United States Department of Labor
Employees' Compensation Appeals Board

R.J., Appellant	)	
and	)	**Docket No. 07-527**
	)	**Issued: June 8, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Providence, RI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 27, 2006 merit decision denying her claim on the grounds that it was not timely filed and a December 6, 2006 nonmerit decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant's claim was timely filed pursuant to 5 U.S.C. § 8122(a); and (2) whether the Office properly denied her request for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 23, 2006 appellant, a 55-year-old secretary, filed an occupational disease claim (Form CA-2) for a right shoulder injury. She stated that she developed a labral tear in her right shoulder while pitching mail and first became aware of the condition and its relationship to her

employment on December 1, 1988. Appellant also advised that she did not report her shoulder condition when she first noticed it as she thought only traumatic injuries were reported. By letter dated July 17, 2006, the Office informed appellant of the type of evidence needed to support her claim.

In a July 18, 2006 statement, Russell Fontaine, manager of customer services for the employing establishment, indicated that appellant worked as a part-time regular clerk from April 1988 through August 1993 for four hours per day, five days a week. He indicated that her duties included opening up the building, opening up the safes, signing for registered mail, sorting mail and occasionally working the window unit. Mr. Fontaine stated that appellant's tasks involved pitching mail, which involved breaking the mail into sections and placing it into the mail box where it belonged.

In an August 24, 2006 statement, appellant noted that she was treated for tendinitis and lived with her discomfort when her condition did not improve. She advised that a recent magnetic resonance imaging (MRI) scan showed a very old injury. Appellant stated that the only injury to her shoulder she had experienced was in 1988. She stated that, because her shoulder was a result of a repetitive motion problem and not a traumatic injury, she did not realize that it had to be reported to her supervisor at that time.[1]

In an August 9, 2006 report, Dr. Kenneth R. Catallozzi, a Board-certified orthopedic surgeon, stated that it was possible that a superior labral tear or rotator cuff pathology could be related to repetitive motion activities and could be the source and cause of appellant's current pain and tenderness. However, he stated that he could not answer the question of causality of her current condition in terms of probability due to the information and time frame he had.

By decision dated September 27, 2006, the Office denied the claim for a right shoulder injury as not timely filed.

In a September 29, 2006 letter, appellant requested reconsideration of the Office's decision. She reiterated that her only injury had occurred in 1988 and that she did not realize that she had to notify her supervisor at that time as it was a repetitive motion problem. Appellant additionally argued that the case of *Willis E. Bailey*[2] which the Office had cited would not apply to an injury that occurred prior to the date of that decision. She also argued that, as she started working for Mr. Fontaine in 1996, he could not have possibly known her work duties in 1988.[3] Unsigned progress notes dated March 13 and May 3, 1989 from Dr. Steven McCloy[4] were

[1] Copies of a July 21, 2006 letter from Norma Johnson, an injury compensation specialist, regarding a June 22, 2006 electronic mail exchange between herself and appellant along with a copy of the June 22, 2006 email were submitted. The letter and email pertained to appellant's query to Ms. Johnson regarding whether she could file a claim.

[2] 49 ECAB 509 (1998).

[3] Appellant provided the names of the manager and supervisor she had in 1988.

[4] Dr. McCloy's credentials were not of record.

submitted along with an unsigned progress note of February 28, 1989 from Carolyn Hiscox, a nurse practitioner.

By decision dated December 6, 2006, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT – ISSUE 1

In cases of injury on or after September 7, 1974, section 8122(a) of the Act[5] provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless:

> "(1) [T]he immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury or death; or
>
> "(2) [W]ritten notice of injury or death as specified in section 8119 of this title was given within 30 days."[6]

Section 8119 provides: a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury or in the case of death, the employment factors believed to be the cause; and be signed by and contain the address of the individual giving the notice.[7] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[8]

Section 8122(b) 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 and the Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.[9] For actual knowledge of a supervisor to be regarded as timely filing, an employee must show, not only that the immediate superior knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.[10]

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[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8122(a).

[7] *Larry E. Young*, 52 ECAB 264 (2001).

[8] *Laura L. Harrison*, 52 ECAB 515 (2001).

[9] *Gerald A. Preston*, 57 ECAB ___ (Docket No. 05-1198, issued December 15, 2005); *L.C.*, 57 ECAB ___ (Docket No. 06-1190, issued September 18, 2006); *Delmont L. Thompson*, 51 ECAB 155 (1999).

[10] *Duet Brinson*, 52 ECAB 168 (2000).

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 her condition and her employment. When an employee becomes aware or reasonably should have been aware that he or she has a condition which has been adversely affected by factors of 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.[11] 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.[12] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[13]

The time limitations do not begin to run against any individual whose failure to comply is excused by the Secretary on the grounds that such notice could not be given because of exceptional circumstances.[14]

ANALYSIS -- ISSUE 1

Appellant filed a claim for a right shoulder injury on June 23, 2006. She advised that she became aware of her shoulder condition and its relationship to her work as a part-time regular clerk on December 1988 while pitching mail. The record establishes that, from April 1988 to August 1993, appellant worked as a part-time regular clerk which involved the task of pitching mail. As the time for filing a claim began to run on the date of her last injurious exposure to the implicated work factor, the three-year period for filing expired no later than August 1996. Since appellant did not file her claim for a right shoulder injury until June 23, 2006, her claim was filed outside the three-year time limitation period.[15]

Although appellant's claim would be regarded as timely under section 8122(a)(1) of the Federal Employees' Compensation Act if her immediate superior had actual knowledge of the injury or death within 30 days, there was no evidence that her supervisor had actual knowledge of the injury within 30 days. She advised that she did not report her right shoulder condition until she filed her claim on June 23, 2006. Appellant did not otherwise present any evidence establishing timely actual knowledge of her immediate superior. Thus, she has not established actual knowledge by her supervisors of her work-related condition within 30 days and, therefore, has not established a timely claim.[16]

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[11] *Larry E. Young*, *supra* note 7.

[12] *Id.*

[13] *Debra Young Bruce*, 52 ECAB 315 (2001).

[14] 5 U.S.C. § 8122(d)(3).

[15] 5 U.S.C. § 8122(b).

[16] Likewise, there is also no evidence that written notice of the injury was given within 30 days after injury pursuant to 5 U.S.C. § 8119. *See* 5 U.S.C. § 8122(a)(2).

Appellant explained that she did not realize that her right shoulder condition needed to be reported to her supervisor in 1988 as her injury was a repetitive motion problem. The Board, however, has held that unawareness of possible entitlement, lack of access to information and ignorance of the law or of one's obligations under it do not constitute exceptional circumstances that could excuse a failure to file a timely claim.[17] Appellant noted that she was aware of a relationship between her employment and her right shoulder condition as of December 1, 1988. Her last exposure to the implicated work factor of pitching mail was August 1993. However, appellant did not file a claim until June 23, 2006. Her lack of awareness of compensation under the Act or that she was eligible to receive benefits do not excuse her failure to timely file an appeal. Appellant did not submit any probative evidence that her circumstances were exceptional such that she could be excused from the three-year filing requirement.

The Board accordingly finds that appellant's claim was not timely filed under 5 U.S.C. § 8122.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[18] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[19]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits.[20] Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[21]

ANALYSIS -- ISSUE 2

In her request for reconsideration, appellant did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. She advised that her only injury had occurred in 1988 and that she did not realize that she had to notify her supervisor at that time as it was a repetitive motion problem. This argument is identical to her previous arguments, which the Office addressed in its September 27, 2006 decision. Appellant additionally advanced arguments which

[17] *Ralph L. Dill*, 57 ECAB ___ (Docket No. 05-1620, issued December 6, 2005).

[18] 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

[19] *Howard A. Williams*, 45 ECAB 853 (1994).

[20] *Donna L. Shahin*, 55 ECAB 192 (2003)

[21] 20 C.F.R. § 10.608.

have no basis in legal validity. She argued that the case of *Willis E. Bailey*[22] which the Office cited, would not apply to an injury that occurred prior to the date of that decision. However, this assertion did not show that the Office erroneously applied or interpreted a specific point of law as appellant did not cite any authority supporting her assertion and she did not otherwise explain how this was relevant to the underlying point at issue -- whether she timely filed an occupational disease claim. Appellant additionally argued that Mr. Fontaine could not have possibly known her work duties in 1988. While Mr. Fontaine may not have been appellant's supervisor in 1988, he was able to review employing establishment records and provide a description of the duties for an individual in appellant's job as a part-time regular clerk and also report the time period in which she performed such duties. Appellant's arguments have no color of legal validity and, therefore, are insufficient to require the Office to reopen her claim for merit review.[23] The Board finds that she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[24]

Appellant also failed to satisfy the third requirement listed in section 10.606(b)(2). She did not submit any relevant and pertinent new evidence not previously considered by the Office. The evidence that appellant submitted is not pertinent to the issue on appeal. While the progress notes of Dr. McCloy and nurse practitioner, Carolyn Hiscox, support that appellant underwent treatment for her right shoulder condition in 1989, such evidence does not address or contain any relevant information pertinent to the issue of whether appellant timely filed a claim for a right shoulder injury. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.[25]

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her request for reconsideration.

[22] *Supra* note 2.

[23] *Marion Johnson*, 40 ECAB 735 (1989).

[24] 20 C.F.R. § 10.606(b)(2).

[25] *See David J. McDonald*, 50 ECAB 185 (1998).

CONCLUSION

The Board finds that appellant has not established that her right shoulder condition claim was timely filed pursuant to section 8122 of the Act. The Board further finds that the Office properly denied appellant's request for merit review.

ORDER

IT IS HEREBY ORDERED THAT the December 6 and September 27, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 8, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board