

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUGENE LENOIR and DEPARTMENT OF THE NAVY,
HUNTERS POINT NAVAL SHIPYARD, San Francisco, Calif.

*Docket No. 96-1654; Oral Argument Held June 18, 1997;
Issued May 22, 1998*

Appearances: *Eugene Lenoir, pro se; Sheldon G. Turley, Jr., Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

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

The issues are: (1) whether appellant timely filed his claim for a pulmonary condition under the applicable time limitation provisions of the Federal Employees' Compensation Act¹; and (2) whether the Office of Workers' Compensation Programs abused its discretion pursuant to 5 U.S.C. § 8128 by denying merit review on February 20, 1996.

On March 17, 1995 appellant, then a 66-year-old former federal employee, filed a claim for compensation benefits alleging that his pulmonary condition was caused by exposure to asbestos materials during his 10-year employment as a pipefitter. Appellant stated that he was exposed to asbestos from 1958 through 1967; and that he received medical care for this condition from the employing establishment's physician on March 23, 1967. He stated that he first became aware of his condition in May 1988 but did not file a claim for compensation benefits because the employing establishment had closed down.

In an attached narrative, appellant stated that he worked with asbestos materials for 10 years without respiratory protection. He explained that his job was heavily involved with asbestos dust exposure inasmuch as he was required to rip out old asbestos lined pipe, which, when ripped away from its fittings, resulted in significant inhalation of asbestos dust. Appellant was then required to treat the new replacement pipes with a dry asbestos covering. This work was performed for 8-hour shifts, 40 hours a week. Appellant stated that he had no exposure to asbestos other than his employment history with the federal government.

On June 21, 1995 the Office advised appellant that it had received his claim and asked him to advise the Office as to when he was first aware of his pulmonary condition and whether

¹ 5 U.S.C. §§ 8101-8193.

he notified anyone at the workplace regarding this medical condition. The Office also asked appellant to address the time delay between his awareness of his condition which he reported to be May 1988 and his filing date of March 1995.

In a response received by the Office on July 11, 1995, appellant stated that he was first aware of his condition in 1958 when he was treated by a doctor in the shipyard for breathing problems; and that he advised the Mare Island Shipyard commander of his condition in 1972.² He stated that he filed his claim at the time he did based on the advice of an attorney.

On October 18, 1995 the Office, in a decision, denied appellant's claim for compensation benefits on the grounds that his claim was untimely filed. The Office noted that the one-year time limit for filing a claim may be waived if the claim was filed within five years of the injury and if appellant could explain and provide reasons why he was unable to file within the one-year time limit. In this case, appellant reported that he became aware that his medical condition may have been caused by his federal employment in May 1988. The Office noted that since asbestosis is a latent illness, the time to file for compensation benefits would begin to run when appellant first became aware that his condition may have been work related. In the instant case, appellant reported he first became aware of his asbestosis and related it to his employment in 1988. However, he did not file a claim until 1995, beyond the five-year time limit. The Office stated that a July 12, 1972 medical report prepared pursuant to appellant's retirement, showed a normal chest x-ray.

On January 6, 1996 appellant requested reconsideration of the Office's decision. Appellant did not submit any new evidence in support of his request for reconsideration. The Office did obtain from appellant's official personnel file, employing establishment medical records. The Office determined in a memorandum dated January 18, 1996 that there was no evidence in these medical records that appellant received treatment or surveillance of a pulmonary condition.

On January 18, 1996 the Office notified appellant that he had 30 days to submit new evidence in support of his request for reconsideration.

On February 20, 1996 the Office denied appellant's application for review on the grounds that he did not provide new and relevant evidence or information showing that his claim complied with appropriate time limits.

The Board finds that appellant did not timely file his claim for a pulmonary condition under the applicable time limitation provisions of the Act.

The Act requires in cases of injury prior to September 7, 1974 that a claim be filed within one year of the date that the claimant was aware, or reasonably should have been aware, that his condition was caused by factors of his federal employment. The requirement may be waived if the claim is filed within five years and: (1) it is found that such failure was due to circumstances

² Appellant's employing facility, was closed at the time appellant believed that his medical condition was caused by his federal employment. Mare Island Shipyard was, in 1972, the nearest similar facility to appellant's home.

beyond the control of the person claiming benefits; or (2) that such person has shown sufficient cause or reason in explanation thereof and material prejudice to the interest of the United States had not resulted from such failure.³ The filing provision is a maximum, mandatory requirement which may not be waived regardless of the reasons for, or the circumstances surrounding, the failure to file a claim within the prescribed time.⁴

In a claim such as the present one based on an allegation of latent occupational disease, the time limitation of the Federal Employees' Compensation Act begins to run when the employee becomes aware, or reasonably should have been aware, of a possible relationship between his condition and his employment.⁵

Appellant last worked on March 23, 1967 and subsequently retired due to an unrelated disability. Appellant contended that he was first aware that his pulmonary condition was causally related to his employment in 1988, but did not file a claim for compensation benefits until 1995 because the employing establishment had closed down.⁶ As noted above, even if the one-year time limitation is waived, the five-year filing provision is a maximum, mandatory requirement which may not be waived regardless of the reasons for, or the circumstances surrounding, the failure to file a claim within the prescribed time. The evidence of record establishes that appellant did not timely file a claim for pulmonary condition within five years of 1988.

Notwithstanding appellant's failure to timely file his claim, appellant would be entitled to medical benefits for a condition shown to be causally related to his employment, even though the claim was not timely filed, if it were shown that his immediate superior had timely actual knowledge of the condition and that appellant related it to his employment.⁷ There is no evidence of record that appellant did advise his supervisor of his condition and its relationship to his employment. Other than appellant's own recollection that some 23 years earlier he told his superior of his condition, there is nothing in the record to indicate that appellant's supervisor had knowledge that appellant regarded his condition as being employment related. While appellant also recalled that he informed his health unit physician in 1972 of his condition, the medical records do not substantiate any such complaint, but merely note that appellant's chest x-ray studies were normal. Furthermore, appellant's own statement that he only became aware of his condition and its relationship to his employment in 1988, contradicts appellant's awareness and notification of such in 1972. The Board therefore concludes that appellant is not entitled to medical benefits.

The Board also finds that the Office did not abuse its discretion by denying merit review on February 20, 1996.

³ *Salvatore Previte*, 39 ECAB 316, 320-21 (1987).

⁴ *See Robert Shelton*, 28 ECAB 11 (1976).

⁵ *Pedro Laguer*, 35 ECAB 981 (1984).

⁶ *See Albert K. Tsyitsui*, 44 ECAB 1004 (1993).

⁷ *Victor Medina*, 32 ECAB 1227 (1981).

The Office's regulations at 20 C.F.R. § 10.138(b)(1) provide that a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁸

Appellant did not submit any evidence in support of his January 6, 1996 request for reconsideration. The Office did obtain and review appellant's employing establishment's medical records. The Office properly determined that these records did not verify any treatment or surveillance of a pulmonary condition; therefore, these reports were not relevant to the issue of a timely claim for such condition. As appellant did not meet the requirement of 20 C.F.R. § 10.138(b), the Office did not abuse its discretion by denying review.

The decisions of the Office of Workers' Compensation Programs, dated February 20, 1996 and October 18, 1995 are affirmed.

Dated, Washington, D.C.
May 22, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ 20 C.F.R. § 10.138(b)(2); *Norman W. Hanson*, 45 ECAB 430 (1994).