

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

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**M.P., Appellant**

**and**

**U.S. POSTAL SERVICE, STRATFORD POST  
OFFICE, Stratford, CT, Employer**  
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**Docket No. 22-0937  
Issued: January 9, 2024**

*Appearances:*

*John L. DeGeneres, Jr., Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On June 2, 2022 appellant, through counsel, filed a timely appeal from a February 24, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the

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<sup>1</sup> 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 an 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.

<sup>2</sup> Appellant, through counsel, submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of the oral argument request, counsel asserted that oral argument should be granted because it would allow her to present her arguments regarding the issue of timeliness in a succinct manner. The Board, in exercising its discretion, denies appellant's request for oral argument because this matter can be adequately addressed in a decision based on a review of the case record. Oral argument in this appeal would not serve a useful purpose. Therefore, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over 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 October 14, 2019 appellant, then a retired 62-year-old letter carrier,<sup>4</sup> filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral hip osteoarthritis due to factors of his federal employment. He noted, “[t]he relationship to my employment is a medical question that I was unaware of until my exam[ination] with Dr. Scott on September 27, 2017.” Appellant noted that he first became aware of his condition on February 3, 2014, and first realized its relationship to his federal employment on September 27, 2017. On the reverse side of the form, the acting manager of customer service advised that he started working at the employing establishment after appellant retired, and noted that he had no knowledge of appellant’s record. He indicated that appellant first reported his claimed condition to a supervisor on October 14, 2019.

In a November 12, 2019 statement, appellant reported that he had worked for the employing establishment for 32 years from 1981 until he retired in 2013. He advised that beginning in 1981 he worked as a letter carrier, a job that required walking approximately seven to eight miles per day to make 500 deliveries. Appellant noted that he had to ascend and descend hundreds of stairs per day while carrying heavy mail parcels. He estimated that he had to mount and dismount his postal vehicle 100 times per day and advised that he also had to stand for two and a half hours per day while casing mail.

Appellant submitted a June 4, 2009 report detailing an open reduction internal fixation of his right patella by Dr. Mark Wilchinsky, a Board-certified orthopedic surgeon. In a January 9, 2014 report, Dr. Wilchinsky indicated in the history portion of the report that appellant presented with a “many[-]month history of right buttock, hip, and thigh pain” and noted, “[h]e was a mail [carrier] for years and did a lot of walking. Sometimes he gets groin pain. Never had any one specific injury.” He reported physical examination findings, noted that x-rays showed severe degenerative arthritis of the right hip, and diagnosed arthritic right hip and sciatica. Dr. Wilchinsky recommended total right hip replacement.

Appellant also submitted a January 23, 2014 report from John Carravone, a physician assistant, who diagnosed advanced degenerative joint disease of the right hip; a January 23, 2014 pre-surgery checklist; a February 2, 2014 report from Mr. Carravone discussing upcoming right hip surgery; February 3, 2014 x-rays of the right hip; a February 3, 2014 surgery report of total right hip replacement; several February 2014 reports from attending physicians other than

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> Appellant retired from the employing establishment effective May 31, 2013.

Dr. Wilchinsky discussing appellant's condition after his total right hip replacement; February 28, 2014 and May 14, 2015 home health certifications from Dr. Wilchinsky; a March 13, 2014 report from Dr. Wilchinsky discussing appellant's postsurgery condition; a March 3, 2015 report from Dr. Wilchinsky reporting appellant's left knee complaints; a March 9, 2015 report describing a steroid injection in the left hip; a March 19, 2015 report from Dr. Wilchinsky regarding left hip complaints; an April 10, 2015 pre-surgery checklist; an April 20, 2015 surgery report of total left hip replacement; several April and May 2015 reports from Dr. Wilchinsky, Mr. Carravone, and other healthcare providers discussing appellant's left hip condition before and after his total left hip replacement; and April 20, 2015 x-rays of the left hip.

In a March 6, 2019 report, Dr. Kevin L. Scott, a Board-certified orthopedic surgeon, discussed appellant's work history, noting that he reported that he had worked for the employing establishment for 32 years. Appellant reported that since 1981 he worked as letter carrier and was required to walk approximately seven to eight miles per day, including going up and down stairs, while carrying heavy mail parcels. Dr. Scott noted that appellant also reported that he had to stand for two and a half hours per day while casing mail. He diagnosed status post bilateral hip total arthroplasties and opined that appellant's bilateral hip osteoarthritis was aggravated by his work activities, including walking, climbing, and lifting.

In a November 6, 2019 letter, an employing establishment official advised that appellant's October 14, 2019 occupational disease claim was being challenged based on the fact that appellant retired on May 31, 2013 and was last exposed to the conditions alleged to have caused his claimed disease/illness on that same date.

In a November 15, 2019 development letter, OWCP notified appellant of the deficiencies of 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.

Appellant submitted copies of previously submitted documents. In a December 2, 2019 statement, he provided additional details regarding his work duties. In a December 17, 2019 letter, counsel argued that appellant had established his claim.

By decision dated March 24, 2020, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed condition and the accepted factors of his federal employment. It concluded, therefore, that the requirements had not been met to establish an injury or condition due to the accepted employment factors.

On March 31, 2020 appellant, through his then-counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated May 18, 2020, OWCP's hearing representative set aside the March 24, 2020 decision and remanded the case to OWCP for further development, to be followed by issuance of a *de novo* decision. The hearing representative determined that the reports of Dr. Scott were of sufficient probative value to require, upon remand, that appellant be referred for a second opinion examination and evaluation regarding his claim for a work-related occupational disease.

On September 18, 2020 OWCP referred appellant for a second opinion examination and evaluation with Dr. Clinton Jambor, a Board-certified orthopedic surgeon. It requested that Dr. Jambor provide an opinion regarding whether appellant sustained an occupational disease related to the accepted employment factors.

In an October 21, 2020 report, Dr. Jambor discussed appellant's factual and medical history, and reported the findings of his physical examination. He diagnosed status post total arthroplasty, but opined that appellant's surgery was not related to a work injury. Dr. Jambor noted, "[h]e developed arthritis secondary to age[-]related degenerative changes. It is my opinion that his work activities as a vehicle maintainer and letter carrier were not a substantial factor in his need for surgery."

By decision dated February 5, 2021, OWCP denied appellant's claim for an occupational disease, finding that the fifth basic element, causal relationship, had not been met.

On February 22, 2021 appellant, through his then-counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. During the June 10, 2021 hearing, appellant's then-counsel argued that appellant had submitted sufficient medical evidence to establish a work-related occupational disease.

In a June 29, 2021 statement, appellant asserted that he first became aware that his bilateral arthritic hips were related to his work activities on September 27, 2017, when he saw Dr. Scott who asked him about his work history in detail. He maintained that Dr. Scott was the first physician he ever had a discussion with about his work causing his hip condition. Appellant noted, "I never knew that I potentially had a compensable disability caused by work or that there was a causal relationship between my work and my employment until my appointment with Dr. Scott on September 27, 2017."

By decision dated September 1, 2021, OWCP's hearing representative affirmed OWCP's February 5, 2021 decision, as modified to reflect that appellant's occupational disease claim was now denied on the basis that the claim was untimely filed. The hearing representative found that appellant's October 14, 2019 claim was not filed within three years of January 9, 2014, the date he was reasonably aware of the possible relationship between his work duties and his diagnosed bilateral hip condition. The hearing representative cited appellant's assertion that he was not aware of such a possible relationship until September 27, 2017 and noted, "[h]owever, the medical report of January 9, 2014 from Dr. Wilchinsky does indicate the claimant has an extensive walking history as a mail[carrier]. In light of this history from 2014 and the claimant[']s bilateral hip replacements in 2014 and 2015, I find the claimant's statement that he was not aware of the employment connection of his hip condition to his carrier duties is disingenuous."

On January 28, 2022 appellant, through counsel, requested reconsideration of the September 1, 2021 decision. Counsel continued to argue that appellant was not aware of the possible relationship between his work duties and his diagnosed bilateral hip condition until September 27, 2017.

By decision dated February 24, 2022, OWCP denied modification of its September 1, 2021 decision.

## LEGAL PRECEDENT

An employee seeking benefits under FECA<sup>5</sup> 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,<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.<sup>9</sup> 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.<sup>10</sup> The Board has found that the statute of limitations begins to run on the date that the employee actually knows of the possible relationship between the employee's condition and his or her employment, or reasonably should have known of the possible relationship.<sup>11</sup>

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.<sup>12</sup> 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 his or her federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.<sup>13</sup> 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

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<sup>5</sup> *Supra* note 3.

<sup>6</sup> *G.L.*, Docket No. 18-1057 (issued April 14, 2020); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>7</sup> *M.G.*, Docket No. 18-1616 (issued April 9, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>8</sup> 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).

<sup>9</sup> *C.S.*, Docket No. 18-0009 (issued March 22, 2018); *David R. Morey*, 55 ECAB 642 (2004); *Charles W. Bishop*, 6 ECAB 571 (1954).

<sup>10</sup> 5 U.S.C. § 8122(a); *see also S.F.*, Docket No. 19-0283 (issued July 15, 2019); *W.L.*, 59 ECAB 362 (2008).

<sup>11</sup> *William A. West*, 36 ECAB 525, 528-29 (1985).

<sup>12</sup> *R.T.*, Docket No. 18-1590 (issued February 15, 2019).

<sup>13</sup> *G.M.*, Docket No. 18-0768 (issued October 4, 2018).

to section 8119.<sup>14</sup> The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.<sup>15</sup> It is the employee's burden of proof to establish that a claim is timely filed.<sup>16</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that he filed a timely claim for compensation, pursuant to 5 U.S.C. § 8122(a).

Appellant submitted a Form CA-2 on October 14, 2019 alleging that he sustained bilateral hip osteoarthritis due to factors of his federal employment. A hearing representative issued a September 1, 2021 decision, which modified the prior denial of the claim to reflect that appellant's occupational disease claim was being denied on the basis that the claim was untimely filed. The hearing representative found that appellant's October 14, 2019 Form CA-2 was not filed within three years of January 9, 2014, the date he was reasonably aware of the possible relationship between his work duties and his diagnosed bilateral hip condition. The hearing representative cited appellant's assertion that he was not aware of such a possible relationship until September 27, 2017 and noted, "[h]owever, the medical report of January 9, 2014 from Dr. Wilchinsky does indicate the claimant has an extensive walking history as a mail [carrier]. In light of this history from 2014 and the claimant's bilateral hip replacements in 2014 and 2015, I find the claimant[s] statement that he was not aware of the employment connection of his hip condition to his carrier duties is disingenuous." In the January 9, 2014 report referenced by OWCP's hearing representative, Dr. Wilchinsky indicated in the history portion of the report that appellant presented with a "many month history of right hip symptoms" and noted, "[h]e was a mail [carrier] for years and did a lot of walking. Sometimes he gets groin pain. Never had any one specific injury." He reported physical examination findings, noted that x-rays showed severe degenerative arthritis of the right hip, and diagnosed arthritic right hip and sciatica.

The Board finds that, by January 9, 2014, appellant was aware or reasonably should have been aware of the possible relationship between his claimed medical condition and employment factors. The above-described report demonstrates that, by January 9, 2014, appellant was aware or reasonably should have been aware that the work duties he had been performing for more than 30 years could have caused or aggravated his hip condition.

The Board has previously held that when an employee becomes aware, or reasonably should have become aware that he has a condition, which has been adversely affected by factors of his employment, such awareness is competent to start the running of the time limitations period, even though he does not know the precise nature of the impairment, or whether the ultimate result of such adverse effect would be temporary or permanent.<sup>17</sup> In discussing the degree of knowledge required by the employee prior to filing a claim, the Board emphasized that he need only be aware

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<sup>14</sup> 5 U.S.C. §§ 8122(a)(1), 8122(a)(2); *see also D.D.*, Docket No. 19-0548 (issued December 16, 2019).

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

<sup>16</sup> *A.S.*, Docket No. 18-1094 (issued February 7, 2019).

<sup>17</sup> *D.R.*, Docket No. 18-1754 (issued April 4, 2019).

of a possible relationship between his condition and his employment to commence the statute of limitations. The Board has not required that appellant have definitive evidence of a condition and causal relationship on the date the claim is filed.<sup>18</sup> The January 9, 2014 report establishes that, by this date, appellant associated his symptoms with activities at work, including extensive walking on his mail delivery route. As appellant acknowledged he had symptoms in the region of the claimed injury after performing work duties, and the medical evidence demonstrated that he sought medical treatment for this condition as early as January 9, 2014 and was diagnosed with a hip condition, the Board finds that appellant was aware, or reasonably should have been aware, as early as January 9, 2014, of the relationship between his hip condition and employment factors.<sup>19</sup> However, because he did not file his claim until October 14, 2019, a date more than three years after January 9, 2014, his claim was untimely filed.<sup>20</sup>

Appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate superior had actual knowledge of the injury within 30 days, or under section 8122(a)(2) if written notice of injury was given to his immediate superior within 30 days as specified in section 8119.<sup>21</sup> He has not made any claim that he has satisfied either of these provisions, nor does the record support a finding that he has satisfied either of them.<sup>22</sup> As the evidence of record is insufficient to establish actual knowledge by appellant's supervisor of a work-related injury within 30 days, the Board finds that he has not established a timely 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 and 10.607.

### CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he filed a timely claim for compensation, pursuant to 5 U.S.C. § 8122(a).

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<sup>18</sup> *C.S.*, *supra* note 9; *Edward Lewis Maslowski*, 42 ECAB 839 (1991).

<sup>19</sup> *See R.H.*, Docket No. 21-1364 (issued April 5, 2022).

<sup>20</sup> *See supra* notes 10 and 11.

<sup>21</sup> *See supra* notes 14 and 15.

<sup>22</sup> There is no indication in the record that appellant provided a statement to his immediate superior such that he satisfied the provisions of sections 8119 and 8122(a) of FECA. *See id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 24, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 9, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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