U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SALLY OWEN, claiming as the widow of WILLIAM D. OWEN and
DEPARTMENT OF THE ARMY, PINE BLUFF ARSENAL,
Pine Bluff, AR

Docket No. 99-928; Submitted on the Record;
Issued January 24, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
VALERIE D. EVANS-HARRELL

The issue is whether appellant's claim for survivor's benefits is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act.

Appellant, the employee's widow, filed a claim for death benefits on October 24, 1994. She also filed a notice of occupational injury and claim for compensation (Form CA-2) was filed on January 18, 1995. The employee was a supervisory quality assurance specialist from 1970 until July 1988. The employee stopped work in July 1988 and filed a claim for disability retirement with the employing establishment which, according to appellant, was approved on May 3, 1989. The employee was diagnosed with chronic myelogenous leukemia in September 1987 and subsequently died of the disease on June 4, 1989.

In a March 9, 1994 letter to the Department of Energy, appellant alleged that the employing establishment and the United States government were responsible for the employee's death due to his constant exposure to chemicals on the job. Appellant stated that she had contacted lawyers about a wrongful death suit in the past, but no one would take the case.

In a May 1, 1995 letter, appellant stated that she first became aware that the employee's chronic myelogenous leukemia condition was related to his employment around May 1990 when she found the employee's job descriptions and job standards listing known chemicals and toxic cancer causing agents known to cause chronic myelogenous leukemia dating back to the beginning of the employee's employment. She indicated that she had contacted lawyers in Florida, Pine Bluff, Little Rock and Texas, but no one would handle the case. She indicated that, in January 1994, reports started coming out regarding radiation exposure and testing by the government. It was then she contacted the Department of Energy. Appellant indicated that the employee feared filing a claim for his job-related exposure to radiation and chemicals because he felt it would greatly affect his disability retirement claim and leave appellant in financial distress.

Appellant further stated that she could not submit a physician's statement as she doubted that any doctor would say without hesitation that the employee's condition was caused from or by his employment. She related that the employee never spoke to any of his doctors about his exposures or what he did for a living at the employing establishment. She indicated that she knew this as she accompanied him on each and every visit to a doctor and was with him in the examining room at all times.

Appellant also related that in December 1987 she had become ill with systemic lupus and, in 1991, was diagnosed as bipolar manic depressive with clinical depression. She advised that she is medically disabled and on social security. Appellant asserted that, because of her illnesses, she was unable to continue with the current claim until 1994.

The employing establishment enclosed copies of monitoring records surrounding the employee's work around radiation from 1970 through October 1, 1988. All exposure periods were indicated to be within the acceptable level. It indicated that the employee began using sick leave in July 1989. A copy of the employee's most recent job description was enclosed along with dispensary records and annual physical records.

The employing establishment related that its health clinic advised the employee to consult his private physician on February 13, 1984 and on October 1, 1986 due to his elevated white blood cell count. It further stated that, "following annual physicals given by Pine Bluff Arsenal Health Clinic personnel in February 1984 and October 1986, as indicated by his medical record, [the employee] was advised to consult his personal physician for elevated white blood cell count. His leukemic condition was not reported to his supervisors until approximately October 30, 1987. [The employee] did not seem overly concerned at the time as he felt his condition was treatable." The employing establishment further related that there was never any discussion concerning possible relationship of the employee's illness to his employment.

In a March 2, 1984 medical report, Dr. William F. Harper, an employing establishment physician, noted that the employee had an elevated white blood cell count and that he had a maternal uncle who died of leukemia. The physician noted that the employee was not exposed to any toxins at the present time as he was an inspector. An impression of luekocyteous and chronic bronchitis was provided along with the recommendation that the employee discontinue smoking cigarettes. No opinion regarding a causal relation between the employee's condition and his employment was provided.

In an October 30, 1987 medical report, Dr. Ishmael S. Reid, an internist specializing in hematology and onocology, advised that the employee was undergoing treatment for chronic myelogenous leukemia. He stated that the employee was able to work without restrictions. No opinion as to a possible causal relationship was provided.

In an August 19, 1988 medical report, Dr. Jacob Amir, an internist specializing in hematology and onocology, advised that the employee was known to have chronic myelogenous leukemia since November 1987. He related that the employee had recently been hospitalized for a splenectomy and would be undergoing an aggressive chemotherapy regimen. He noted that the employee's prognosis remained extremely guarded and that he was unable to perform any

gainful employment. No opinion was provided regarding a causal relation between the employee's condition and his employment.

By decision dated June 23, 1995, the Office denied the claim on the grounds that the three-year statute of limitations for filing a claim began to run on May 31, 1990 when appellant was first aware of a possible relation between the employee's death and employment and that appellant did not file a claim for compensation within three years of May 31, 1990. The Office further found that the evidence of record did not establish that the official supervisor had actual knowledge of the disabling condition and its possible relation to employment.

In a July 6, 1995 letter, appellant requested a hearing. She again related that she became ill in November 1987 and was diagnosed with systemic lupus. After her husband's death, appellant stated that she was unable to work, think or sleep properly. She related that she could not think rationally most of the time and that her speech would become lost in mid sentence. She indicated that she changed doctors multiple times from her husband's death in June 1989 until January 1990. She was rejected from social security disability and had to try to return to work. She related that she only worked a few weeks and, on her doctor's recommendation, began to see a psychiatrist, Dr. Joy R. Joffe, who diagnosed her with manic depression, bipolar and clinical depression. In October 1991 she again filed for social security disability and was approved dating back to June 1991. She related that she was too ill to do much of anything and was again determined to be 100 percent disabled in 1994.

Appellant submitted papers from 1991 and 1995 with regard to her applications for Social Security Administration disability. Statements submitted from Richard Ennis Bill Coyle and appellant's mother attested to the fact that appellant was unable to handle her affairs following her husband's death.

In a May 7, 1996 note, Dr. Mary L. Stedman, a Board-certified child and adolescent psychiatrist, stated "Upon reviewing the progress notes from Dr. Joffe, her previous psychiatrist, it appears that Ms. Owens was incompetent at the time she first saw Dr. Joffe, June 1991."

In a June 7, 1996 report, Dr. Joffe, a psychiatrist, wrote "[appellant] was incompetent to handle anything more than normal daily activities at the time I began treating her in June 1991." Progress notes from June 24, 1991 through January 6, 1992 fail to indicate or reference that appellant was incompetent.

By decision dated July 17, 1996, an Office hearing representative affirmed the untimely filing noting that, although appellant's circumstances were admittedly difficult, they did not raise to the level of such an exceptional circumstance such that her failure to file a timely claim should be excused.

Appellant requested reconsideration and submitted duplicative evidence of record along with new evidence.

In a January 14, 1992 report, Dr. Joffe diagnosed appellant as being bipolar II and depressed. In addressing appellant's mental status, under the heading "thought processes," Dr. Joffe stated that there was no loosening of associations but has been severely agitated and

depressed. Appellant did not have any delusions or paranoia. She was oriented times three. Under intellectual function, Dr. Joffe noted that appellant's recent memory had been a problem for three to four years and she was of normal intelligence.

In a November 5, 1996 report, Dr. Stedman stated that she was writing regarding appellant's mental status examination by Dr. Joffe. She opined that, on January 14, 1992, appellant's intellectual functioning was impaired. Dr. Stedman related that "She had difficulty retaining recent information which was problematic for three to four years. She had difficulty concentrating as evidenced by her slowness in performance on the serial 7's calculations. She had difficulty abstracting information because of poor concentration. She has normal intelligence."

By decision dated January 16, 1997, the Office, after performing a merit review, denied modification of its prior decision.

In a letter dated April 21, 1997, appellant requested reconsideration and submitted a medical dictionary definition of incompetence, an April 21, 1997 letter to President Clinton and a February 17, 1997 medical report from Dr. Stedman who wrote:

> "[Appellant] was seen by Dr. Joffe after her husband's death. During that period, she was incompetent to care for herself or to make decisions regarding anything. Her psychiatrist told her to file for [s]ocial [s]ecurity [d]isability. With the help of her children, she was able to file for [s]ocial [s]ecurity [d]isability. Dr. Joffe did not know about the government's involvement in her husband's death. Therefore, Dr. Joffe did not direct her to file a complaint. It is clear that she was incompetent and only under the advise of her psychiatrist was able to file for [s]ocial [s]ecurity [d]isability."

By decision dated May 5, 1997, the Office, after performing a merit review, denied modification of its prior decision.

In a letter dated July 26, 1997, appellant requested reconsideration and submitted a March 22, 1997 report from Dr. Joffe who stated that she saw appellant intermittently from late 1991 to mid 1994, at which time she retired. She stated that appellant was diagnosed with bipolar affective disorder for which she was treated with appropriate medication. Dr. Joffe related that appellant was initially employed, but lost her job within a short period of time after she began treatment. She opined that, although appellant was able to handle activities of daily living, including travel, her judgment on matters such as the submission of paperwork was impaired due to her illness.

By decision dated September 18, 1997, the Office, after performing a merit review, found the evidence insufficient to modify its prior decision.

In a May 4, 1998 statement, appellant, through her attorney, requested reconsideration. No written authorization was submitted, however, designating appellant's attorney as her legal representative. Duplicative evidence was submitted along with new evidence. The new evidence consisted of a "[p]hysician's [c]ertification of [t]otal and [p]ermanent [d]isability"

dated February 4, 1997 whereby Dr. Joffe declared appellant totally and permanently disabled as of January 1, 1991 due to lupus and bipolar II; a listing of the type of medication and the effects of the medications appellant took during 1989 through 1995; and copies of appellant's pay stubs from December 1987 to December 1988.

By decision dated August 31, 1998, the Office, after performing a merit review, found that the evidence submitted was insufficient to support modification of its prior decision.

The Board finds that appellant's claim for survivor's benefits is barred by the applicable time limitation provisions of the Act.

Section 8122 of the Act plainly states that an original claim for compensation for disability or death must be filed within 3 years after the injury or death unless the official supervisor had actual knowledge of the injury and its possible relation to employment, or if written notice was given within 30 days. Subsection (b) deals only with latent disability, not death. Subsection (c) adds that the timely filing of a disability claim because of injury will also satisfy the time requirements for a death claim based on the same injury.[1]

The implementing regulation provides that, in the case of death due to a latent disability, the time for filing a claim does not begin to run until the employee has died and his survivors are aware of, or by the exercise of reasonable diligence should have been aware of, the causal relationship of the employee's death to factors of his employment.[2]

In this case, no disability claim was filed. Although the employee's chronic myelogenous leukemia was diagnosed in 1987, there is no indication in the record that either the employing establishment or the employee's physicians had actual knowledge of the disabling condition and its possible relation to employment. None of the employee's physicians mention a possible relation of the employee's illness to his employment. The employment establishment denied any knowledge of any discussions concerning a possible relationship of the employee's illness to his employment. Appellant, herself, asserted that the employee, himself, feared filing such a claim because he felt it would greatly affect his disability retirement claim and leave her in financial distress. Accordingly, as there was no disability claim filed and no actual knowledge of the official supervisor regarding a possible relation of the employee's illness to his employment, the three-year time limitation applies.

In the present case, the three-year time limitation for appellant's survivor claim began to run on May 1990, the date appellant indicated she became aware of the possible relationship between the employee's condition and factors of his federal employment. Since appellant did not file a claim until October 24, 1995, it was not timely filed within the three-year period of limitation. Additionally, appellant's March 9, 1994 letter directed to the Department of Energy is not timely filed and, as it is not directed to the employing establishment, is not sufficient to put the employing establishment on notice.

[1] 5 U.S.C. § 8122(a)-(c).

[2] 20 C.F.R. § 10.105(c) (1999); *Anna M. Hooper*, 37 ECAB 495, 498 (1986).

Appellant has contended that the time limitations should not run against her due to the fact that she was incompetent. Section 8122(d)(2) provides that the time limitations of sections 8122(a) and 8122(b) do not "run against an incompetent individual while he is incompetent and has no duly appointed legal representative."[3] A stay against the time limitation also applies 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.[4]

Appellant submitted multiple medical reports and nonmedical evidence showing that her condition had impaired her ability to perform certain tasks, *i.e.*, managing her financial concerns, taking care of herself. However, she has not submitted evidence establishing that she was incompetent at any time from May 1990 within the meaning of the Act. The Board has held that it is appellant's burden to show that she is incompetent for a given period by submitting medical evidence stating that her condition was such that she was not capable of filling out a claim form or of otherwise furnishing the relatively simple information necessary for filing a claim and satisfying the limitation requirements.[5] The nonmedical witness statements along with a medical dictionary's definition of incompetence, copies of appellant's medication list and descriptions, payroll stubs, and a copy of an April 21, 1997 letter to President Clinton are of no value in establishing the allegation of incompetency as such materials are of only general application.[6]

Moreover, the medical reports of Drs. Stedman and Joffe do not establish that appellant's condition rendered her incapable of performing the above or similar tasks such that she would be considered incompetent within the meaning of the Act. First, the reports do not address the incompetency for any period other than June 1991, when Dr. Joffe began treating appellant. Second, they do not establish that appellant was incapable of filling out a form or otherwise supplying information necessary to make a claim under the Act, especially in light of the fact appellant filed Social Security Administration forms in January, February and November 1991 in regards to her claim for social security benefits. Although both Drs. Stedman and Joffe indicate that appellant had had a problem with short-term memory for three to four years and had difficulty with concentration and abstraction of information, Dr. Joffe's January 14, 1992 report stated that appellant was oriented in all three spheres, had no delusions, paranoia, hallucinations, or loose associations and was of normal intelligence. Although in her March 22, 1997 report, Dr. Joffe stated that appellant's judgment on matters such as the submission of paperwork was impaired due to her illness, she also related that appellant was able to handle activities of daily living, including travel. As there is no medical evidence that appellant suffered from loss of memory or disorientation, appellant's emotional condition was not so severely incapacitating so that it prevented her from filing a claim.[7] The February 4, 1997 disability certificate whereby

[3] 5 U.S.C. § 8122(d)(2).

[4] *Dale M. Newbigging*, 44 ECAB 551, 553-54 (1993); *Paul S. Devlin*, 39 ECAB 715 (1988).

[5] *Paul S. Devlin*, *supra* note 4.

[6] *William C. Bush*, 40 ECAB 1064 (1989).

[7] The Board has held that, even when an employee was not technically incompetent so as to toll the running of the time limitation provision as provided under section 8122 (d)(2) of the Act, he may nevertheless suffer from an emotional condition of sufficient severity to justify waiver; *see, e.g.*, *Richard T. Southmayd*, 19 ECAB 437 (1968). In that case, waiver was granted because the appellant, after surgery for an employment-related condition, suffered

Dr. Joffe declared appellant totally and permanently disabled as of January 1, 1991[8] due to her medical conditions, does not support that appellant was incapable of filing a claim for benefits. Moreover, although in her February 17, 1997 report, Dr. Stedman stated that Dr. Joffe helped direct appellant to file for social security disability benefits and, as Dr. Joffe did not know about the government's involvement in appellant's husband's death, Dr. Joffe could not direct her to file a complaint. Although the explanation is plausible, Dr. Stedman's February 17, 1997 report is insufficient to establish that appellant was incompetent to file a claim for benefits as Dr. Stedman was not treating appellant and the report fails to clarify or state the exact period of time appellant was "incompetent." Therefore, appellant has filed to show that the time limitations of section 8122 do not run against her.

For these reasons, the Office properly denied appellant's compensation claim on the grounds that she did not establish that her claim was filed within the applicable time limitations provisions of the Act.

permanent brain damage causing loss of memory and confusion. Waiver was granted also in *Ubaldo F. Baca*, 28 ECAB 96 (1976), a case in which the appellant had been hospitalized a number of times for a mental condition for which he was under continues psychiatric care and medication. The Board found that the evidence demonstrated that appellant was in such a mental state that he should not be subjected to the reasonable man tests for determining whether waiver of the one-year period of limitations was justified. Thus, the Board found sufficient cause or reason to waive the one-year filing requirement.

[8] It is noted that, in her June 7, 1996 report, Dr. Joffe stated that she started treating appellant in June 1991. Accordingly, the date of January 1, 1991 as the date of appellant's total disability is a typographical error.

The decision of the Office of Workers' Compensation Programs dated August 31, 1998 is hereby affirmed.

Dated, Washington, DC
January 24, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

Valerie D. Evans-Harrell
Alternate Member