

**United States Department of Labor
Employees' Compensation Appeals Board**

N.N., Appellant)	
)	
and)	Docket No. 23-0299
)	Issued: August 11, 2023
U.S. POSTAL SERVICE, OXNARD POST)	
OFFICE, Oxnard, CA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Capp P. Taylor, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On December 11, 2022 appellant, through counsel, filed a timely appeal from a June 30, 2022 merit decision and an October 21, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that she filed a timely claim for compensation, pursuant to 5 U.S.C. § 8122(a); and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 26, 2021 appellant, then a 58-year-old retired city delivery specialist, filed an occupational disease claim (Form CA-2) alleging that her preexisting cervical degenerative disease, right hip enthesopathy, and multilevel stenosis (bilateral) facet arthropathy radiculopathy had been aggravated by factors of her employment.³ She first became aware of her conditions on August 12, 2011 and their relationship to factors of her federal employment on April 25, 2021. OWCP assigned the claim OWCP File No. xxxxxx100. Appellant was last exposed to the conditions alleged to have caused the condition on April 17, 2018, and she retired on disability effective April 5, 2019.

In a narrative statement dated April 25, 2021, appellant referenced her prior occupational disease claim, under OWCP File No. xxxxxx550, noting the date of injury as August 9, 2011. She indicated that she returned to work as a city carrier in 2016. In January 2017, appellant worked as a city carrier with a 25-pound lifting restriction. The duties of her modified position required several hours of casing mail, placing mail into a vehicle for delivery and delivering mail. Casing mail involved bending, overhead reaching, stooping, and lifting from the floor. Appellant performed her modified job from January 2017 until her retirement.⁴ She stated that she noticed a sore neck and bilateral arm and hip numbness, which she attributed to walking and getting in and out of her vehicle while delivering mail. In April 2018, appellant stopped work after contracting pneumonia and becoming depressed. She did not return to work after her pneumonia resolved due to her cervical and right hip conditions.

In an August 12, 2020 medical report, Dr. Richard D. Scheinberg, an attending Board-certified orthopedic surgeon, noted appellant's injury history, that she had previously undergone C5-7 cervical fusion, her job description and that she was seen for increasing neck pain and headaches with cervical spinal stiffness. He detailed examination findings and diagnosed status post C5-7 anterior cervical discectomy and fusion, and headaches of cervical origin. Dr. Scheinberg recommended that appellant undergo another computerized tomography (CT) scan of the cervical spine.

Dr. Scheinberg, in a February 23, 2021 supplemental report, noted that appellant was initially seen on August 12, 2020. He reviewed her January 25, 2020 statement and a diagnostic

³ Appellant has a prior occupational disease claim under OWCP File No. xxxxxx550, which OWCP accepted for right hip enthesopathy, right hip trochanteric bursitis, and permanent aggravation of cervical disc disease. OWCP has not administratively combined the claims.

⁴ Appellant indicated that she retired in April 2018, but the notification of personnel action (PS Form 50) indicated April 5, 2019 as her retirement date.

test, and reiterated his prior diagnoses of status post C5-7 anterior cervical discectomy and fusion, and headaches of cervical origin. Dr. Scheinberg also diagnosed significant cervical degenerative disc disease. He opined that appellant's degenerative disc disease likely worsened over time and was related to cumulative trauma after appellant resumed work in January 2017.

In subsequent reports dated February 26, May 12, and June 30, 2021, Dr. Scheinberg noted appellant's increasing neck pain and stiffness. He continued to diagnose status post C5-7 anterior cervical discectomy and fusion, and headaches of cervical origin. In his report dated May 12, 2021, Dr. Scheinberg also noted mild central spinal canal stenosis at C3-4 and multilevel advanced neural foraminal stenosis.

In a letter dated May 5, 2021, the employing establishment challenged appellant's claim asserting that it was untimely filed. It noted her last physical day of work was April 17, 2018 and that she was approved for disability retirement on April 5, 2019.

In a development letter issued on August 7, 2021, OWCP requested additional factual and medical evidence to establish that appellant provided timely notification of her claimed work injury and that her diagnosed conditions were causally related to her accepted employment factors. It further provided a questionnaire for her completion. OWCP afforded appellant 30 days for a response.

In response to OWCP's development letter, appellant submitted additional reports from Dr. Scheinberg covering the period August 11, 2021 through June 15, 2022; an April 20, 2022 report documenting that appellant had undergone steroid injections; diagnostic test reports; reports from Dr. Tristan Zhang, a physician specializing in family and general medicine, covering the period July 26, 2021 through May 6, 2022; and an April 1, 2021 chiropractic note.

In a narrative report dated October 21, 2021, Dr. Scheinberg further explained that when appellant returned to work in January 2017 she had an accepted cervical condition of cervical degenerative disc disease, and had undergone fusion at C5-7. When she returned to work, appellant performed several hours of work each day of overhead reaching, bending and stooping and lifting from the floor. As she performed these tasks her radicular symptoms returned. A CT cervical scan performed on September 17, 2020 depicted neural foraminal stenosis bilaterally at C2-7. Dr. Scheinberg opined that while unquestionably appellant had severe degenerative disc disease prior to returning to work in September 2017, her work performed after that time contributed to her multilevel stenosis or aggravation of her cervical degenerative disc condition.

By decision dated June 30, 2022, OWCP denied appellant's occupational disease claim as untimely filed, finding that the evidence of record did not establish that her claim was filed within three years of the date of injury, August 12, 2011, or that her immediate supervisor had actual knowledge of the claimed condition within 30 days of the date of injury.

On July 26, 2022 appellant, through counsel, requested reconsideration. Counsel alleged that appellant had a prior claim involving a cervical condition and had been able to work a modified job from January 2017 until April 2018. Prior to retiring appellant experienced some neck pain with radicular symptoms, which were not disabling. She was unaware of her current cervical condition, C2-7 neural foraminal stenosis, until Dr. Scheinberg's February 23, 2021 report and his

supplemental October 2, 2021 report, in which it attributed her condition to her return to modified work. Counsel asserted that appellant's claim was timely filed as it was filed within three years of February 23, 2021, when she first became aware of her current condition and its causal relationship to her federal employment.

By decision dated October 21, 2022, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim, including the fact 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 period of FECA,⁶ 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.⁷ 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.⁸

The issue is whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.⁹ 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.¹⁰

In an occupational disease claim, 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 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

⁵ *Supra* note 2.

⁶ *R.L.*, Docket No. 22-0057 (issued September 2, 2022); *W.P.*, Docket No. 21-0107 (issued May 4, 2021); *M.O.*, Docket No. 19-1398 (issued August 13, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *R.L., id.*; *J.R.*, Docket No. 20-0496 (issued August 13, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ *R.L., id.*; *B.M.*, Docket No. 19-1341 (issued August 12, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁹ *R.L., id.*; *M.B.*, Docket No. 20-0066 (issued July 2, 2020); *Charles Walker*, 55 ECAB 238 (2004); *Charles W. Bishop*, 6 ECAB 571 (1954).

¹⁰ 5 U.S.C. § 8122(a); *F.F.*, Docket No. 19-1594 (issued March 12, 2020); *W.L.*, 59 ECAB 362 (2008).

¹¹ *See R.L., supra* note 6; *A.M.*, Docket No. 19-1345 (issued January 28, 2020); *Larry E. Young*, 52 ECAB 264 (2001).

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 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.¹³ It is the employee's burden of proof to establish that a claim is timely filed.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant filed a timely claim for compensation, pursuant to 5 U.S.C. § 8122(a).

Where an 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.¹⁵ The date of last exposure in the present case is April 17, 2018, which is more than three years prior to April 26, 2021, the date appellant filed her claim.

In cases of latent disability, however, the time for filing a claim does not begin to run until the claimant is aware, or by exercise of reasonable diligence, should be aware of the causal relationship between his or her condition and his or her employment.¹⁶ Appellant has alleged that she first became aware of the relationship of her current cervical condition on February 23, 2021, the date of Dr. Scheinberg's report.

OWCP found appellant's claim untimely under 5 U.S.C. § 8122(a) because it was filed on April 26, 2021 more than three years after August 12, 2011, the date of appellant's initial injury under OWCP File No. xxxxxx550. It determined that she knew or reasonably should have known of a relationship between her condition and her federal employment on August 12, 2011, the date of injury.

On February 23, 2021 Dr. Scheinberg described appellant's history and noted a prior August 9, 2011 employment injury. He opined that appellant's degenerative disease likely worsened over time and was related to the cumulative trauma of resuming work in January 2017. Dr. Scheinberg recommended that appellant undergo an additional CT scan. In his supplemental report dated October 21, 2021, he opined that appellant had C2-7 foraminal stenosis was

¹² *R.L., id.*; *S.O.*, Docket No. 19-0917 (issued December 19, 2019); *Larry E. Young, id.*

¹³ 5 U.S.C. § 8122(b).

¹⁴ *R.L., supra* note 6; *D.D.*, Docket No. 19-0548 (issued December 16, 2019); *Gerald A. Preston*, 57 ECAB 270 (2005).

¹⁵ *L.S.*, Docket No. 20-0705 (issued January 27, 2021); *supra* note 9.

¹⁶ *D.D.*, Docket No. 19-0548 (issued December 16, 2019); *J.M.*, Docket No. 10-1965 (issued May 16, 2011); *Larry E. Young, supra* note 11.

aggravated by the cumulative trauma following her return to work in 2017.¹⁷ The evidence of record establishes that appellant sustained further cervical injury which was first reported on February 23, 2021 by Dr. Scheinberg. The Board, therefore, finds that appellant's claim was timely filed under 5 U.S.C. § 8122(a) as it was filed on April 26, 2021 within three years of February 23, 2021.¹⁸

As appellant has filed a timely claim for compensation, the case is remanded to OWCP to address the merits of the claim. After such further development as is deemed necessary, it shall issue a *de novo* decision.¹⁹

CONCLUSION

The Board finds that appellant's claim for compensation was timely filed within the applicable time limitation provisions of 5 U.S.C. § 8122(a).²⁰

¹⁷ See *L.S.*, *supra* note 15; *C.S.*, Docket No. 18-0009 (issued March 22, 2018); *A.S.*, Docket No. 17-1639 (issued November 27, 2017).

¹⁸ *Id.*

¹⁹ The Board notes that appellant's prior claim, OWCP File No. xxxxxx550, has not been administratively combined with the current claim. Upon return of the case record, OWCP shall administratively combine appellant's current claim with her prior claim, OWCP File No. xxxxxx550, as they relate to the same body part.

²⁰ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the June 30, 2022 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 11, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board