, more than three years after November 3, 2014, the date she indicated that she first realized her condition was related to her federal employment.

On October 10, 2018 appellant requested reconsideration and submitted additional evidence.

In a September 20, 2018 report, Mary Luder, an advanced practice registered nurse, indicated that appellant was officially diagnosed *via* bone marrow biopsy on November 5, 2014. She noted that she could not say with certainty that the exposure was the cause or trigger of appellant’s cancer.

Appellant also submitted a narrative statement asserting that she was diagnosed with a form of cancer that was mainly found in children and she did not file a claim within three years because she had been misdiagnosed until her illness worsened and she was admitted to Kansas University Medical Center.

In an e-mail dated January 8, 2019, the employing establishment notified OWCP that it had no evidence that appellant's immediate supervisor had actual knowledge of her condition within 30 days of the date of injury.

By decision dated January 8, 2019, OWCP denied modification of its September 6, 2018 decision.

On April 9, 2019 appellant requested reconsideration. In an attached narrative statement, she summarized her medical history and indicated that on November 3, 2014 she had been admitted to the hospital due to a worsening of her condition. Appellant noted that her doctor inquired whether she had worked around any chemicals. The doctor subsequently diagnosed her with leukemia and went on to say that this type of leukemia was the type they found in small children. Appellant indicated that she was unable to notify her supervisor of her illness because her employment had ended on December 30, 1989. She subsequently contacted the employing establishment and inquired about how to file a claim and then she filed.

By decision dated June 14, 2019, OWCP denied modification of its January 8, 2019 decision because the submitted evidence was insufficient to establish that her claim was timely filed.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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,⁴ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁵ 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

³ *Supra* note 1.

⁴ *G.L.*, Docket No. 18-1057 (issued April 14, 2020); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *M.G.*, Docket No. 18-1616 (issued April 9, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ 20 C.F.R. § 10.115; *A.S.*, Docket No. 19-1955 (issued April 9, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any 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, disability, or death, must be filed within three years after the injury or death.⁸

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 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.⁹ 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.¹⁰

Section 8122(b) provides that, in latent disability cases, the time limitation 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.¹¹ The Board has emphasized that an employee need only be aware of a possible relationship between his or her condition and his or her employment to commence the running of the applicable statute of limitations,¹² and that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.¹³

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 supervisor 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 8119.¹⁴ The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.¹⁵

⁷ *F.F.*, Docket No. 19-1594 (issued March 12, 2020); *Charles W. Bishop*, 6 ECAB 571 (1954).

⁸ 5 U.S.C. § 8122(a); *A.M.*, Docket No. 19-1345 (issued January 28, 2020); *W.L.*, 59 ECAB 362 (2008).

⁹ *S.O.*, Docket No. 19-0917 (issued December 19, 2019); *Larry E. Young*, 52 ECAB 264 (2001).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993); *see also G.M.*, Docket No. 18-0768 (issued October 4, 2018).

¹¹ 5 U.S.C. § 8122(b).

¹² *D.D.*, Docket No. 19-0548 (issued December 16, 2019); *Gerald A. Preston*, 57 ECAB 270 (2005).

¹³ *D.R.*, Docket No. 18-1754 (issued April 4, 2019); *Mitchel Murray*, 53 ECAB 601 (2002); *Garyleane A. Williams*, 44 ECAB 441 (1993).

¹⁴ 5 U.S.C. §§ 8122(a)(1), 8122(a)(2); *see also Larry E. Young*, *supra* note 9.

¹⁵ *R.H.*, Docket No. 17-0251 (issued November 28, 2018); *B.H.*, Docket No. 15-0970 (issued August 17, 2015).

It is the employee's burden of proof to establish that a claim is timely filed.¹⁶

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).

Appellant was employed by the employing establishment from September 2, 1980 to December 30, 1989. On May 15, 2018 she filed a Form CA-2 indicating that she first became aware of her condition in "early 2000" and "April 2004" and realized its relation to her federal employment on November 3, 2014. Because appellant did not file her occupational disease claim until May 15, 2018, more than three years after she first became aware that her condition was related to her federal employment on November 3, 2014, the Board finds that she untimely filed her claim.¹⁷

Appellant, therefore, has not established that this occupational disease claim was timely filed.¹⁸

On appeal appellant reiterates that during the course of her illness she was not aware that her illness was employment related until she was hospitalized for 30 days and was asked by one of her physicians if she had ever worked around chemicals. As explained above, the Board finds that she has not established that she timely filed her occupational disease 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 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).

¹⁶ *A.S.*, *supra* note 6.

¹⁷ *D.R.*, *supra* note 13.

¹⁸ *D.D.*, Docket No. 19-0548 (issued December 16, 2019); *R.T.*, Docket No. 18-1590 (issued February 15, 2019).

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 23, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board