United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 07-1507**
	)	**Issued: November 6, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Neosha, MO, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 14, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 19, 2007 merit decision denying his claim as untimely filed and the March 16, 2007 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these issues.

ISSUES

The issues are: (1) whether the Office properly determined that appellant's claim for compensation is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act; and (2) whether the Office properly refused to reopen his case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 20, 2005 appellant, a 52-year-old retired letter carrier, filed an occupational disease claim, alleging that he developed carpal tunnel syndrome (CTS) as a result of performing repetitive job duties. He retired and last worked for the employing establishment,

on March 1, 1994. Appellant stated that he first realized that his condition was caused or aggravated by his employment on May 19, 2003. The official supervisor's report reflects that appellant first reported the condition to the employing establishment on November 28, 2005.

Appellant submitted an October 31, 2005 report from Dr. Brian K. Ellefsen, a Board-certified osteopath, specializing in orthopedic surgery, who had been treating appellant for several years. Dr. Ellefsen stated that appellant worked for the employing establishment for eight years prior to his retirement on March 1, 1994. Due to bilateral hand complaints and aching pain, appellant was placed in splints while he slept and worked, full time for a month. Although his symptoms improved temporarily, they gradually returned overtime and were worse while he was at work, where he was required to hold magazines and flats in his left arm, while he sorted them with his right hand. Appellant's job also required repetitive gripping and prolonged holding when he delivered mail. Dr. Ellefsen indicated that appellant's symptoms continued after he stopped work and have bothered him ever since. He opined that appellant's bilateral CTS were caused by his work activities.

On November 30, 2005 the employing establishment controverted appellant's claim, contending that he failed to establish that his CTS resulted from employment activities.

Appellant submitted a May 19, 2003 report from Dr. Ellefsen, who diagnosed bilateral CTS. In a report of a July 8, 2004 nerve conduction study, Dr. Ellefsen stated that the study was consistent with a mild median neuropathy at both wrists and was suggestive of a right-sided C8 and T1 radiculopathy; a right brachial plexopathy; or a right proximal median neuropathy.

In a November 28, 2005 statement, appellant indicated that in late 1989 and 1990, his hands started to cramp up and "go numb" at different times of the day and especially at night. After he retired in 1994, his hands stopped hurting all the time, but he was still unable to grasp "real hard" and his hands still "went numb" at night. Appellant stated that Dr. Ellefsen informed him the previous fall that he had CTS in both hands. He alleged that both his wrists and hands were affected by his repetitive job duties at the employing establishment, which included throwing flats and holding batches of letters in the left hand while placing them in slots with the right hand. Appellant indicated that he was required to wear braces on both hands and wrists in March 1990, both at home and at work, for numbness. He stated: "At the time, I didn't know that was the start of carpal tunnel."

By decision dated December 13, 2005, the Office denied appellant's claim on the grounds that it was not timely filed. It advised him that the date of injury was the date of his last occupational exposure, namely March 1, 1994, the date of his retirement and that he should have been aware of a relationship between his employment and the claimed condition by that date. As appellant's claim was filed on November 20, 2005, more than 11 years after the date of injury, the Office found that it was untimely filed. It further found that there was no evidence that his supervisor had actual knowledge of his condition within 30 days.

On November 10, 2006 appellant requested reconsideration, contending that he was first aware that he had CTS on May 19, 2003, when he received the diagnosis from Dr. Ellefsen. He stated that he experienced wrist pain during his employment, but that after wearing wrist braces for a month, "the problem went away." After he retired in 1994, his hands "would hurt some the

first of the mourning (sic), but stopped hurting altogether after a short while." Appellant "didn't think anything of it," until several years later, when the pain and numbness returned and worsened and he began to drop things. He contended that his treating physicians did not diagnose CTS while he was working at the employing establishment, noting that the condition was not widely known at that time. The record contains laboratory test results for the period November 4, 2004 through January 7, 2005.

By decision dated January 19, 2007, the Office denied modification of its December 13, 2005 decision. The Office found that the statement submitted in support of appellant's request for reconsideration showed that he was reasonably aware that he had sustained a work-related condition at the time he retired.

On March 11, 2007 appellant submitted an appeal request form requesting reconsideration of the Office's January 19, 2007 decision. No documents were submitted in support of his request.

By decision dated March 16, 2007, the Office denied appellant's request for merit review on the grounds that his request neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

In cases of injury on or after September 7, 1974, section 8122(a) of the Act[1] 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
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> "(2) written notice of injury or death as specified in section 8119 was given within 30 days."[2]

Section 8119 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 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

[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8122(a).

of the individual giving the notice.[3] Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.[4]

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. 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.[5] In order to establish that a supervisor had actual knowledge, 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]

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 his condition and his employment. When an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his 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.[7] Where the employee continues in the same employment after he reasonably should have been aware that he has a condition which has been adversely affected by factors of federal employment,[8] the time limitation begins to run on the date of the last exposure to the implicated factors.[9] The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.[10]

ANALYSIS -- ISSUE 1

The Board finds that appellant did not timely file a claim for compensation under the Act. Although he was last exposed to repetitive working conditions on March 1, 1994, when he retired, appellant alleged on his CA-2 form that he first became aware that his condition was caused by his employment on May 19, 2003. The evidence of record, however, establishes that he knew or reasonably should have known of the relationship between his carpal tunnel condition and factors of his employment at the time of his last exposure. Appellant's statements confirm his awareness that his work activities were responsible for his bilateral wrist condition

[3] 5 U.S.C. § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

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

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

[6] 5 U.S.C. § 8122(b); *Duet Brinson*, 52 ECAB 168 (2000).

[7] *Larry E. Young*, *supra* note 3.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993); *see James A. Sheppard*, 55 ECAB 515 (2004).

[9] *Id.*

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

prior to his retirement on March 1, 1994. On November 28, 2005 he stated that, in late 1989 and 1990, his hands started to cramp up and "go numb" at different times of the day and especially at night; that both of his wrists and hands were affected by his repetitive job duties at the employing establishment, which included throwing flats and holding batches of letters in the left hand while placing them in slots with the right hand; and that he was required to wear braces on both hands and wrists in March 1990, both at home and at work, for numbness. On November 10, 2006 appellant stated that he experienced wrist pain during his employment, but that after wearing wrist braces for a month, "the problem went away." After he retired in 1994, his hands would hurt some the first of the morning, but stopped hurting after a short while.

Reports from appellant's physician indicate that he suffered from his wrist condition, which was later diagnosed as CTS, during the period of his employment and that he was aware that his employment activities were responsible for the condition. Dr. Ellefsen stated that, during the eight years he worked for the employing establishment, appellant experienced bilateral hand complaints and aching pain and was placed in splints while he slept and worked, full time for a month. Although his symptoms improved temporarily, they gradually returned overtime and were worse while he was at work, where he was required to hold magazines and flats in his left arm, while he sorted them with his right hand. Dr. Ellefsen noted that his job also required repetitive gripping and prolonged holding when he delivered mail. He indicated that appellant's symptoms continued after he stopped work and have bothered him ever since.

Appellant alleged that he was not aware that he had CTS until May 19, 2003, when he received a diagnosis from Dr. Ellefsen. He argued that, although he had wrist complaints for which he was required to wear wrist braces, he "didn't know that was the start of carpal tunnel." These allegations are not sufficient to establish that appellant was unaware of his condition by the time he retired on March 1, 1994. As the Board has previously noted, when an employee becomes aware or reasonably should have become aware, that he has a condition which has been adversely affected by factors of his employment, such awareness is competent to start the running of the time limitations period, even though he does not know the precise nature of the impairment, or whether the ultimate result of such adverse effect would be temporary or permanent.[11] In discussing the degree of knowledge required by the employee prior to filing a claim, the Board has emphasized that he need only be aware of a possible relationship between his condition and his employment to commence the statute of limitations. The Board has not required that appellant have definitive evidence of a condition and causal relationship on the date the claim is filed.[12] Appellant experienced and was treated for substantial pain and numbness in his wrists during his period of employment, which he attributed to his repetitive work activities. Although he may have had some doubt as to a definitive diagnosis, the Board finds that he knew

[11] *See Edward Lewis Maslowski*, 42 ECAB 839 (1991); *see also Percy E. Rouse*, 26 ECAB 214 (1974).

[12] *See Edward Lewis Maslowski, supra* note 11. *See also William A. West*, 36 ECAB 525 (1985).

or reasonably should have known, of a relationship between his condition and his employment by the date of his last exposure on March 1, 2004.[13]

For reasons stated above, the evidence establishes that appellant should have known of a causal relationship between his wrist condition and his employment before he stopped working. Therefore, the time limitations began to run on March 1, 1994, appellant's last day of work and exposure to the implicated employment factors. Since appellant did not file a claim until November 20, 2005, his claim was filed outside the three-year limitation period.

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 the injury within 30 days of his last exposure to the implicated employment factors on March 1, 1994.[14] Additionally, the claim would be deemed timely if written notice of injury had been provided within 30 days pursuant to 5 U.S.C. § 8119.[15] In the instant case, there is no indication that appellant provided written notice of injury prior to November 20, 2005, the date he filed his claim or that his immediate supervisor had actual knowledge of his wrist condition.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[16] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[17] which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

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

[13] *Cf. Willie Wade*, Docket No. 03-425 (issued April 4, 2003) (where appellant experienced only minor symptoms of wrist pain during his period of employment and the medical evidence did not show that his condition was such that he was aware or should have been aware of a possible employment related cause for his condition at that time, the Board found that it was reasonable that he would not relate his claimed upper extremity condition to his employment at that time).

[14] *Larry E. Young*, *supra* note 3. *See* Federal (FECA) Procedure manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

[15] 5 U.S.C. §§ 8122(a).

[16] 5 U.S.C. § 8128(a).

[17] 20 C.F.R. § 10.606(b).

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 the Office without review of the merits of the claim.[18]

ANALYSIS -- ISSUE 2

Appellant's March 11, 2007 request for reconsideration, encompassed in an appeal request form, neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

As noted above, appellant did not submit any new evidence with his reconsideration request. Therefore, he did not meet the third requirement listed in section 10.606(b) by submitting relevant and pertinent new evidence not previously considered by the Office.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his March 11, 2007 request for reconsideration.

CONCLUSION

The Board finds that the Office properly determined that appellant's claim for compensation is barred by the applicable time limitation provisions of the Act. The Board further finds that the Office properly refused to reopen his case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

[18] *Id*. at § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the March 16 and January 19, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 6, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees'' Compensation Appeals Board