United States Department of Labor
Employees' Compensation Appeals Board

P.S., Appellant	)	
and	)	**Docket No. 16-0601**
	)	**Issued: June 21, 2016**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Los Angeles, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 9, 2016 appellant filed a timely appeal from a November 17, 2015 merit decision and a January 27, 2016 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 this case.

ISSUES

The issues are: (1) whether appellant's claim for compensation was timely filed under 5 U.S.C. § 8122; and (2) whether OWCP properly denied appellant's request for reconsideration without merit review of the claim, pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 27, 2014 appellant, then a 42-year-old mail handler, submitted an October 1, 2014 traumatic injury claim (Form CA-1), alleging that he sustained a back injury on November 9, 2010 while loading and unloading trucks. On the reverse of the claim form (the supervisor's report), the supervisor asserted that appellant had never reported an injury, and appellant did not see a physician. The employing establishment submitted an October 27, 2014 letter from a human resources specialist, who indicated that appellant had worked on November 9, 2010 and never reported an injury to his supervisor. The specialist wrote that appellant had filed two occupational disease claims, CA-2 forms with this Form CA-1, claiming back injuries due to unloading and loading trucks, with the dates of injury listed as July 12 and May 24, 2010. According to the human resources specialist, appellant's employment was terminated effective July 13, 2012 due to violation of a "last chance" agreement.

In a letter dated November 7, 2014, OWCP requested that appellant submitted additional evidence to support his claim for compensation. It noted that the evidence submitted was insufficient to establish that appellant provided timely notification of injury.

In a November 13, 2014 response, appellant reported that, after unloading and loading containers on November 8 to 9, 2010, he felt muscle spasms and he "called off from work" on November 9, 2010. Appellant also made references to discrimination and unlawful discharge. As to reporting an injury, he asserted that on June 7 and 30, 2012 he had reported an injury during an investigative interview for use of sick leave on November 9, 19, and 30, 2010. Appellant submitted copies of an employee handbook, Board decisions, disciplinary actions, and grievances filed.

By decision dated December 18, 2014, OWCP denied the claim for compensation. It found that the claim was untimely filed under 5 U.S.C. § 8122. OWCP indicated that the date of injury was November 9, 2010, but the claim was not filed until October 1, 2014, which was beyond the three-year time limit. It also found that appellant's supervisor did not have actual knowledge within 30 days of injury.

On December 31, 2014 OWCP received a request for a review of the written record by an OWCP hearing representative. The evidence submitted included a June 30, 2011 "investigative interview" form. The form was from appellant's supervisor and requested appellant to provide explanations for certain dates of absence from work, including November 9, 19, and 30, 2010. The record also contains a portion of an undated investigative interview also requesting appellant to provide information regarding absences on November 9, 19, and 20, 2010. In a statement dated June 7, 2011, appellant reported that on November 9, 2010 he had back issues.

Appellant submitted a statement indicating that he reported the date of injury as November 9, 2010 because that was the date on the investigative interview. He indicated in a statement received on January 22, 2015 that his claim was found to be untimely because he had not been provided opportunity to explain the date of injury. Appellant submitted additional Board cases where a claimant had established the occurrence of an employment incident.

By decision dated May 8, 2015, the hearing representative affirmed the December 18, 2014 OWCP decision. She found that the evidence did not establish the claim was timely filed. The hearing representative indicated that appellant had not filed a claim within three years and had not given timely notice of injury.

Appellant requested reconsideration on May 21, 2015. He indicated that he was submitting additional evidence, but the record does not substantiate that additional evidence was received.

By decision dated August 11, 2015, OWCP reviewed the merits of the claim and denied modification. It again found that appellant's claim was untimely filed under 5 U.S.C. § 8122.

On August 21, 2015 appellant again requested reconsideration. He argued that the evidence was sufficient to modify the denial of the claim. Appellant discussed other claims he had filed and indicated that the current claim could be considered an occupational disease claim, as it involved incidents that occurred on November 9, 19, and 30, 2010. He also argued that OWCP had not properly considered evidence and that he should not have been removed from employment.

In a decision dated November 17, 2015, OWCP reviewed the case on its merits and denied modification. It reviewed appellant's arguments and again found that the claim for compensation was untimely filed, and that his supervisor did not have actual knowledge of injury within 30 days.

Appellant again requested reconsideration on November 23, 2015. By decision dated January 27, 2016, OWCP determined that the reconsideration request was insufficient to warrant a merit review of the claim. It found that appellant had not submitted relevant evidence or arguments with respect to the issue presented.

LEGAL PRECEDENT -- ISSUE 1

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.[2] 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. 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) the immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death; or (2) written notice of injury or death as specified in section 8119 was given within 30 days.[3]

Section 8119 of FECA provides that 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

[2] *Charles Walker*, 55 ECAB 238, 239 (2004); *see Charles W. Bishop*, 6 ECAB 571 (1954).

[3] 5 U.S.C. § 8122(a).

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.[4] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[5] For actual knowledge of a supervisor to be regarded as timely filed, 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.[6]

When a traumatic injury definite in time, place, and circumstances is involved, the time for giving notice of injury and filing for compensation begins to run at the time of the incident, even though the employee may not have been aware of the seriousness or ultimate consequences of his injury.[7] 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.[8]

ANALYSIS -- ISSUE 1

In the present case, appellant originally filed a traumatic injury claim dated October 1, 2014. On the claim form he alleged that he was unloading and loading trucks and the date of injury was November 9, 2010. Appellant later indicated that he had felt muscle spasms in his back after working on November 8, 2010, and he took sick leave on November 9, 2010. Therefore the date of injury would be November 8, 2010. While appellant also claimed that he used sick leave on November 19 and November 30, 2010, he did not discuss the performance of job duties on those dates. The claim in this case was for an alleged back injury resulting from loading and unloading trucks on November 8, 2010.

With respect to timeliness of the claim, the three-year time limitation begins to run on the date of injury, as noted above. Appellant would therefore have had three years from November 8, 2010 to timely file the claim. The Form CA-1 dated October 1, 2014 was not filed within three years.

The claim could still be considered timely if the 30-day notice provisions of 5 U.S.C. § 8122 were met, but in this case no probative evidence was presented that appellant provided notice of injury within 30 days. The supervisor reported that appellant had not provided notice of an alleged injury on November 8, 2010. Appellant did not provide any evidence that his immediate superior had actual knowledge of an employment injury within 30 days, nor is there any evidence that written notice of injury was given within 30 days.

[4] *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264, 266 (2001).

[5] *Laura L. Harrison*, 52 ECAB 515, 517 (2001).

[6] *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

[7] *Emma L. Brooks*, 37 ECAB 407, 411 (1986).

[8] *Supra* note 6.

Appellant has referred to an investigative interview and asserted that he provided notice of injury. However, the only evidence or record was a June 7, 2011 note in which appellant referred to using sick leave on November 9, 2010 for back pain issues. This does not constitute notice of an on-the-job injury, nor was it not provided within 30 days of November 8, 2010.

For the above reasons, the Board finds that OWCP properly found the claim in this case was untimely filed. The evidence of record does not establish that the claim was timely under the provisions of 5 U.S.C. § 8122.

On appeal appellant submitted copies of the decisions and because the heading provides appellant's name under "employee," he argues this shows he was an employee as of the date of the decision. As noted above, appellant's last day in pay status was July 13, 2012. The timeliness issue is determined by the date of the injury and the filing of the claim for compensation. For the reasons discussed above, the claim in this case was untimely filed based on the evidence of record.

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

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[9] OWCP's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."[10] 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.[11]

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the November 17, 2015 decision denying his claim for compensation. There is no indication, however, that appellant submitted additional evidence or argument with his reconsideration request.

A claimant is entitled to a merit review only if one of the requirements of 20 C.F.R. § 10.606(b)(3) is met, as noted above. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously

[9] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[10] 20 C.F.R. § 10.606(b)(3).

[11] *Id*. at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

considered by OWCP, or submit relevant and pertinent new evidence not previously considered by OWCP. Since appellant did not met any of the requirements of 20 C.F.R. § 10.606(b)(3), OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant's claim was untimely filed under 5 U.S.C. § 8122. The Board further finds that OWCP properly denied appellant's reconsideration request without merit review of the claim, pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 27, 2016 and November 17, 2015 are affirmed.

Issued: June 21, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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