

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

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C.B., Appellant )

and )

DEPARTMENT OF THE ARMY, UMATILLA )  
CHEMICAL DEPOT, Hermiston, OR, Employer )

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**Docket No. 06-1057  
Issued: September 14, 2006**

*Appearances:*  
C.B., *pro se*  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On April 6, 2006 appellant filed a timely appeal from a January 11, 2006 merit decision of an Office of Workers' Compensation Programs' hearing representative who denied appellant's claim on the grounds that it was untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant's claim for compensation for Type 2 diabetes mellitus with peripheral neuropathy due to employment-related Agent Orange exposure is barred by the time limitation provisions of the Federal Employees' Compensation Act.

**FACTUAL HISTORY**

On May 27, 2004 appellant, a 70-year-old munitions operator, filed an occupational disease claim alleging peripheral neuropathy and diabetic symptoms due to his exposure to Agent Orange. He noted that he developed his diabetic symptoms and leg pain in 1973. The Department of Veterans Affairs (VA) took over his care in 1993, which was when he became

aware that these conditions were due to his Agent Orange exposure.<sup>1</sup> In support of his claim, appellant submitted factual and medical evidence from 1957 to 1973.

By letters dated October 4, 2004, the Office informed appellant of the evidence needed to support his claim and requested that the employing establishment provide information concerning the alleged exposure to Agent Orange.

In a letter dated November 1, 2004, the employing establishment stated that an investigation in 1992 found no evidence of Agent Orange being stored nor released to the environment at the employing establishment.

In a report dated November 2, 2004, Dr. Jonathan C. Hitzman, a treating Board-certified family practitioner, provided a history that appellant had been exposed to Agent Orange while working at the chemical depot. Appellant had been his patient since April 2004 and was diagnosed with Type 2 diabetes and acute peripheral neuropathy. Dr. Hitzman concluded that it was feasible that these diseases were associated with appellant's Agent Orange exposure, noting that this conclusion was based upon a history related by appellant and that he did not have a long term history with appellant.

Appellant submitted additional medical and factual evidence including an October 29, 2004 statement identifying the date of injury as between July 5, 1967 and September 4, 1973. He alleged that Agent Orange was shipped in containers, some of which leaked, from the employing establishment to Vietnam. He first became aware of his condition in 1970 and was diagnosed with Type 2 diabetes mellitus in 1981. On August 13, 1993 he realized his condition was employment related due to his care by the VA. Appellant stated that his employer was not notified of the condition as his symptoms began after he left the employing establishment and that his date of last exposure was in 1973. His symptoms worsened to include heart failure, arterial sclerosis, failing kidneys, blindness in the left eye due to a blocked left carotid artery and congestive heart failure. Additional factual evidence included information on pesticides and an April 21, 2004 letter from the VA noting his participation in the Agent Orange Registry.

By decision dated July 22, 2005, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that the incident, *i.e.*, exposure to Agent Orange, occurred as alleged.

On August 10, 2005 appellant requested an oral hearing, which was held on November 15, 2005. Subsequent to the hearing, appellant submitted a February 4, 2001 letter from the VA informing him that he met the definition of catastrophically disabled veterans as well as medical reports from the VA.

By decision dated January 11, 2006, the Office hearing representative affirmed the July 22, 2005 decision as modified to reflect that appellant's claim was barred by the time limitation provisions of the Act. The hearing representative found that the statute of limitations began running in 1993 when appellant first became aware of a possible relationship between his condition and his employment, as this was when his treatment was transferred to the VA.

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<sup>1</sup> Appellant retired effective December 31, 1993 from the Army Corps of Engineers.

## LEGAL PRECEDENT

Section 8122(a) of the Act states that an 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>

The claim would still be regarded as timely under section 8122(a)(1) of the Act if the claimant's immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of appellant's injury.<sup>5</sup> An employee must show not only that his immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.<sup>6</sup>

## ANALYSIS

In this case, appellant claimed that exposure to Agent Orange at the employing establishment from July 5, 1967 through September 4, 1973 caused Type 2 diabetes mellitus with peripheral neuropathy and that his claim was timely filed because the medical conditions did not become manifest until years later. Appellant noted that he first became aware that these conditions were due to his Agent Orange exposure on August 13, 1993 due to his care by the VA. The Board, however, finds that appellant's claim for compensation under the Act is barred by the applicable time limitation provisions. In a case involving a claim for an occupational disease or illness, the time does not begin to run until the claimant is aware or reasonably should have been aware, of the causal relationship between his employment and the compensability disability.<sup>7</sup> If his exposure to the implicated employment factors extends beyond the date of such awareness, the time limitation begins to run on the last date of such exposure.<sup>8</sup> The record

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<sup>2</sup> 5 U.S.C. § 8122(a).

<sup>3</sup> 5 U.S.C. § 8122(b). *See Paul S. Devlin*, 39 ECAB 715 (1998) (latent disability generally refers to injury or disability of insidious onset, such as an occupational disease or condition produced by systemic infections, continued or repeated use of strain, exposure to toxic chemicals, fumes or poisons, or continued or repeated exposure to the conditions of the work environment which produce a cumulative or increasingly deleterious effect upon the employee of which the employee might not be aware).

<sup>4</sup> *See Mitchell Murray*, 53 ECAB 601 (2002); *Alicia Kelly*, 53 ECAB 244 (2001); *Larry E. Young*, 52 ECAB 264 (2001); *Garyleane A. Williams*, 44 ECAB 441 (1993).

<sup>5</sup> 5 U.S.C. § 8122(a)(1); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(a)(3) (March 1993); *see also Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987).

<sup>6</sup> *Charlene B. Fenton*, 36 ECAB 151 (1984).

<sup>7</sup> *Charles Walker*, 55 ECAB \_\_\_\_ (Docket No, 03-1732, issued January 8, 2004).

<sup>8</sup> *Peter S. Elliott*, 51 ECAB 627 (2000).

establishes that appellant's last possible exposure to Agent Orange was on September 4, 1973 the date he was last employed at the employing establishment. However, he was not aware of the relationship between his condition and his exposure to Agent Orange until August 13, 1993. Appellant did not file his claim for compensation until May 27, 2004. He did not file his claim within three years of his awareness on August 13, 1993 that his condition was employment related. There is no evidence that he was exposed to Agent Orange as part of his employment subsequent to that date. Appellant failed to timely file his claim.

Appellant contends that the claim was timely filed because he was unaware that his medical conditions were related to Agent Orange exposure until he was informed by the VA of the connection between his conditions and his exposure to Agent Orange. The record does not support that his claim was timely filed since he was aware of the connection between his condition and his Agent Orange exposure by August 13, 1993. On the claim form appellant indicated that his diabetic symptoms and neuropathy began in 1973 and that he became aware that these conditions were due to Agent Orange exposure on August 13, 1993 when the VA took over his care. These facts demonstrate that appellant was aware or should reasonably have been aware of the relationship between his medical conditions and any employment-related Agent Orange exposure as of August 13, 1993.

Appellant's claim, however, would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor, another employing establishment official or an employing establishment physician or dispensary had actual knowledge of the injury within 30 days of his last exposure to Agent Orange on September 4, 1973.<sup>9</sup> He stated his employer was not notified of the condition as his symptoms began after he had left the employing establishment and his date of last exposure was in 1973. The Board finds that the evidence of record does not establish that appellant's supervisor had actual knowledge of the claimed condition within 30 days after his last exposure to the implicated employment factor on September 4, 1973. The exceptions to the statute have not been met, and thus, appellant has failed to establish that he filed a timely claim on May 27, 2004.

### **CONCLUSION**

Appellant's claim is barred by the applicable time limitation provisions of the Act.

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<sup>9</sup> 5 U.S.C. § 8122(a)(1); *Larry E. Young*, *supra* note 4; Federal (FECA) Procedure Manual, *supra* note 5.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 11, 2006 is affirmed.

Issued: September 14, 2006  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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