

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

D.A., Appellant)	
)	
and)	Docket No. 22-0056
)	Issued: May 9, 2023
U.S. POSTAL SERVICE, POST OFFICE,)	
North Reading, MA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Daniel B. Shapiro, for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On June 10, 2021 appellant, through counsel, filed a timely appeal from an April 19, 2021 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 August 27, 2020 appellant, then a 65-year-old retired truck driver, filed an occupational disease claim (Form CA-2) alleging that factors of his federal employment contributed to his bilateral hip osteoarthritis. He noted that he first became aware of his condition on February 24, 2014 and realized its relation to his federal employment on July 21, 2020. Appellant stopped work on January 1, 2014.

In an attached statement dated March 11, 2020, appellant noted that he worked at the employment establishment for 31 years from 1983 until 2014. This included work as a part-time flexible motor vehicle operator for eight months, a letter carrier for nine years, and a truck driver until his 2014 retirement. Appellant began to develop hip symptoms in 2000. He noted that he had only been off work for 10 days when he injured his back and he did not recall any periods of light, limited or modified duty.

Appellant submitted diagnostic testing, operative reports, and medical reports from physicians, nurse practitioners, and physician assistants from December 5, 2013 through July 21, 2020, which diagnosed bilateral arthritic hip conditions.

In a December 5, 2013 report, a certified physician assistant, noted that appellant was seen for left hip discomfort secondary to left hip osteoarthritis. She noted that appellant had sizable fluid collection within the iliopsoas bursa which may account for the more recent increase of left hip pain.

In a January 24, 2014 report, Dr. Stephen Raterman, a Board-certified orthopedic surgeon, noted that appellant was a retired truck driver who had left hip issues for over two years with no known injury, and he recalled pain in his hip longer than that. Appellant reported significant difficulty putting on socks and shoes and getting in and out of his car. An assessment of symptomatic left hip degenerative joint disease was provided. Dr. Raterman counseled appellant to lose weight.

On February 24, 2014 appellant underwent left hip resurfacing for left hip degenerative disc disease. Following the February 24, 2014 procedure, appellant continued to follow up with Dr. Raterman.

In a report dated October 10, 2016, Dr. Raterman noted that appellant had experienced right hip pain for two weeks, and that he had denied a fall or any other injury. Dr. Raterman diagnosed right hip degenerative disc disease. On October 28, 2016 appellant underwent a right hip resurfacing. His October 28, 2016 hospital records noted a history of severe osteoarthritis and obesity. Appellant continued to see Dr. Raterman in follow up.

In a July 21, 2020 report, Dr. Kevin L. Scott, a Board-certified orthopedic surgeon, noted that appellant, a retired truck driver, first experienced pain in his hips some time in 2000. He

reported that appellant had a left hip resurfacing on February 24, 2014 and a right hip resurfacing on October 28, 2016. Dr. Scott reviewed medical documentation, presented examination findings, and diagnosed status post resurfacing of bilateral hips for which appellant was at maximum medical improvement. He opined that appellant's work duties contributed to the development and progression of his lower extremity osteoarthritis and the need for bilateral hip arthroplasty. Dr. Scott also provided a permanent impairment rating.

In a September 17, 2020 development letter, OWCP informed appellant that the evidence of record was insufficient to establish that his claim was timely filed. It advised him of the type of medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In an October 14, 2020 response, appellant stated that while he was aware of his bilateral hip arthritis in 2014, he was unaware that it was related to his federal employment until July 21, 2020 when Dr. Scott first informed him of the relationship. He indicated that he filed the claim once he became aware of the possible causal relationship.

In an October 14, 2020 letter, counsel asserted that this was a latent disability case, and while appellant was aware of his lower extremity conditions prior to his retirement, he was not aware of a causal relationship between his federal employment and his lower extremity conditions until he was first informed of that relationship by Dr. Scott on July 21, 2020. As July 21, 2020 was, therefore, the earliest date appellant could have possibly known of a causal relationship, counsel contended that he had until July 23, 2023 to timely file his claim.

By decision dated December 15, 2020, OWCP denied appellant's occupational disease claim, finding that he had not filed a timely claim within the requisite three-year time limitation under section 8122(a) of FECA. It found that he first became aware of the relationship between his condition and his federal employment on January 24, 2014, but did not file a claim until August 27, 2020, more than three years after the date of last exposure, which was January 1, 2014.

On January 28, 2021 appellant, through counsel, requested reconsideration.

In a January 21, 2021 statement, appellant asserted that Dr. Scott was the only medical provider with whom he ever had a detailed discussion with about his work history and possible connection of his bilateral hip problems with his work. He denied having any discussion with other medical providers about his work causing his hip problems.

By decision dated April 19, 2021, OWCP denied modification of its December 15, 2020 decision.

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

³ *Supra* note 3.

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 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

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.⁹

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.¹⁰ 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,¹¹ 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.¹²

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

⁴ *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).

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 5 U.S.C. § 8122(b).

¹¹ *L.S.*, Docket No. 20-0705 (issued January 27, 2021); *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.

¹² *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 8119.¹³ The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.¹⁴

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).

The date of last exposure in the present case is January 1, 2014, the date appellant stopped work and was no longer exposed to employment factors. Dr. Raterman, in his January 24, 2014 report, related that appellant was a retired truck driver with ongoing left hip issues for over two years with symptoms of increased pain on walking and difficulty getting in and out of his car. However, Dr. Raterman did not reference appellant's work factors. The diagnostic testing and other medical evidence of record likewise did not reference appellant's work factors. Furthermore, the medical record indicates that appellant's condition was degenerative in nature and that appellant was also assessed with obesity.

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.¹⁵ The case record establishes that appellant was not aware or reasonably should have been aware of a relationship between his condition and his federal employment until the July 21, 2020 report of Dr. Scott.¹⁶

The Board, therefore, finds that appellant's claim was timely filed under 5 U.S.C. § 8122(a) as it was filed on August 27, 2020, within three years of the date of awareness on July 21, 2020.

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).

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

¹⁴ *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).

¹⁵ *Supra* note 10.

¹⁶ *See S.K.*, Docket No. 21-0592 (issued February 21, 2023).

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 9, 2023
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board