

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

E.B., claiming as widow of N.B., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL SEA
SYSTEMS COMMAND-SHIPYARDS,
Philadelphia, PA, Employer**

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**Docket No. 07-629
Issued: July 18, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 3, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 14, 2006 denying her claim on the grounds that it was not timely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant filed a timely claim for death benefits under 5 U.S.C. § 8122(a).

FACTUAL HISTORY

On June 12, 2005 appellant filed a Form CA-5 claim seeking compensation for the death of her husband, a comptroller. The employee died on December 30, 1999, at the age of 69, from asbestos exposure. In a June 16, 2005 attending physician's report, Dr. Dennis Woodall, a Board-certified family practitioner, diagnosed mesothelioma, a rare form of cancer due to asbestos exposure and advised the direct cause of death was asbestos. A December 14, 1999

pathology report and a December 14, 1999 report from Dr. Carrie Y. Inwards, Board-certified in anatomic pathology and clinical pathology, listed a final diagnosis of pleura left biopsy, malignant mesothelioma.

Appellant submitted a July 13, 1982 letter from the Veterans Administration (VA) which denied her claim for disability benefits in part due to exposure to asbestos. Certificate of commendations for the employee dated March 22 and April 22, 1955 and July 15, 1956 from the San Francisco Naval Shipyard were provided to the record. In a December 2, 1999 handwritten note to Dr. Ramon Schmidt, a Board-certified general surgeon, the employee noted his symptoms following an August 20, 1999 bronchoscope and August 25, 1999 endoscopy. In an undated note, appellant indicated that on or about December 20, 1999, the employee was told his malignant mesothelioma was due to asbestos which he attributed to working at the San Francisco Naval Shipyard. She also submitted a copy of a newspaper article from the Salina Journal dated March 24, 2000 regarding an asbestos lawsuit.

On August 20, 1999 the employee underwent a fiberoptic bronchoscope. The surgical pathological report found no atypical cells but noted that the left main stem bronchus biopsy revealed chronic bronchitis. An August 25, 1999 endoscope ultrasonography report found probable pathologic lymph nodes within the mediastinum adjacent to a larger mass effect in the left hilum. A November 5, 1999 computerized tomography (CT) examination noted considerable worsening of the chest with significant density at the left infrahilar region and significant collapse of the left lower lobe with moderate amount of pleural fluid. A left lung needle biopsy of November 16, 1999 indicated that no tumor was seen. A December 8, 1999 report included a final pathological diagnosis as scarred lung parenchyma and malignant tumor consistent with biphasic malignant mesothelioma in the left lung.

On August 3, 2005 the Office conducted a conference call with appellant. The issue involved the timely filing of the claim. During the conference, appellant stated that she did not know she could file a claim for death benefits with the Department of Labor until she received a CA-5 form from Andrew Tharp, after she wrote to the Department to inquire whether her step children or their biological mother received any financial settlement. She confirmed that the employee did not file a claim for disability with the Department of Labor due to his lung condition. Appellant also documented the employee's military employment as a machinist and as a comptroller. The Office found that the employee was probably exposed to asbestos in the 1950s, as he started working for the Department of the Air Force in 1959 and retired in 1976 while working as a comptroller with the Department of the Army. Appellant explained that a lung x-ray in August 1999 showed a small spot, but the CT scan for the spot, a three piece biopsy of the lungs, an endoscopy and a "needle" biopsy showed no cancer. She stated that the employee died three weeks after he had surgery on his lungs. The Office noted that appellant indicated that she was aware that the employee's lung cancer was work related around December 20, 1999.

In response to the Office's conference memorandum of August 3, 2005, appellant submitted an August 15, 2005 letter explaining why she did not file her claim earlier. Appellant stated that she was aware that a claim for workers' compensation should be filed when an employee sustains an injury and is unable to continue working. Appellant argued that her case was different as the employee retired in 1976 and, since they received a monthly annuity, they

did not think about compensation. She noted that she received a small survivor benefit after the employee's death. Appellant stated that she did not know she could file a claim for death benefits and only became aware of the possibility after viewing advertisements on television. On March 28, 2000 she sent one of her step daughters an article about asbestos and sent, to all five stepchildren, a clipping from the Salina Journal dated March 24, 2000 about an asbestos lawsuit. Appellant did not receive any response from her stepchildren. Subsequently, Mr. Tharp indicated that she could file the CA-5 form. She noted that the employee did not file a claim for disability with the Department of Labor as he was in no condition to think or speak.

By decision dated September 13, 2005, the Office denied appellant's claim, finding that it was not timely filed within either the one-year or five-year limit for an injury caused by exposure to asbestos during the 1950s. It found that appellant should have been aware of the relationship between the employee's employment and the illness that caused the death was work related on or around December 20, 1999, there was no evidence that the employing establishment was aware of the work-related mesothelioma as it developed in 1999 and that the employee did not file a claim for a work-related disability due to mesothelioma.

Appellant filed a request for review of the written record on October 6, 2005. In a September 13, 2005 letter, she provided new reasons for the delay in filing of her claim. Appellant stated that she did not know she had a right to file a claim until she received the CA-5 form from Mr. Tharp. She alleged that the employee did not apply to the VA for a disability of the lungs as yearly routine chest x-rays were spotless, even though the employee had been a smoker. The employee never filed a disability claim with the Department of Labor for an asbestos-related lung condition during his civilian employment and following his retirement because he did not have a lung problem. Appellant indicated that a routine x-ray in August 1999 showed a small spot and they learned on December 20, 1999 that he had malignant mesothelioma.

By decision dated February 14, 2006, an Office hearing representative affirmed the September 13, 2005 decision finding that the claim for death benefits was untimely, based on the three-year statute of limitations. The hearing representative found that appellant should have been aware of a possible casual relationship between the employee's condition and his employment as early as December 20, 1999 when the employee indicated that his asbestos exposure at the San Francisco Shipyard caused his malignant mesothelioma. The three-year statute of limitations began to run on December 30, 1999, the date the employee died. The hearing representative also found that the record did not establish that any immediate supervisor had actual knowledge of the injury or death within 30 days and appellant did not meet any exception for excusing her delay in filing the claim.

LEGAL PRECEDENT

In cases of injury on or after September 7, 1974, section 8122(a) of the Federal Employees' Compensation Act provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.¹ In the case of death due to a

¹ 5 U.S.C. § 8122(a); *Gerald A. Preston*, 57 ECAB ____ (Docket No. 05-1198, issued December 15, 2005); *L.C.*, 57 ECAB ____ (Docket No. 06-1190, issued September 18, 2006).

latent disability, the time for filing a death 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

The three-year limit on filing a claim for compensation does not apply in the following limited circumstances: (1) the employee's direct supervisor had actual knowledge that created reasonable notice of an on-the-job injury or death within 30 days;³ (2) an employee or survivor gave formal written notice within 30 days of becoming aware that the injury or death was causally related to the federal employment;⁴ (3) the employee filed a timely disability claim for a work-related injury or disability and the employee's death is based on the same injury;⁵ and (4) the claimant is under 21 years old, the claimant is incompetent and has no legal representative, or the claimant is prevented from giving notice by exceptional circumstances.⁶ Lack of awareness of possible entitlement, lack of information or ignorance of the law or one's rights and obligations under it do not constitute exceptional circumstances that excuse a failure to file a timely claim.⁷

ANALYSIS

Appellant claims that the employee's death on December 30, 1999 due to malignant mesothelioma was caused by asbestos exposure during his federal employment as a machinist at the San Francisco Naval Shipyard. The Office found that the employee's exposure to asbestos occurred in the 1950s. The evidence supports that appellant and the employee first learned about his malignant mesothelioma condition in December 1999. The employee passed away December 30, 1999. A latent disability requires appellant to show that she filed her claim within three years of the time she was aware or with reasonable diligence could have been aware that the employee's death was due to factors of his federal employment.⁸

There is no medical or factual evidence of record to indicate that either appellant or the employee knew his condition was causally related to factors of his federal employment prior to December 20, 1999. Although the employee's claim for disability benefits due to exposure to asbestos was denied by the VA in July 1982, the Board has held that mere concern about a history of exposure to dangerous substances without positive medical evidence does not begin the three-year period for filing a claim.⁹ In this case, appellant first became aware of the

² 5 U.S.C. § 8122(b); *Gerald A. Preston*, *supra* note 1; *Lucile B. Shores*, 49 ECAB 219 (1997). *See also* 20 C.F.R. § 10.105.

³ 5 U.S.C. § 8122(a).

⁴ 5 U.S.C. § 8122(a) and (b).

⁵ 5 U.S.C. § 8112(c).

⁶ 5 U.S.C. § 8112(d).

⁷ *Roger W. Robinson*, 54 ECAB 846 (2003) (government's failure to recognize for several years that Gulf War personnel were exposed to potentially dangerous chemicals did not constitute exceptional circumstances).

⁸ *Gerald A. Preston*, *supra* note 1; *Lucile B. Shores*, *supra* note 2.

⁹ *Edward C. Horne*, 43 ECAB 834 (1992).

employee's condition and of the potential relationship between the employee's job as a machinist and his condition on December 20, 1999. A handwritten note from appellant, received with the claim, indicated that on December 20, 1999 when the employee was told he had malignant mesothelioma he stated his belief that his asbestos exposure at the San Francisco Shipyard caused his condition. However, the employee died on December 30, 1999. Thus, the three-year limitation started running as of December 30, 1999. As appellant filed her claim for death benefits on June 12, 2005, her claim was not timely filed within the three-year time limitation.

Though appellant has not met the burden of proving that she filed within the three-year limitation, her claim could be considered timely if she met any of the statutory exceptions. The Board finds, however, that these exceptions are not established by the evidence of record. There is no evidence of record that the employee's immediate supervisor had actual knowledge that the employee's death was related to his employment within 30 days. There is also no evidence that appellant or the employee provided written notice to the employing establishment within 30 days of becoming aware of the possibility that the employee's death or illness was causally related to his employment. Appellant has verified that no disability claims related to the employee's federal employment were ever filed.

Additionally, none of the exceptions relating to a claimant's ability to file a claim apply in this case. Appellant was not a minor, has not alleged that she was incompetent and has not provided evidence of an exceptional circumstance that would excuse her failure to timely file the claim. Although she argued that she did not know she could file a claim for death benefits until she received the CA-5 form, the Board has held that unawareness of possible entitlement, lack of access to information and ignorance of the law or one's obligations under it does not constitute exceptional circumstances that could excuse a failure to file a timely claim.¹⁰

¹⁰ *Ralph L. Dill*, 57 ECAB ____ (Docket No 05-1620, issued December 6, 2005).

CONCLUSION

Appellant did not file a timely claim for death benefits in accordance with 5 U.S.C. § 8122.

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2007
Washington, DC

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

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

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