

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

_____)
R.L., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
ARIZONA AIR NATIONAL GUARD,)
Tucson, AZ, Employer)

Docket No. 22-0057
Issued: September 2, 2022

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

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
 VALERIE D. EVANS-HARRELL, Alternate Judge
 JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On October 18, 2021 appellant filed a timely appeal from a June 25, 2021 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 to consider the merits of this case.

ISSUE

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

FACTUAL HISTORY

On March 11, 2020 appellant, then a 58-year-old retired aircraft engine mechanic, filed a an occupational disease claim (Form CA-2) alleging that he developed neck conditions due to

¹ 5 U.S.C. § 8101 *et seq.*

factors of his federal employment, including performing excessive engine maintenance procedures, manual engine movements with excessive force, and the excessive neck strain while performing manual borescope procedures.² He noted that he first became aware of his condition on February 12, 1993 and first realized that it was caused or aggravated by his federal employment on May 28, 2014. Appellant retired, effective July 2, 2011, and first reported his condition to his supervisor on October 1, 2019.

In a narrative statement, appellant asserted that he first injured his low back at work on February 12, 1993. In December 5, 2013, he first sought treatment for his neck pain. Appellant indicated that his neck condition developed from 2010 through 2013. On May 28, 2014 he sought treatment in the emergency room and underwent triple level anterior cervical discectomy and fusion on May 29, 2014.

On December 5, 2013 Elizabeth Thomas, a nurse practitioner, examined appellant due to neck and low back pain. Appellant reported experiencing neck pain for several years, which radiated into his shoulders. Ms. Thomas diagnosed cervicalgia and cervical disc degeneration. She noted that appellant discussed reopening his workers' compensation case.

On April 15, May 5, and September 10, 2014 Dr. Monica Silvia Moore, a family practitioner, diagnosed cervical disc disease. In a July 2, 2014 note, she reported that, prior to his surgery, appellant had known degenerative joint disease of the cervical and lumbar spine, but no incident that triggered the recent event.

On May 28, 2014 Dr. Hemant Kudrimoti, a Board-certified neurologist, examined appellant due to gait difficulties. He noted that appellant had been performing fairly intense backyard work since December 20, 2013 while building a gazebo and in 2014 began noticing numbness in his feet and tingling in his fingers. Dr. Kudrimoti also noted severe degenerative joint disease of the cervical spine with myelopathy as demonstrated on a May 28, 2014 magnetic resonance imaging (MRI) scan.

In a report dated September 11, 2019, Dr. Moore asserted that she first examined appellant in December 2009 due to low back pain. She also reported intermittent neck and shoulder pain prior to his hospitalization in May 2014. Appellant underwent a cervical MRI scan at that time, which demonstrated moderate-to-severe spinal stenosis from C3 through C6 with severe cord compression. He underwent urgent anterior cervical discectomy and fusion C3 through C6 on May 30, 2014. Dr. Moore attributed appellant's spinal problems directly to his work activities.

In a memorandum of telephone call (Form CA-110) dated March 17, 2020 appellant advised OWCP that his cervical condition was not fully diagnosed until September 20, 2019 and

² On February 12, 1993 appellant filed a traumatic injury claim (Form CA-1) for a back injury on that date due to lifting heavy equipment while in the performance of duty. On March 2, 2000 he filed a Form CA-1 alleging that he sustained low back pain during physical fitness training while in the performance of duty. OWCP accepted the claim for displacement of the lumbar intervertebral disc without myelopathy; File No. xxxxxx489. On May 18, 2004 appellant filed a Form CA-1 alleging that he injured his right lower back moving an engine while in the performance of duty, which OWCP accepted for a back strain; File No. xxxxxx851. On August 3, 2004 he filed a notice of recurrence (Form CA-2a) due to his accepted May 18, 2004 traumatic injury. OWCP has not administratively combined these files.

that was the date when he realized that his neck condition was work related, not May 30, 2014 when he underwent neck surgery, as listed on his claim form. The employing establishment provided a correction on March 17, 2020.

On March 30, 2020 appellant alleged that he originally submitted his Form CA-2 to the employing establishment on September 20, 2019. He further contended that the date that he realized that his disease was work related, was the same as the date that he realized that the full extent of his disease or when he reached maximum medical improvement, which was September 20, 2019.

In an April 22, 2020 development letter, OWCP requested additional factual and medical evidence to establish that appellant provided timely notification of his claimed work injury and that his diagnosed conditions were causally related to his accepted employment factors. It further provided a questionnaire for his completion. OWCP afforded appellant 30 days for a response.

Appellant responded to the development questionnaire on May 21, 2020 and disagreed with OWCP's statement of his burden of proof to establish his claim. He also provided a May 19, 2020 report from Dr. Moore in which she reviewed his employment duties of an excessive number of engine maintenance procedures, a number of manual engine movements with excessive force, and excessive neck strain while performing manual borescope procedures, attributed his diagnosed cervical conditions to these duties, and provided a physiological explanation for her opinion.

By decision dated July 24, 2020, OWCP denied the claim as it was not timely filed within three years of the date at which appellant was aware or by the exercise of reasonable diligence should have been aware of the causal relationship between his diagnosed conditions and his employment by July 1, 2011, the date of his last exposure to the implicated employment factors. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On August 18, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. He clarified that his claim was for a latent neck injury, which became apparent on May 28, 2014 and related permanent impairment, not for his previous lower back injuries. Appellant further asserted that he first realized that his neck injury was causally related to his employment factors on September 20, 2019.

In a May 20, 2020 letter, W.L, appellant's brother, asserted that on March 28 and 29, 2019, while discussing appellant's medical history, they realized that his condition was not improving and had resulted in permanent disability. They determined that appellant's current condition was caused by his employment duties.

Following a preliminary review, by decision dated September 29, 2020, OWCP's hearing representative set aside the July 24, 2020 decision and remanded the case for further development of the timeliness of appellant's claim for work-related cervical conditions.

By decision dated November 19, 2020, OWCP denied appellant's claim as it was not timely filed. It found that he reasonably should have been aware of a potential relationship between his cervical condition and his employment duties in 2014 "when the condition progressed

to the point a surgery was performed on May 30, 2014,” more than three years prior to the filing of his claim.

On December 2, 2020 appellant requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review.

By decision dated January 19, 2021, OWCP found that the case was not in posture for a hearing as the November 19, 2020 decision was not accompanied by appeal rights. It returned the case to appellant’s claims examiner for further action, as necessary, to be followed by the issuance of a decision accompanied by appeal rights.

Also on January 19, 2021 OWCP issued an amended decision, which acknowledged that the November 19, 2020 decision did not include appeal rights, denied appellant’s claim on the basis that it was not timely filed, and provided appropriate appeal rights.

On January 26, 2021 appellant requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review.

The oral hearing took place on April 13, 2021. Appellant’s then representative asserted that appellant’s cervical condition was latent, and made itself know several years after his retirement in 2011. He further asserted that, until Dr. Moore’s 2019 report, which attributed appellant’s cervical condition to appellant’s employment, he had no reasonable expectation that this condition was employment related. Appellant denied any traumatic neck injuries during or after his employment.

By decision dated June 25, 2021, OWCP’s hearing representative affirmed the January 19, 2021 decision, finding that the claim was not timely filed due to inconsistencies in the evidence regarding when appellant first developed neck pain.

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 period 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

³ *Supra* note 1.

⁴ *W.P.*, Docket No. 21-0107 (issued May 4, 2021); *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).

⁵ *J.R.*, Docket No. 20-0496 (issued August 13, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

The issue is 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 for disability or death must be filed within three years after the injury or death.⁸

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 or 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) 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.¹¹ It is the employee's burden of proof to establish that a claim is timely filed.¹²

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.¹³ The date of last exposure in the present case is July 2, 2011, the date appellant retired from federal service.

⁶ *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).

⁷ *M.B.*, Docket No. 20-0066 (issued July 2, 2020); *Charles W. Bishop*, 6 ECAB 571 (1954).

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

⁹ *See A.M.*, Docket No. 19-1345 (issued January 28, 2020); *Larry E. Young*, 52 ECAB 264 (2001).

¹⁰ *S.O.*, Docket No. 19-0917 (issued December 19, 2019); *Larry E. Young, id.*

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 *L.S.*, Docket No. 20-0705 (issued January 27, 2021); *supra* note 7.

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 or her condition and his or her employment.¹⁴ Appellant has alleged that he first became aware of the relationship of his cervical conditions to his federal employment on September 19, 2020, the date of Dr. Moore's report.

OWCP found appellant's claim untimely under 5 U.S.C. § 8122(a) because it was filed on March 12, 2020 more than three years after the date of last exposure on July 2, 2011. It determined that he knew or reasonably should have known of a relationship between his condition and his federal employment on May 28, 2014 when he underwent cervical spine surgery.

The Board finds that the evidence of record does not establish that appellant should have known earlier than May 19, 2020 that he had a work-related cervical spine condition. On May 28, 2014 Dr. Kudrimoti described appellant's history of performing fairly intense backyard work since December 20, 2013 and that in 2014 appellant began noticing numbness in his feet and tingling in his fingers. Appellant provided this history of injury, indicating that he initially attributed his cervical condition and symptoms to nonemployment activities. A review of the record shows that he did not become aware of the connection between his cervical spine conditions and factors of his federal employment until May 19, 2020 when Dr. Moore opined that the diagnosed cervical conditions were caused, accelerated, and aggravated by his work activities, including an excessive number of engine maintenance procedures, a number of manual engine movements with excessive force, and excessive neck strain while performing manual borescope procedures.¹⁵ The Board, therefore, finds that appellant's claim was timely filed under 5 U.S.C. § 8122(a) as it was filed on March 12, 2020 within three years of the date of awareness on May 19, 2020.¹⁶

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).

¹⁴ *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 9.

¹⁵ *See L.S.*, *supra* note 13; *C.S.*, Docket No. 18-0009 (issued March 22, 2018); *A.S.*, Docket No. 17-1639 (issued November 27, 2017).

¹⁶ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 2, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board