

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

M.S., claiming as widow of M.S., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
BAY PINES VETERANS MEDICAL CENTER,)
Bay Pines, FL, Employer)

**Docket No. 14-930
Issued: February 25, 2015**

Appearances:

*Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 14, 2014 appellant, through her attorney, filed a timely appeal from a December 30, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 in accordance with 5 U.S.C. § 8122. If so, whether the employee's June 26, 2007 death was causally related to his federal employment.

On appeal appellant's attorney asserts that the human instincts doctrine is applicable in this case because the employee was denied the best means of survival, an emergency room that was less than 200 feet away when he had a cardiac arrest at work on June 26, 2007.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

Appellant, widow of the deceased employee, filed a claim for death benefits on December 15, 2011.² The employee, then a 51-year-old quality systems service computer assistant, suffered a heart attack at work on June 26, 2007. A Pinellas County emergency medical services (EMS) patient care report indicated that the employee was found on the floor in cardiac arrest and cardiopulmonary resuscitation (CPR) was in progress.³ The death certificate indicated that the cause of death was acute coronary syndrome. An unidentified note of clinical death indicated that death was pronounced on June 26, 2007 at 9:41 by a Dr. "K" whose name is illegible.

In letters dated August 20, 2012, OWCP asked that appellant and the employing establishment respond to the claim. Appellant submitted a U.S. District Court order dated June 10, 2011. This indicated that she had filed a claim for wrongful death under the Federal Tort Claims Act. The order stated that there was a substantial question as to whether the employee was covered by FECA and stayed the case for exhaustion of all administrative procedures for remedy under FECA.

Heather M. Nichol, a benefits specialist with the employing establishment, telephoned OWCP on September 10, 2012. She indicated that the employee had a massive heart attack at work, and it was determined that he should be transferred to St. Petersburg General Hospital (SPGH), rather than being treated at his place of work, a Veterans Administration (VA) hospital, because he was not a veteran. Ms. Nichol indicated that the widow was receiving Office of Personnel Management (OPM) benefits and maintained that the claim was untimely as the employee's death occurred five years previously.

In letters dated March 12, 2013, OWCP asked appellant's attorney to furnish medical evidence that established a causal connection between the employee's death and the employing establishment's alleged failure to respond to the health emergency. It also asked the employing establishment to provide a time-line of the employee's activity from the time he arrived at work on June 26, 2007 and a detailed time-line of the events that occurred following the heart attack, including all efforts to provide medical aid. The employing establishment was asked to review the District Court order and to describe emergency procedures that were in place, and indicate whether an investigation had been done.

On March 25, 2013 Ms. Nichol stated that at approximately 9:00 a.m. on June 26, 2007, two of the employee's coworkers were walking past the employee's office when they heard a loud gasp. They entered his office and found him leaning back in his chair, unresponsive and immediately called for assistance. They moved him to the floor, and initiated mouth-to-mouth resuscitation and CPR. Ms. Nichol noted that the employee's office was primarily staffed by nurses, and that three registered nurses rushed to provide assistance and continued resuscitation efforts. A fourth registered nurse contacted 411 to have EMS dispatched, and a code blue was

² The claim was received by OWCP on July 12, 2012. A copy of the certificate of marriage, issued by the State of Maryland, indicates that appellant and the employee married on May 21, 1983.

³ The headings for this report are illegible.

initialed. Two physicians, who were alerted by the code blue, assisted in the administration of CPR until EMS arrived. Ms. Nichol indicated that, as a nonveteran, the employee was not eligible to be admitted to a VA facility, so upon the arrival of EMS, his care was transferred to the paramedics, and he was transported to SPGH, located 3.7 miles from the employing establishment. She maintained that the VA met its obligations under the human instincts doctrine because emergency care was rendered by four registered nurses and two physicians and further asserted that the claim was untimely and that the cardiac arrest was not caused by employment duties.

By decision dated April 12, 2013, OWCP denied the claim on the grounds that it was untimely filed. Appellant, through her attorney, timely requested a hearing. Counsel asserted that the human instincts doctrine was applicable, and that the care the employee received or did not receive at the employing establishment contributed to his death. Dr. W. Brent Young, a family physician, provided a September 4, 2013 report in which he indicated that he had reviewed materials provided by the attorney and concluded that the decision made to transport the employee to SPGH with a cardiac arrest in play, instead of allowing a more timely intervention at the employing establishment, contributed to the failed CPR effort.

At the hearing held on September 12, 2013 appellant's attorney asserted that the claim was timely and argued that the human instincts doctrine was applicable and that the opinion of Dr. Young supported this conclusion.

In undated correspondence, Ms. Nichol asserted that the care given the employee went well above and beyond the human instincts doctrine because he was cared for by multiple nurses and physicians prior to the transfer of his care.

In a December 30, 2013 decision, an OWCP hearing representative found the claim was timely and affirmed the April 12, 2013 decision as modified. She noted that, under the human instincts doctrine, causal connection could only be established if the employer failed to make reasonable efforts to procure medical care and in this case the care given the employee was reasonable as he was assisted by registered nurses and physicians prior to being transported.

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.⁴ In cases of injury on or after September 7, 1974, section 8122(a) of FECA provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.⁵ In the case of death due to a 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

⁴ *Charles Walker*, 55 ECAB 238 (2004); *see Charles W. Bishop*, 6 ECAB 571 (1954).

⁵ 5 U.S.C. § 8122(a); *E.B.*, 58 ECAB 642 (2007).

should have been aware of the causal relationship of the employee's death to factors of his employment.⁶

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;⁷ (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;⁸ (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;⁹ 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.¹⁰ 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.¹¹ Section 8122(d)(3) of FECA provides that time limitations for filing a claim "do not run 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."¹²

Section 8119 of FECA provides that a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury, or in the case of death, the employment factors believed to be the cause; and be signed by and contain the address of the individual giving the notice.¹³ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.¹⁴ For actual knowledge of a supervisor to be regarded as timely filing, a claimant must show not only that the immediate superior knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.¹⁵

⁶ *Id.* at § 8122(b); *E.B.*, *id.*

⁷ *Supra* note 7; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Death Claims*, Chapter 2.700.5.b (April 1994).

⁸ 5 U.S.C. § 8122(a), (b); Federal (FECA) Procedure Manual, *id.* at Chapter 2.700.5.b(1).

⁹ *Id.* at § 8122(c).

¹⁰ *Id.* at § 8122(d).

¹¹ *E.B.*, *supra* note 6.

¹² 5 U.S.C. § 8122(d)(3).

¹³ *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

¹⁴ *Laura L. Harrison*, 52 ECAB 515 (2001).

¹⁵ 5 U.S.C. § 8122(b); *Duet Brinson*, 52 ECAB 168 (2000).

ANALYSIS

The Board finds that appellant's claim is barred by the applicable time limitation provisions of FECA.

Appellant, the widow of the employee who died on June 26, 2007, filed the instant claim for death benefits on December 15, 2011. The time to file a claim began to run on June 26, 2007, the date of the employee's death.¹⁶

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 his death on June 26, 2007. Appellant has filed a wrongful death claim in U.S. District Court, and the record supports that, by order dated June 20, 2011, the court found there was a substantial question as to whether the employee was covered by FECA and stayed the case for exhaustion of all administrative procedures for remedy under FECA. A district court filing and subsequent stay, however, does not excuse appellant's failure to timely file a claim under FECA. The three-year time limitation began to run on June 26, 2007. As appellant filed her claim for death benefits on December 15, 2011, her claim was not timely filed within the three-year time limitation.¹⁷

Though appellant has not met the burden of proving that she filed within the three-year time limitation, her claim could be considered timely if she were to meet any of the statutory exceptions. The Board finds, however, that an exception has not been established by the evidence of record. There is no evidence 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. The record does not indicate that the employee filed a disability claim under FECA for a cardiac condition prior to his death on June 26, 2007.

Additionally, none of the exceptions relating to a claimant's ability to file a claim apply in this case. Appellant was not a minor, she has not alleged that she was incompetent, and she has not provided evidence of an exceptional circumstance that would excuse her failure to timely file the claim. The Board has held that unawareness of possible entitlement, lack of access to information, and ignorance of the law or one's obligations under FECA does not constitute exceptional circumstances that could excuse a failure to file a timely claim.¹⁸

Section 8122(d)(3) of FECA provides that, time limitations for filing a claim "do not run 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." Appellant has not established that she could not file a timely claim due to exceptional circumstances as that term is

¹⁶ *Supra* note 9.

¹⁷ 5 U.S.C. § 8122.

¹⁸ *Ralph L. Dill*, 57 ECAB 248 (2005).

used in section 8122(d)(3) of FECA. The Board finds that appellant's failure to timely file her claim within three years of the employee's death on June 26, 2007 precludes her from seeking compensation under FECA.¹⁹

As the Board has found that appellant's claim was not timely filed, it need not address additional arguments raised on appeal.

CONCLUSION

The Board finds that appellant did not file a timely claim for death benefits in accordance with 5 U.S.C. § 8122.²⁰

ORDER

IT IS HEREBY ORDERED THAT the December 30, 2013 decision of the Office of Workers' Compensation Programs is affirmed as modified to indicate that appellant's claim was not timely filed.

Issued: February 25, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

¹⁹ *E.B., supra* note 6.

²⁰ Michael E. Groom, Alternate Judge, participated in the preparation of this decision but was no longer a member of the Board effective December 27, 2014.