

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

_____)	
L.S., Appellant)	
)	
and)	Docket No. 20-0705
)	Issued: January 27, 2021
U.S. POSTAL SERVICE, PARKVILLE)	
STATION POST OFFICE, Brooklyn, NY,)	
Employer)	
_____)	

Appearances:
John L. DeGeneres, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On February 11, 2020 appellant, through counsel, filed a timely appeal from a November 29, 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

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 January 25, 2019 appellant, then a 66-year-old retired letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed osteoarthritis of the left knee due to factors of his federal employment. He indicated that he first became aware of his condition and its relationship to his federal employment on July 18, 2018. On the reverse side of the claim form the employing establishment noted that appellant retired effective August 1, 2015.

In an attached July 1, 2018 signed statement, appellant indicated that he worked for the employing establishment from 1970 to 2015. He indicated that he began experiencing left knee problems in 2004 and began receiving treatment in 2005. Appellant asserted that he did not know that he could file a claim related to his left knee because, unlike his right knee, he could not specify a particular traumatic event. He alleged that factors of his federal employment contributed to his left knee condition, including excessive standing, walking with weight, entering and exiting his work vehicle, ascending and descending stairs, bending, stooping, twisting, squatting, lifting, and carrying. Appellant noted that he worked approximately 48 hours a week, 5 days a week for 45 years. He indicated that, since 2010, he played golf for approximately four hours once per week. Appellant stated that, due to his knee pain, he only played golf four times over the prior year.

An April 28, 2004 magnetic imaging resonance (MRI) scan of appellant's left knee revealed a torn medial meniscus and chondromalacia of the patellofemoral joint.

In a June 28, 2005 report, Dr. John L'Insalata, a Board-certified orthopedic surgeon, noted that appellant had severe, intermittent left knee pain for the past year. He reviewed x-rays and an MRI scan of appellant's left knee and diagnosed left knee internal derangement with medial meniscus tear and chondromalacia.

In a July 21, 2005 operative report, Dr. L'Insalata described the procedure for left knee arthroscopy, partial medial meniscectomy, debridement chondroplasty of the medial and patella femoral compartments, and partial synovectomy operations. He noted postoperative diagnoses of left knee medial meniscus tear, chondromalacia of the medial and patellofemoral compartments, and synovitis including medial plica. A pathology report on shavings of appellant's left knee, dated July 21, 2005, revealed fragments of fibrocartilage with degenerative changes, mild chronic synovitis, and fibrous tissue and adipose tissue consistent with torn meniscus.

In a January 19, 2006 report, Dr. L'Insalata noted that appellant was working as a postal worker and experienced discomfort and swelling in the left knee, particularly with extended walking. He examined appellant and diagnosed left knee effusion and chondromalacia.

In an August 4, 2014 statement, appellant noted that on July 14, 2014 he experienced right foot pain.³ He indicated that he did not report his pain because as a postal worker of 45 years, he had experienced many nicks and pains. Appellant further stated that on August 1, 2014 he experienced pain in his lower left back while working. He noted that the pain in his right foot and back still remained.

A drug counseling information sheet, dated March 2, 2015, indicated that appellant was prescribed an injectable hyaluronic acid for his left knee, which was to be administered on a weekly basis.

In a January 20, 2017 report, Dr. Justin Kung, a Board-certified diagnostic radiologist, reviewed bilateral knee radiographs, dated January 10, 2017. He diagnosed severe degenerative changes in the medial compartments of both knees.

In a July 18, 2018 report, Dr. Stewart Kaufman, a Board-certified orthopedic surgeon, noted that appellant worked as a letter carrier for 45 years, which involved frequent repetitive motion, including getting in and out of a truck, lifting loads, and carrying packages. He indicated that appellant developed pain in both knees, particularly in the patellofemoral joints. Dr. Kaufman examined appellant and reviewed his medical record and MRI scans of his knees. He diagnosed right knee patellofemoral arthritis and left knee patellofemoral disease. Dr. Kaufman opined that appellant's degenerative osteoarthritis of the left and right knee was caused, accelerated, and aggravated by his work activities, including lifting, walking, and climbing.

In a development letters dated March 13 and April 2, 2019, OWCP notified appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

On April 8, 2019 appellant responded to OWCP's development questionnaire. He reiterated that the date he became aware that his left knee condition was work related was July 18, 2018, the date of his examination with Dr. Kaufman. Appellant noted that, although he received a diagnosis of arthritis prior to this date, he was unaware of the causal relationship between his work activities and his left knee condition.

In a letter dated April 9, 2019, counsel asserted that the date appellant became aware that his left knee condition was work related was the date of a medical determination that had not

³ The Board notes that on August 4, 2014 appellant filed a traumatic injury claim (Form CA-1) under OWCP File No. xxxxxx684 alleging that on July 14, 2014 he experienced pain in his right foot due to excessive walking and stepping on and off truck steps and house steps. By decision dated December 19, 2014, OWCP denied appellant's claim as the evidence of record was insufficient to establish that the incident occurred, as alleged, since appellant failed to clarify what type of injury he was claiming or explain his delay in filing his claim and receiving medical treatment. By decision dated March 25, 2016, the Board found that appellant had not established that he sustained a right foot condition in the performance of duty on July 14, 2014 and further found that OWCP properly denied his request for an oral hearing as untimely. *See* Docket No. 15-0698 (issued March 25, 2016). In a separate appeal, the Board found that OWCP properly denied his request for oral hearing from a denial of a low back claim as untimely. *See* Docket No. 15-1433 (issued December 8, 2015).

occurred until July 18, 2018. He further asserted that Dr. Kaufman's July 18, 2018 report provided both a diagnosis and a well-rationalized, uncontroverted opinion regarding causal relationship.

By decision dated May 17, 2019, OWCP denied appellant's occupational disease claim, finding that he failed to file a timely claim within the requisite three-year time limitation under section 8122(a) of FECA. It found that he had become aware of the relationship between his condition and his federal employment on August 1, 2014,⁴ but had not filed a claim until February 26, 2019, more than three years after the date of last exposure, August 1, 2015.

On May 31, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a memorandum dated September 12, 2019, appellant noted that OWCP had found that he indicated in an August 1, 2014 statement that he was aware of a relationship between his condition and his employment, but he noted that he had not made such a statement on August 1, 2014. He again indicated that he was unaware of a relationship between his work activities and his left knee condition until his July 18, 2018 examination with Dr. Kaufman.

On September 13, 2019 appellant, through counsel, requested that the appeal for an oral hearing be converted to a review of the written record by a representative of OWCP's Branch of Hearings and Review. Counsel asserted that appellant's August 4, 2014 statement, in OWCP File No. xxxxxx684, demonstrated that he was only addressing pain in his right foot and back and not his left knee. He further argued that appellant's general statements on "nicks and pains" involving his right leg did not suggest that he was aware of a relationship between his work activities and his left knee condition. Counsel asserted that the earliest possible date appellant could have known he had a compensable claim was January 20, 2017, the date of Dr. Kung's x-ray report on appellant's knees, and that the earliest date that appellant should have known he had a compensable claim was July 18, 2018, the date of Dr. Kaufman's examination.

By decision dated November 29, 2019, OWCP's hearing representative affirmed the May 17, 2019 decision, finding that appellant's occupational disease claim was untimely filed. The hearing representative found that appellant should have reasonably known within three years of the time of his last exposure at work that his diagnosed left knee arthritis was possibly related to his federal employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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 period of FECA,⁶ that an injury was sustained in the performance of duty, as

⁴ OWCP relied on a statement, by appellant, which was actually dated August 4, 2014.

⁵ *Supra* note 2.

⁶ *M.O.*, Docket No. 19-1398 (issued August 13, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁷ 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.⁸

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes a determination on the merits of the claim.⁹ 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.¹⁰

In an occupational disease claim, 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 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.¹¹

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 a causal relationship between the employment and the compensable disability.¹² 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,¹³ 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.¹⁴

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

⁷ *J.R.*, Docket No. 20-0496 (issued August 13, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ *B.M.*, Docket No. 19-1341 (issued August 12, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁹ *M.B.*, Docket No. 20-0066 (issued July 2, 2020); *Charles W. Bishop*, 6 ECAB 571 (1954).

¹⁰ 5 U.S.C. § 8122(a); *F.F.*, Docket No. 19-1594 (issued March 12, 2020); *W.L.*, 59 ECAB 362 (2008).

¹¹ *See A.M.*, Docket No. 19-1345 (issued January 28, 2020); *Larry E. Young*, 52 ECAB 264 (2001).

¹² 5 U.S.C. § 8122(b).

¹³ *D.D.*, Docket No. 19-0548 (issued December 16, 2019); *J.M.*, Docket No. 10-1965 (issued May 16, 2011); *Larry E. Young*, *supra* note 11.

¹⁴ *S.F.*, Docket No. 19-0283 (issued July 15, 2019); *Mitchel Murray*, 53 ECAB 601 (2002); *Garyleane A. Williams*, 44 ECAB 441 (1993).

provided within 30 days pursuant to section 8119.¹⁵ The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.¹⁶

ANALYSIS

The Board finds that appellant's claim for compensation was timely filed within the applicable time limitation provisions of 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.¹⁷ The date of last exposure in the present case is August 1, 2015, the date appellant retired from federal service.

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.¹⁸ Appellant has alleged that he first became aware of his left knee condition and its relationship to his federal employment on July 18, 2018, the date of his examination with Dr. Kaufman.

OWCP found appellant's claim untimely under 5 U.S.C. § 8122(a) because it was filed on January 25, 2019, more than three years after the date of last exposure on August 1, 2015. It determined that appellant knew or reasonably should have known of a relationship between his condition and his federal employment on August 1, 2014 when he noted in a statement that he suffered from right foot pain and experienced many nicks and pains.

The Board finds that the evidence of record does not establish that appellant should have known earlier than July 18, 2018 that he had a work-related left knee condition. Appellant's August 4, 2014 statement addressed pain in his right foot and lower left back, but did not reference a left knee condition. In a January 20, 2017 report, Dr. Kung diagnosed severe degenerative changes in the medial compartments of both knees, but did not relate the condition to factors of appellant's federal employment. A review of the record shows that appellant did not become aware of the connection between his left knee condition and factors of his federal employment until July 18, 2018 when Dr. Kaufman diagnosed left knee patellofemoral disease and opined that it was caused, accelerated, and aggravated by appellant's work activities, including lifting, walking, and climbing.¹⁹ The Board therefore finds that appellant's claim was timely filed under

¹⁵ 5 U.S.C. §§ 8122(a)(1); 8122(a)(2); *see also* *Larry E. Young*, *supra* note 11.

¹⁶ *S.O.*, Docket No. 19-0917 (issued December 19, 2019); *B.H.*, Docket No. 15-0970 (issued August 17, 2015); *Willis E. Bailey*, 49 ECAB 511 (1998).

¹⁷ *M.B.*, *supra* note 9.

¹⁸ *Supra* note 13.

¹⁹ *See C.S.*, Docket No. 18-0009 (issued March 22, 2018); *A.S.*, Docket No. 17-1639 (issued November 27, 2017).

5 U.S.C. § 8122(a) as it was filed on January 25, 2019, within three years of the date of awareness on July 18, 2018.²⁰

As appellant has filed a timely claim for compensation, the case is remanded to OWCP to address the merits of the claim. After such further development as is deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant's claim for compensation was timely filed within the applicable time limitation provisions of 5 U.S.C. § 8122(a).

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.²¹

Issued: January 27, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²⁰ *Id.*

²¹ Christopher J. Godfrey, Deputy Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after January 20, 2021.