

elevated inspection stand and injured his right knee when his leg became hung.¹ The claim was received by the Office on November 13, 2003.

In support of his claim, appellant submitted a report from Dr. W.S. Bundrick, a Board-certified orthopedic surgeon, dated March 10, 1999, who treated him on October 29, 1998 for pain of the right knee caused by a twisting injury. He noted findings upon physical examination of a moderate effusion and limitation on extension and flexion. On December 30, 1998 Dr. Bundrick performed chondroplasty and arthroscopic medial meniscectomy and diagnosed torn medial meniscus. He noted that appellant developed synovitis in the knee.

By decision dated November 21, 2003, the Office denied appellant's claim on the grounds that the evidence failed to demonstrate that his claim was timely filed in accordance with 5 U.S.C. § 8122. The Office found that the injury occurred on October 28, 1998 and that the claim was filed on September 25, 2002 and received by the employing establishment on October 3, 2003 which was after the three-year time limitation provided for under the statute. The Office advised that appellant became aware of the relationship between the employment and the claimed condition on October 28, 1998 and there was no evidence that his supervisor had knowledge of the injury within 30 days of the injury.

By letter dated December 4, 2003, appellant requested reconsideration and submitted additional evidence. He noted that he informed his immediate supervisor, Dr. Fred Sharaf, of his right leg injury by telephone on October 28, 1998. Appellant advised that he requested leave the following day to see a physician and that Dr. Sharaf approved the leave request. He submitted an Equal Employment Opportunity (EEO) complaint settlement dated May 1990, which detailed a settlement of a discrimination claim filed in 1988. Also submitted were medical records from Dr. Bundrick dated February 11 to May 5, 2000, which noted appellant's treatment for injuries sustained to his left leg on August 26, 1998 and to his right leg on October 28, 1998. He performed arthroscopic surgery on appellant's right knee on December 30, 1998. Dr. Bundrick noted that appellant experienced increasing chondromalacia and osteoarthritis in the medial compartment of the right knee and opined that he would not be able to return to his previous job. Appellant also submitted a statement from David Cooper, consumer safety food inspector, dated March 8, 2000, who noted that appellant was his supervisor from April 1992 and confirmed that he injured his leg on October 28, 1998 while stepping onto an elevated inspection stand. A statement from Letha L. Echoes, a subordinate of appellant's, confirmed that appellant injured his left knee in August 1998. Another statement from Verna J. Williamson, a food inspector, dated March 9, 2000, noted that she worked with appellant since 1978 and that he was her immediate supervisor since 1991. She noted that she witnessed that he injured his leg on October 28, 1998. A statement from Frederick Johnson, Jr., a coworker of appellant's and plant evisceration supervisor, dated March 10, 2000, noted that appellant injured his right leg on October 28, 1998 while attempting to climb over an elevated inspection stand.

¹ The record reflects that appellant filed a separate claim for an injury to his left leg occurring on August 26, 1998 which was accepted by the Office in file number 16-0321791. This claim was appealed to the Board and in a decision dated April 3, 2002, the Board affirmed the Office decision dated May 21, 2001, denying his claim for compensation for the period January 16 to May 2000. Docket No. 01-1956 (issued April 3, 2002).

Appellant also submitted emails from the employing establishment. An email from Dr. Sharaf dated March 7, 2001 to appellant advised that appellant was unable to use injury leave to attend a hearing in conjunction with his compensation claim for his left leg (claim number 16-0321791) and would be required to use annual leave. In an email dated March 8, 2001, appellant requested an explanation as to why he could not use injury leave when he was permitted to use leave to attend an EEOC hearing. Dr. Sharaf responded by email on March 8, 2001 and advised that injury leave could be used when an employee was incapacitated to perform his duties due to a work-related injury. An email from Crystal Gagnon, an employing establishment claim specialist, dated September 16, 2003 to appellant indicated that she received his CA-1 with a date of injury of October 28, 1998 and noted that the claim form was never forwarded to the Department of Labor. She advised that she would forward the CA-1 to the Department of Labor for processing. An email from Ms. Gagnon to Wayne Batson, appellant's supervisor, dated September 22, 2003, indicated that she received a CA-1 filed by appellant for a right knee injury sustained on October 28, 1998. Ms. Gagnon noted that appellant reported giving the original claim form to Mr. Batson during a conference in 2002. In a responding email, Mr. Batson advised that he received the CA-1 from appellant and completed the supervisor's portion; however, he was not familiar with the incident because it occurred before he became appellant's supervisor and he did not have any direct knowledge of the circumstances. Appellant also submitted a decision by the Board dated April 3, 2002, for a separate claim for an injury sustained to his left knee on August 28, 1998.²

By decision dated January 25, 2005, the Office denied modification of the prior decision.

LEGAL PRECEDENT

Section 8122(a) of the Federal Employees' Compensation Act³ states that "[a]n original claim for compensation for disability or death must be filed within three years after the injury or death."⁴ Section 8122(b) provides that in latent disability cases, the time limitation 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.⁵ The Board has held 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.⁶

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days. The knowledge must be such as to put the immediate superior reasonably

² Docket No.01-1956 (issued April 3, 2002), *id.*

³ 5 U.S.C. § 8122(a).

⁴ *Id.*

⁵ 5 U.S.C. § 8122(b).

⁶ See *Larry E. Young*, 52 ECAB 264 (2001); *Garyleane A. Williams*, 44 ECAB 441 (1993); *Alicia Kelly*, 53 ECAB 244 (2001); *Mitchell Murray*, 53 ECAB 601 (2002).

on notice of appellant's injury.⁷ An employee must show not only that his immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.⁸

ANALYSIS

In the instant case, appellant's alleged injury involved a traumatic incident of which he was immediately aware, the hanging of his leg while climbing a stand.⁹ Therefore, this is not a case of latent disability and the three-year statute of time limitations began to run on October 28, 1998, the date on which appellant suffered his traumatic right knee injury while in the performance of duty.¹⁰ The record reflects that his claim was signed by him on September 25, 2002 and received by the employer on October 3, 2003 and processed by the Office on November 13, 2003. The employing establishment was unable to explain the delay in filing appellant's claim with the Office.¹¹ However, the Board notes that the Office, in its November 21, 2003 and January 25, 2005 decisions, used September 25, 2002, the day the CA-1 was signed by appellant as the filing date for the claim so that he would not be prejudiced by any employing establishments delay in processing the claim. Even using the September 25, 2002 date, the claim was not timely filed. The Office properly noted October 28, 1998 the day he sustained his alleged traumatic injury to the right knee, as the starting point for the three-year time limitation under section 8122. As he did not file his claim until September 25, 2002 his claim is untimely under 8122 of the Act.

Appellant's claim would be regarded as timely under section 8122(a)(1) if his immediate superior had actual knowledge of his alleged job-related injury within 30 days of the injury. The knowledge must be such as to put the immediate superior reasonably on notice of his injury.¹² However, there is no evidence in the record which indicates that appellant's immediate supervisor had actual knowledge of his right knee injury within 30 days of the date of injury. His current supervisor, Mr. Batson stated that he was not familiar with the incident because it occurred before he became appellant's supervisor and did not have any direct knowledge of the circumstances. Appellant's statement of December 4, 2003 advised that he informed his immediate supervisor, Dr. Sharaf, of his right leg injury by telephone on October 28, 1998. However, the Board notes that there is no evidence in the record to support this contention as

⁷ 5 U.S.C. § 8122(a)(1); *see also Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987); *see also Federal (FECA) Procedure Manual*, Part 2 -- Claims, *Time*, Chapter 2.801.3(a)(3) (March 1993).

⁸ *Charlene B. Fenton*, 36 ECAB 151 (1984).

⁹ *See Paul S. Devlin*, 39 ECAB 715, 725-26 (1988).

¹⁰ *Id.*

¹¹ An email from Ms. Gagnon, an employment establishment claim specialist, dated September 16, 2003, to appellant, advised that she received a CA-1 with a date of injury of October 28, 1998 which was never sent to the Department of Labor. The record reflects that the Office received the claim for processing on November 13, 2003.

¹² 5 U.S.C. § 8122(a)(1). *See also Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987).

Dr. Sharaf did not indicate actual knowledge of the injury within 30 days of the date of injury. Rather, the first mention of a work injury by Dr. Sharaf was in emails dated March 7 and 8, 2001 advising appellant that he was unable to use injury leave to attend a hearing in conjunction with his compensation claim. However, Dr. Sharaf's email references another claim filed by appellant with regard to his left knee occurring on August 26, 1998, file number 16-0321791, as the current claim for a right knee injury on October 28, 1998 was filed on September 25, 2002, a year and a half after this email. Therefore, this does not substantiate an immediate supervisor's knowledge of appellant's work-related right leg injury within 30 days of the injury.

Consequently, appellant has not met his burden of proof, as he has not established that he filed a timely notice of traumatic injury and claim for compensation under the applicable time limitation provisions of the Act.

CONCLUSION

The Board finds that the Office properly denied appellant's compensation claim on the grounds that he did not establish that his claim was filed within the applicable time limitation provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 1, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board