United States Department of Labor
Employees' Compensation Appeals Board

A.B., Appellant	)	
and	)	**Docket No. 14-720**
	)	**Issued: July 9, 2014**
DEPARTMENT OF THE ARMY, ROCK ISLAND ARSENAL, Rock Island, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 11, 2014 appellant filed a timely appeal of the September 25, 2013 merit and November 19, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 OWCP properly denied appellant's traumatic injury claim as it was not timely filed under 5 U.S.C. § 8122; and (2) whether it properly denied his request for reconsideration.

FACTUAL HISTORY

On June 5, 2013 appellant, then a 40-year-old machinist, filed a traumatic injury claim alleging that on October 24, 2009 he strained his left buttocks when he grabbed a "trail" and

[1] 5 U.S.C. §§ 8101-8193.

pulled it toward a machine. He noted informing Terry Brewer, branch chief, of the injury who offered him leave pursuant to the Family Medical Leave Act (FMLA). Mr. Brewer noted on the Form CA-1 that he was not advised of appellant's October 24, 2009 injury until June 13, 2013. He noted that appellant's injury did not occur in the performance of duty or at work rather, it was an old nonwork-related strain that had flared-up. Mr. Brewer noted that appellant worked another 17 days after this alleged injury without taking leave. Appellant was removed from employment for cause on June 5, 2013.

Appellant submitted employing establishment medical records from a registered nurse who treated him from December 1 to 21, 2009 for a nonwork-related backache. He sought treatment from a chiropractor on November 24, 2009. Appellant indicated that he did not know how he hurt his back. In an October 28, 2010 note, the nurse treated him for a backache and released him to work with restrictions. On September 14, 2011 the nurse saw appellant for a fitness-for-duty examination and he reported undergoing chiropractic treatments for a football injury. The nurse released him to work with restrictions. In a June 6, 2013 note, the nurse indicated that on December 1, 2009 appellant returned to work after a back injury. Appellant stated that he did not know how he injured his back. He submitted a December 11, 2009 certificate of health care provider from Dr. Jeramy Blackwood, a chiropractor, who noted appellant's back condition commenced on October 24, 2009 when he had an acute exacerbation of his low back symptoms and was currently being treated for lumbosacral radicular pain, lumbalgia, lumbar sacroiliac and pelvic segmental dysfunction and muscle spasm. Dr. Blackwood noted that appellant could return to work with restrictions. In a June 28, 2010 certificate of health care provider, he noted appellant's back condition began on October 24, 2010. Dr. Blackwood diagnosed lumbar segmental dysfunction and radicular symptoms into his lower extremities. He noted that appellant could return to work regular duty. On December 13, 2010 Dr. Blackwood noted appellant's back condition commenced on October 24, 2009. He noted that appellant was currently under maintenance care and diagnosed lumbar segmental dysfunction and radicular symptoms into his lower extremities. Dr. Blackwood noted that appellant could return to work regular duty.

In an undated statement, Mr. Gordon noted that he was not appellant's supervisor or division chief on October 24, 2009 but he conferred with Mr. Brewer who was appellant's supervisor at this time. Mr. Brewer reported that appellant came to him and mentioned that he aggravated an old injury. He reported that appellant was clear that this injury did not occur at work and he did not want paperwork submitted but Mr. Brewer offered appellant FMLA paperwork at this time. Appellant reported that his supervisor did not notify him of the policy for submitting a workers' compensation claim and he felt like his supervisor was not treating him fairly or providing him with all the information that he needed.

The employing establishment controverted the claim noting that appellant was terminated from employment for cause on June 5, 2013 and subsequently filed three workers' compensation claims. It indicated that he had a long history of nonoccupational incidents which caused back and buttocks injuries.

Appellant submitted additional medical evidence. A November 24, 2009 x-ray of the lumbopelvic spine revealed mild subchondral sclerosis that could indicate early degenerative

joint disease. Appellant submitted reports from Dr. Blackwood and Dr. Eric E. Lundgren, another chiropractor who noted treating appellant for back and symptoms.

By letter dated July 19, 2013, OWCP requested appellant to submit additional information to establish his claim.

In a September 25, 2013 decision, OWCP 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. It noted that the claimed injury occurred on October 24, 2009 but that the claim was filed on June 5, 2013 and received by the employing establishment on June 19, 2013 which was after the three-year time limitation provided for under the statute. OWCP found that there was no evidence that appellant's supervisor had knowledge of the injury within 30 days of the injury.

In an October 7, 2013 appeal form, appellant requested reconsideration. He did not submit additional evidence.

In a November 19, 2013 decision, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

Section 8122(a) of FECA[2] states that "[a]n original claim for compensation for disability or death must be filed within three years after the injury or death."[3] 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.[4] 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.[5]

Appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA 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 on notice of appellant's injury.[6] 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.[7]

[2] 5 U.S.C. § 8122(a).

[3] *Id.*

[4] *Id*. at § 8122(b).

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

[6] 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).

[7] *Charlene B. Fenton*, 36 ECAB 151 (1984).

ANALYSIS -- ISSUE 1

In the instant case, appellant's alleged injury involved a traumatic incident of which he was immediately aware, grabbing a "trail" and pulling it back to the machine and experiencing a strain of the left buttocks, back and hip injury.[8] Therefore, this is not a case of latent disability and the three-year statute of time limitations began to run on October 24, 2009, the date on which he suffered his traumatic left buttock, back and hip injury while in the performance of duty.[9] The record reflects that appellant's claim was signed by him on June 5, 2013 and received by the employing establishment on June 13, 2013 and processed by OWCP on June 19, 2013. The claim was not timely filed. OWCP properly noted October 24, 2009 the day appellant sustained his alleged traumatic injury to the left buttocks, low back and hip, as the starting point for the three-year time limitation under section 8122. As appellant did not file his claim until June 5, 2013 his claim is untimely under section 8122 of FECA.

Appellant's claim would be regarded as timely under section 8122(a)(1) if his immediate superior had actual knowledge of a work-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.[10] However, there is no evidence in the record which indicates that appellant's immediate supervisor had actual knowledge of a work-related injury to his left buttocks, back and hip injury within 30 days of the date of injury. Mr. Brewer noted on the Form CA-1 that appellant's injury did not occur at work; rather it was an old nonwork-related strain that flared up. He further noted that, after the alleged injury appellant worked 17 days without taking leave. Similarly, Mr. Gordon, division chief, noted that, although he was not appellant's supervisor on October 24, 2009, he conferred with Mr. Brewer who reported that appellant came to him and mentioned that he aggravated an old injury. Mr. Brewer reported that appellant was clear that this injury did not occur at work and he did not want paperwork submitted but Mr. Brewer offered appellant FMLA paperwork at this time. Appellant's statement on the Form CA-1 noted that he reported his injury to Mr. Brewer and he provided FMLA forms. However, the evidence does not support that his supervisor was aware of a work-related injury. Mr. Brewer noted on the Form CA-1 that appellant's injury did not occur at work; rather it was an old nonwork-related strain that flared up. This does not substantiate an immediate supervisor's knowledge of appellant's work-related left buttocks, back and hip injury right leg injury within 30 days of the injury.[11] Knowledge merely of an employee's illness is not sufficient to establish actual knowledge and timeliness, it must be shown that the circumstances were such as to put the

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

[9] *Id.*

[10] 5 U.S.C. § 8122(a)(1). *See also Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987).

[11] *See Linda J. Reeves*, 48 ECAB 373 (1997) (where the Board held that, while appellant submitted a statement from a former supervisor that established that he had some knowledge of appellant's complaints, this statement is not sufficient to establish that her immediate superior had actual knowledge of a work-related injury as the statement only makes a vague reference to appellant's health and does not indicate that she sustained any specific employment-related injury, rather the knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death).

supervisor on notice that the alleged injury was actually related to the employment or that the employee attributed it thereto.[12]

Therefore, the Board finds that appellant has not established actual knowledge by his supervisors of his work-related condition within 30 days and, therefore, has not established a timely claim. The record is void of any indication that his immediate supervisors had written notice of his work-related injury within 30 days. The exceptions to the statute have not been met, and thus, appellant has failed to establish that he filed a timely claim. 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 FECA.

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.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,[13] OWCP has the discretion to reopen a case for review on the merits. OWCP must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

> "(1) Shows that OWCP erroneously applied or interpreted a specific point of law; or
>
> "(2) Advances a relevant legal argument not previously considered by OWCP; or
>
> "(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[14]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.[15]

[12] *See id.; Roseanne S. Allexenberg*, 47 ECAB 498 (1996) (where the Board held that knowledge of an employee's illness is not sufficient to establish actual knowledge and timeliness of a claim, it must be shown that the circumstances were such as to put the supervisor on notice that the alleged injury was actually related to the employment or that the employee attributed it thereto).

[13] *Supra* note 2.

[14] 20 C.F.R. § 10.606(b)(2).

[15] *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

OWCP denied appellant's claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. Thereafter, it denied his reconsideration request, without a merit review. The only relevant issue on reconsideration was whether appellant's application for benefits was filed within the applicable time limit.

In his October 7, 2013 appeal request form, appellant requested that OWCP reconsider the September 25, 2013 decision. No additional evidence or argument was submitted prior to OWCP's decision. Thus, appellant has not shown legal error by OWCP or advanced a new and relevant legal argument. He did not submit any new and relevant evidence in support of his claim.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP 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 FECA. The Board finds that it properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the November 19 and September 25, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 9, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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