

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOE L. BLOODWORTH and TENNESSEE VALLEY AUTHORITY,  
GALLATIN STEAM PLANT, Gallatin, TN

*Docket No. 03-1584; Submitted on the Record;  
Issued November 10, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant's occupational disease claim was timely filed pursuant to 5 U.S.C. § 8122(a).

On October 23, 2002 appellant, then a 79-year-old retired laborer, janitor and foreman, filed an occupational disease claim alleging that on February 1, 1960 he first became aware of his asbestos-related lung problems. Appellant further alleged that, on December 1, 1988, he first realized that his lung problems were caused or aggravated by his employment. Appellant stated that when he underwent quadruple bypass heart surgery, his surgeon informed him that asbestos was on his lung. He further stated that prior to the surgery, he was experiencing weakness and feeling tired all the time. Appellant also stated that he was not sure whether it was related to his heart. He explained that he did not provide notice and file his claim with the employing establishment within 30 days because "I was not aware that this was a problem at the time." On the reverse of the claim form, Nancy L. Branham, an employing establishment workers' compensation manager, indicated that appellant first reported his condition to a supervisor on October 22, 2002.

In an accompanying narrative statement, appellant related that he was exposed to a great deal of dust and asbestos in his work environment. He stated that he was exposed to these factors four hours or more a day, five to seven days a week and that he was not offered masks, face protectors or respirators until the employing establishment instituted a safety standard policy. Appellant stated that he smoked a pack of cigarettes a day from age 19 to 45. He reiterated that his exposure to asbestos was found on his lung during quadruple bypass heart surgery in December 1988. Appellant also submitted employment records and medical documents in support of his claim.

Ms. Branham submitted an October 21, 2002 letter controverting appellant's claim on the grounds that it was not timely filed. She noted appellant's employment history at the employing establishment as a laborer and janitor from June 15, 1953 to August 2, 1985. Ms. Branham stated that, since August 2, 1985, appellant had not been with the employing establishment. She

further stated that appellant was last exposed to factors, which he attributed to his lung condition, in 1985 when he last worked for the employing establishment. Ms. Branham noted that until appellant filed his claim in August 2002, the employing establishment had no knowledge of an injury. She stated that appellant worked for the employing establishment for 32 years and that contrary to appellant's contention that he was exposed to dust and asbestos, he was never tested for asbestos so there was no data to support such exposure. Ms. Branham noted that data collected for other laborers at the employing establishment revealed that a laborer could have been exposed to trace amounts on rare occasions once or twice a year. She stated, however, that the data did not indicate that a janitor would have ever been exposed to asbestos. Ms. Branham noted appellant's statement regarding his smoking history. She concluded that appellant had not provided any medical evidence in support of his claim of work-related asbestosis.

By letter dated November 21, 2002, the Office of Workers' Compensation Programs advised the employing establishment to provide data regarding appellant's exposure to asbestos, other pollutants and chemicals and dispensary records including, relevant laboratory tests and chest x-ray reports. By letter of the same date, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office requested that appellant submit information concerning his smoking history, a medical report regarding his lung condition, the date that he first noticed his condition and the date he first related his condition to his work exposure. On February 11, 2003 the employing establishment submitted appellant's response to the Office's November 21, 2002 letter, which included medical evidence regarding his December 1988 heart surgery.

By decision dated May 1, 2003, the Office denied appellant's claim on the grounds that it was not timely filed. In so doing, the Office found that appellant's date of injury was August 2, 1985, the date that he was last exposed to the implicated employment factors. The Office also found that appellant's claim was filed on August 12, 2002 and that he should have been aware of a relationship between his employment and the claimed condition by December 1, 1991.

The Board finds that appellant's occupational disease claim was not timely filed pursuant to 5 U.S.C. § 8122(a).

Section 8122(a) of the Federal Employees' Compensation Act<sup>1</sup> states that "[a]n original claim for compensation for disability or death must be filed within three years after the injury or death."<sup>2</sup> Section 8122(b) provides that in latent disability cases, the time limitation 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.<sup>3</sup> The Board has held that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.<sup>4</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 5 U.S.C. § 8122(a).

<sup>3</sup> 5 U.S.C. § 8122(b).

<sup>4</sup> See *Larry E. Young*, 52 ECAB 264 (2001); *Garyleane A. Williams*, 44 ECAB 441 (1993).

The evidence establishes that appellant last worked for the employing establishment on August 2, 1985. He stated that he became aware of a connection between his lung condition and his former employment conditions on December 1, 1988. Appellant further stated that the surgeon who performed heart surgery in December 1988 advised him that he had asbestos on his lung. Under section 8122(b), he had three years to file a claim from his December 1, 1988 date of awareness. Appellant did not file his claim for a lung condition until August 12, 2002, more than three years after December 1, 1988. Since the evidence establishes that his claim was filed more than three years after the date he became aware that his lung condition was work related, the claim was untimely filed.

Appellant's claim, however, 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. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.<sup>5</sup> Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days.<sup>6</sup>

On the reverse of appellant's claim form, Ms. Branham indicated that appellant reported his condition to a supervisor on October 22, 2002. Therefore, his supervisor did not have actual knowledge of the injury within 30 days of the date appellant related it to his employment. The Board finds that appellant has failed to establish that he filed a timely claim on August 12, 2002.

The Board further finds that section 8122(d), which allows the Office to excuse failure to comply with the time limitations provisions for filing a claim for compensation, does not apply in the instant case. Section 8122(d)(1) and (d)(2) tolls the time limitations for a minor or an incompetent individual.<sup>7</sup> The record reflects that appellant was not a minor during his employment as a laborer and janitor and the record is devoid of any showing that appellant was ever an incompetent individual. Furthermore, appellant has not shown that he is entitled to have the time limitations toll due to "exceptional circumstances" as provided by section 8122(d)(3) of the Act.<sup>8</sup> For instance, an "exceptional circumstance" recognized by the Secretary of Labor is where an employee is a prisoner of war. Appellant has not shown that he was under that type of circumstance.<sup>9</sup>

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<sup>5</sup> 5 U.S.C. § 8122(a)(1); see *Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

<sup>6</sup> 5 U.S.C. § 8122(a)(2); *John Giovanni Carrollo*, 41 ECAB 778 (1990).

<sup>7</sup> 5 U.S.C. § 8122(d)(1), (2).

<sup>8</sup> 5 U.S.C. § 8122(d)(3).

<sup>9</sup> *Paul S. Devlin*, 39 ECAB 715, 726 (1988).

The May 1, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
November 10, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member