

<sup>1</sup> He voluntarily retired on February 29, 1980.

indicated that he first became aware of his employment-related condition in 1986 when a physician advised that his x-ray revealed asbestosis. The employee explained that he worked with asbestos products from 1942 to 1970. He also identified various employing establishment buildings where he was allegedly exposed to asbestos. In a four-page narrative statement, the employee provided a detailed work history, including his civilian and federal service from June 1941 through April 1995. He described various job duties and the instances when he was exposed to asbestos. The employee also indicated how he first learned he had an asbestos-related lung condition.

Appellant had a heart attack on October 12, 1985 and an angioplasty in December 1985. Dr. Thomas Call, a Board-certified internist specializing in cardiovascular diseases, discovered the “possibility of asbestosis” in January 1986 during a follow-up x-ray examination. This information was conveyed to the employee’s family physician, Dr. Robert Stout, who recommended periodic chest x-rays to monitor the condition. On February 8, 1994 Dr. Andrew Leake reportedly confirmed the diagnosis of asbestosis. The employee also reported having discussed with a medicare representative the possibility of filing a claim against his employer and the asbestos manufacturers. These discussions took place in December 1997 and January 1998.<sup>2</sup> The employee sought legal advice on January 26, 1998 and was reportedly advised that he could not file a claim against the asbestos manufacturers because more than two years had elapsed since he first learned he had asbestosis.<sup>3</sup> On January 27, 1998 he reportedly contacted the employing establishment to obtain information about filing a workers’ compensation claim. Karen E. Ridlon, a compensation specialist, was said to have provided the necessary forms; however, the employee became discouraged by the legal advice he recently received, and thus, took no further action for approximately 3½ years. The employee also stated that he had esophageal cancer surgery on April 9, 2001 and his preoperative and postoperative computerized axial tomography scans revealed an asbestos-related lung condition. He contacted Ms. Ridlon again on May 10, 2002.

In an August 2, 2002 report, Dr. Todd A. Weisman, a Board-certified family practitioner, indicated that the employee had been followed for a number of medical issues, including asbestosis.<sup>4</sup> A recent pulmonary function study revealed moderate obstructive and restrictive changes and a computerized tomography (CT) scan of the chest demonstrated pleural and parenchymal changes consistent with previous asbestos exposure.

The Office wrote to the employee on November 25, 2002 and requested additional information regarding the development of his lung condition. The Office also requested an explanation as to why the employee waited until 2002 to file a claim when he was aware of his condition as early as 1986.

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<sup>2</sup> The employee provided a January 29, 1998 medicare questionnaire wherein he responded that he “acquired asbestosis in prior years working at NACA/NASA.”

<sup>3</sup> The employee provided copies of correspondence from the law firm of Patten, Wornam & Watkins, L.C. regarding his January 1998 consultation.

<sup>4</sup> He also noted that Dr. Andrew Leake and Dr. George Childs, both pulmonologists, had previously evaluated and followed the employee for his asbestosis.

In a December 15, 2002 statement, the employee indicated that he was diagnosed with asbestosis in January 1986 and the diagnosis was confirmed on February 8, 1994. He explained that, while he had been diagnosed with asbestos in 1986, he believed there was no reason to file a claim at that time because he was not injured or in any substantial pain. Because he had been retired for years, notifying the former employer did not seem rational or justified at the time. The employee reiterated that he sought legal counsel in 1998 and was advised that he exceeded the two-year time limit for filing a private industry claim. He then notified the employing establishment on January 30, 1998, but did not specifically notify his supervisor.

On December 18, 2002 Ms. Ridlon, the employing establishment's compensation specialist, advised that the employee's prior supervisors had either separated or retired and there were no records to verify the accuracy of his statement. However, she reported interviewing another employee who worked in Building 1267A from approximately 1967 to 1999 and, based upon this employee's statements, Ms. Ridlon indicated it was entirely reasonable that Mr. King was exposed to asbestos while working in Building 1267A.<sup>5</sup> She did not have any documentation or independent recollection of a 1998 conversation with the employee, but in her opinion it would not be unreasonable that he called. Ms. Ridlon also stated that the employing establishment did not have any dispensary records relative to the claim.

The Office also received a March 12, 1999 report from Dr. George G. Childs, Jr., a Board-certified internist specializing in pulmonary diseases. He noted that the employee was referred to him for an assessment of his respiratory status given his history of asbestosis. Dr. Childs reviewed a January 13, 1999 chest x-ray, which showed cardiomegaly with a calcified plaque over the left hemidiaphragm and mild nonspecific interstitial infiltrate. He stated that no significant change was noted from a film in September 1996. Dr. Childs reviewed the employee's work history, prior medical history, and conducted a physical examination. He diagnosed mild obstructive lung disease and mild restriction consistent with the employee's history of asbestosis. Dr. Childs indicated that the employee was asymptomatic and he recommended a follow-up chest x-ray in one year or earlier if the employee developed chest pain, weight loss or dyspnea.

In a December 11, 2002 report, Dr. Weisman indicated that the employee worked with asbestos fibers during his tenure with the employing establishment from 1941 to 1980. He also noted that the employee had no other history of asbestos exposure. Additionally, Dr. Weisman submitted an August 8, 2002 CT scan and a May 22, 2002 pulmonary function study.

On March 11, 2003 the employee passed away. The Office received a March 17, 2003 death certificate, which identified carcinoma of the esophagus as the immediate cause of death. Additionally, the Office received an April 4, 2003 autopsy report.

In a decision dated May 8, 2003, the Office found that the employee did not file his claim in a timely manner. The employee was aware of his employment-related condition in January 1986, but did not file his claim until November 4, 2002, which was well beyond the three-year time limitation for filing a claim. The Office further found that the employee's

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<sup>5</sup> Mr. King claimed to have worked in Building 1267A from May 1962 to October 1970.

immediate superior did not have actual knowledge within 30 days of his injury. Consequently, the Office denied the claim.

Appellant requested an oral hearing, which was held on November 18, 2003. By decision dated February 18, 2004, an Office hearing representative affirmed the May 8, 2003 denial of the claim.

### **LEGAL PRECEDENT**

Section 8122 of the Federal Employees' Compensation Act provides in relevant part: "An original claim for compensation for disability or death must be filed within three years after the injury or death."<sup>6</sup> However, in a case of latent disability the time for giving notice of injury begins to run when the "employee is aware, or by the exercise of reasonable diligence should have been aware, that his condition is causally related to his employment, whether or not there is a compensable disability."<sup>7</sup> Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within the applicable three-year timeframe.<sup>8</sup>

### **ANALYSIS**

The employee stated that his cardiologist, Dr. Call advised him of the "possibility of asbestosis" in January 1986 when he reviewed an x-ray. The employee also indicated that Dr. Leake "officially confirmed" the diagnosis on February 8, 1994. The record does not include medical evidence from Dr. Call and Dr. Leake that either refutes or substantiates the employee's statements regarding what either doctor told him in 1986 and 1994. The employee appears to have been a highly accurate and credible historian and there is no basis in the record to dispute his assertions regarding the timing and content of the medical information shared with him regarding his asbestos-related lung condition.

Dr. Call's x-ray examination reportedly noted only the "possibility of asbestosis" in January 1986, and, therefore, this information is insufficient to establish that the employee was aware, or by the exercise of reasonable diligence should have been aware that his condition was causally related to his employment. Thus, January 1, 1986 would not be an appropriate starting point from which to determine if the claim was timely filed. Dr. Leake's February 8, 1994 confirmation of asbestosis was sufficient to establish that by the exercise of reasonable diligence, the employee should have been aware that his lung condition was causally related to his employment. The Board finds that the employee was aware by February 8, 1994 that his

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<sup>6</sup> 5 U.S.C. § 8122(a).

<sup>7</sup> 5 U.S.C. § 8122(b). 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. *Alicia Kelly*, 53 ECAB 244, 246 (2001); *Larry E. Young*, 52 ECAB 264, 266 (2001).

<sup>8</sup> 5 U.S.C. § 8122(a). A timely notification is accomplished where: (1) the immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury or death; or (2) written notice of injury or death as specified in 5 U.S.C. § 8119 was given within 30 days. *Id.*

confirmed diagnosis of asbestosis was related to his employment exposure. Accordingly, the Board finds that the three-year time limitation for filing the claim began to run on February 8, 1994.<sup>9</sup>

The employee claimed to have first contacted the employing establishment about his asbestosis on January 27, 1998. Ms. Ridlon could neither confirm nor deny that the conversation occurred as alleged. The employee noted that he received the necessary forms to file his claim, but he took no further action for approximately 3½ years. Ms. Ridlon indicated on the Form CA-2 that the employee telephoned her on May 8, 2002. However, he still did not file his claim for another six months.

The employee knew or should have known about the employment-related nature of his lung condition by February 8, 1994 when, according to his own statement, Dr. Leake confirmed the diagnosis of asbestosis. As the employee did not notify his immediate superior within 30 days or file a claim for compensation within 3 years of that date, the Office properly found that the employee's November 4, 2002 claim was untimely under the Act.<sup>10</sup>

### **CONCLUSION**

The Board finds that the employee did not file a timely claim in accordance with 5 U.S.C. § 8122.

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<sup>9</sup> *Larry E. Young, supra* note 7.

<sup>10</sup> 5 U.S.C. § 8122(a), (b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 10, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 14, 2005  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

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