

<sup>2</sup> The Board notes that following the October 17, 2023 decision, OWCP received additional evidence. 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.*

## **FACTUAL HISTORY**

On October 31, 2022 appellant, then a 41-year-old former temporary wildland firefighter, filed an occupational disease claim (Form CA-2) alleging that he developed asthma, joint disease, coughing, fatigue, nose bleeds, and pain due to factors of his federal employment. He explained that he became ill while engaged in fire suppression activities in Los Alamos, New Mexico. Appellant noted that he first became aware of his condition on May 4, 2000, and realized its relationship to his federal employment on May 17, 2000. On the reverse side of the claim form, V.R., an employing establishment superintendent, controverted the claim as being untimely filed and noted that appellant first reported his condition on August 26, 2022.

In support of his claim, appellant submitted a May 19, 2000 medical note by DaVon Knackstedt, a nurse practitioner, who noted that he related complaints of a cough with chest pain, which developed while he was fighting fires in the Los Alamos area. He diagnosed acute bronchitis, prescribed medication, and recommended that he refrain from fighting fires for five days.

In a November 4, 2022 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed to establish his claim. In a separate development letter of even date, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's statements. OWCP afforded both parties 30 days to submit the necessary evidence.

In an attending physician's report (Form CA-20) dated November 8, 2022, Dr. Ryan Stopher-Mitchell, a Board-certified family medicine specialist, noted that appellant's medical records indicated that he first examined appellant on March 20, 2019 for asthma symptoms, which appellant attributed to an injury on May 17, 2000.

A December 3, 2015 report of a computerized tomography (CT) scan of the sinuses revealed near complete opacification of the right maxillary sinus.

A February 11, 2016 hospital discharge summary indicated that appellant was diagnosed with deviated nasal septum, hypertrophy of the bilateral nasal turbinates, and chronic sinusitis and underwent surgery to his nasal cavities.

A March 20, 2019 report of chest x-rays were positive of a history of asthma.

In an October 14, 2019 report, Dr. Scott Wickless, a dermatologist, noted that appellant related complaints of skin lesions on his right cheek for the past nine years, which he indicated began after fighting a fire with multiple pollutants.

Appellant also submitted an e-mail dated November 8, 2022 containing information obtained pursuant to New Mexico's Right to Know Act, which described levels of plutonium and uranium in the vicinity of White Rock, New Mexico.

By decision dated December 13, 2022, OWCP denied appellant's occupational disease claim, finding that it was untimely filed, pursuant to 5 U.S.C. § 8122. It determined that the

evidence of record did not support that he filed his claim within three years of the date of injury, or that his immediate supervisor had actual knowledge of the claimed condition within 30 days of the date of injury.

On January 12, 2023 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In an undated response to OWCP's questionnaire, appellant indicated that the date he became aware of the cause of his medical conditions was November 8, 2022. He explained that he began searching for the cause of his symptoms in March 2019 and, in August 2019, he obtained a copy of a document pertaining to the 2000 El Cerro Grande Fire *via* the New Mexico Right to Know Act, which he provided to his physician.

OWCP thereafter received July 11, 2007 and March 13, 2008 medical notes by Dr. Carletta Thompson, a physiatrist, for treatment of mid back, low back, and hip pain.

In March 20 and April 4, 2019 medical reports, Dr. Stopher-Mitchell noted that appellant related complaints of recent sinus infections, headaches, and chronic pain and that appellant had "concerns about prior exposure when he was involved in fire control at the Los Alamos fire in year 2000," including that he was exposed to "smoldering ash and smoke" and that his entire crew came down with flu-like symptoms. He further noted that he related that he started developing symptoms of bronchitis and was diagnosed with asthma in May 2000, and, four years later, he developed chronic pain in his back and joints. Dr. Stopher-Mitchell opined that "I do believe findings could be due to his prior exposures in 2000."

In a May 29, 2019 follow-up report, Dr. Stopher-Mitchell again noted appellant's prior exposure to inhaled toxins in 2000 while fighting fire at Los Alamos in New Mexico. He indicated that after the exposure, he developed asthma and chronic pain issues. Dr. Stopher-Mitchell noted spirometry findings and again opined that "I do believe findings could be due to his prior exposures in 2000."

In an August 1, 2019 clinic note, Dr. Ravi Chopra, a Board-certified internal medicine, pulmonary disease, and critical care specialist, diagnosed appellant with asthma and dyspnea.

In a February 25, 2020 medical note, Dr. Stopher-Mitchell, noted a history of inhalational exposure to toxins and diagnosed allergic and persistent asthma, bone/cartilage disorder, degenerative disc disease of the lumbar spine, and degenerative joint disease.

Appellant also submitted a July 31, 2000 news article describing fire suppression efforts to control a wildland fire that threatened Los Alamos National Laboratory in New Mexico; a September 8, 2000 Report to the President in response to the Wildfires of 2000; an undated summary of potential groundwater contaminants due to explosives in 1995 at Ancho Spring; an April 2004 journal article regarding urinary metals following exposure to a large vegetative fire in New Mexico in 2000; an August 1, 2010 report of air contamination samples from May 2000 at the Los Alamos National Laboratory; and a January 24, 2022 article regarding radiation damage to bones.

A hearing was conducted on July 21, 2023. Appellant testified that he was treated at a hospital for smoke inhalation on May 16, 2000 after engaging in fire suppression at Los Alamos. He noted that after his treatment at the hospital, he used breathing treatments and developed multiple health problems. Appellant continued to work as a firefighter until 2003, performed other forestry services until 2005, worked for a tribe until 2007, engaged in a short period of self-employment, and then stopped working due to his medical conditions. He noted that Dr. Stopher-Mitchell was the first physician to explain to him that his environment may be causing his health issues. Appellant stated that he received documents from the State of New Mexico regarding the May 2000 Los Alamos fire on November 8, 2022.

By decision dated October 17, 2023, OWCP's hearing representative affirmed the December 13, 2022 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim, including 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>4</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>5</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>6</sup>

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes a determination on the merits of the claim.<sup>7</sup> 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.<sup>8</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 his or her employment. Such awareness is competent to start the limitation period even though the employee does not know the precise nature of the impairment or

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> *F.H.*, Docket No.18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>5</sup> *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>6</sup> *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>7</sup> *J.T.*, Docket No. 20-1093 (issued August 23, 2022); *M.B.*, Docket No. 20-0066 (issued July 2, 2020); *Charles Walker*, 55 ECAB 238 (2004); *Charles W. Bishop*, 6 ECAB 571 (1954).

<sup>8</sup> 5 U.S.C. § 8122(a); *S.H.*, Docket No. 22-0610 (issued October 21, 2022); *F.F.*, Docket No. 19-1594 (issued March 12, 2020); *W.L.*, 59 ECAB 362 (2008).

whether the ultimate result of such affect would be temporary or permanent.<sup>9</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 federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.<sup>10</sup> 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.<sup>11</sup> It is the employee's burden to establish that a claim is timely filed.<sup>12</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 superior 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.<sup>13</sup> The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.<sup>14</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 an occupational disease claim on October 31, 2022, alleging that he developed asthma, joint disease, coughing, fatigue, and nose bleeds due to fire suppression activities in Los Alamos, New Mexico. He noted that he first became aware of his condition on May 4, 2000 and realized its relationship to his federal employment on May 17, 2000. In his subsequent answers to OWCP's questionnaire and during his testimony on July 21, 2023, appellant asserted that he did not become aware of the relationship between his medical conditions and his employment until November 8, 2022, based upon a discussion with Dr. Stopher-Mitchell and review of materials received from the State of New Mexico regarding the May 2000 fires *via* a Right to Know Act disclosure. However, the March 20, April 4, and May 29, 2019 medical reports by Dr. Stopher-Mitchell reflected that appellant had some "concerns about prior exposure when he was involved in fire control at the Los Alamos fire in year 2000," including that he was exposed to smoldering ash and smoke, developed symptoms of bronchitis, and was diagnosed with asthma in May 2000. Moreover, the reports reflect that Dr. Stopher-Mitchell opined that his findings could be "due to his prior exposures in 2000."

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<sup>9</sup> *S.H., id.*; *M.B., supra* note 7; *S.O.*, Docket No. 19-0917 (issued December 19, 2019); *Larry E. Young*, 52 ECAB 264 (2001).

<sup>10</sup> *Id.*

<sup>11</sup> 5 U.S.C. § 8122(b).

<sup>12</sup> *S.K.*, Docket No. 21-0592 (issued February 21, 2023); *M.B., supra* note 7; *D.D.*, Docket No. 19-0548 (issued December 16, 2019); *Gerald A. Preston*, 57 ECAB 270 (2005).

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

<sup>14</sup> *S.O., supra* note 9; *B.H.*, Docket No. 15-0970 (issued August 17, 2015); *Willis E. Bailey*, 49 ECAB 511 (1998).

On the basis of the foregoing, the Board finds that appellant was aware or should have been aware, of the causal relationship between his conditions and his federal employment as of March 20, 2019.<sup>15</sup> The October 31, 2022 claim was, therefore, not filed within three years of appellant's awareness of the possible relationship between the condition and his federal employment.<sup>16</sup>

As such, the Board finds that appellant's claim was untimely filed under the three-year requirement of 5 U.S.C. § 8122(a).

Appellant's claim would still be regarded as timely under FECA if his immediate supervisor had actual knowledge of his injury and any possible relation to his federal employment within 30 days, or if written notice of injury was given to his immediate supervisor within 30 days of injury.<sup>17</sup> In the present case, the Board finds that there is no evidence of record that appellant's immediate supervisor had actual knowledge of the injury and its possible relation to his federal employment within 30 days of the alleged injury, or that appellant provided written notice of injury within 30 days of the injury. On the reverse side of the October 31, 2022 claim form, V.R., an employing establishment superintendent controverted the claim as being untimely filed and noted that appellant first reported his condition on August 26, 2022. The case record does not contain any evidence documenting that an immediate superior either had actual knowledge of or received written or verbal notification about his conditions and the possible relation to his employment within 30 days of its occurrence. 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 through 10.607.15.

### **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>15</sup> *Supra* note 11.

<sup>16</sup> *Supra* note 8.

<sup>17</sup> *L.H.*, Docket No. 19-0818 (issued December 9, 2019); *C.S.*, Docket No. 18-0009 (issued March 22, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 17, 2023 decision of the Office of Workers Compensation Programs is affirmed.

Issued: March 15, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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