

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL BONACCI and DEPARTMENT OF THE NAVY,  
BROOKLYN NAVAL SHIPYARD, Brooklyn, N.Y.

*Docket No. 97-781; Submitted on the Record;  
Issued October 6, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issue is whether appellant's claim for compensation is barred by the three-year time limitation provision of the Federal Employees' Compensation Act.

On July 4, 1996 appellant, then a 76-year-old former shipyard worker, filed a claim for compensation alleging that his pulmonary condition was caused by factors of his federal employment. Appellant noted that he first became aware that his condition was caused by factors of his federal employment on April 10, 1956 when an x-ray revealed spots on his lung. In support of his claim, appellant submitted a May 18, 1995 computerized tomography scan report from Dr. Romas Dovbyaitis, Board-certified in radiology, who stated that the scan revealed pleural plaques and calcifications that were "related most likely to previous asbestos exposure." Appellant also submitted a narrative in which he stated that after he left employment in the shipyard in 1944 he served in the U.S. Navy to 1946, and subsequently worked as a contractor, welder and restaurant worker until his retirement in 1977.

By letter dated August 2, 1996, the Office of Workers' Compensation Programs advised appellant that he needed to submit additional information regarding his claim for compensation, including a list of all his jobs, his asbestos exposure and what, if any, job protections were provided during those employment periods. The Office also requested that appellant submit a detailed narrative medical report explaining how his doctor believed that his federal employment caused his current medical condition.

In an attachment to a congressional referral letter dated August 23, 1996, appellant stated that he had used a respirator up to eight hours a day when exposed to asbestos and that he had filed a previous claim.

On October 24, 1996 the Office, in a decision, denied appellant's claim on the grounds that his claim was untimely filed.

The Board finds that appellant's claim for a pulmonary condition is barred by the applicable time limitation provisions of the Act.

The Act<sup>1</sup> requires in cases of injury prior to September 7, 1974 that a claim for compensation be filed within one year of the date that the claimant was aware or reasonably should have been aware that the condition may have been caused by the employment factors. The one-year filing requirement may be waived if the claim is filed within five years and: (1) if it is found that such failure was due to circumstances 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 has not resulted from such failure.<sup>2</sup> The test for whether sufficient cause or reason was shown to justify waiver of the one-year time limitation is whether a claimant prosecuted the claim with that degree of diligence which an ordinary prudent person would have exercised in protecting his right under the same or similar circumstances.<sup>3</sup>

In a case involving a claim for an occupational 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 compensation disability.<sup>4</sup>

In the instant case, since appellant admits that he became aware that his pulmonary condition was related to his employment on April 10, 1956, the three-year statute of limitations began to run on that date. Appellant did not file his claim until July 4, 1996.

Furthermore, appellant is not entitled to waiver of the one-year filing requirement because his claim was not filed within five years of the claimed injury; nor has he met the other requirements, as delineated above, for such waiver. The five-year time limitation is a maximum, mandatory period which neither the Office nor the Board has authority to waive.<sup>5</sup>

In addition, for injuries occurring between December 7, 1940 and September 6, 1974, the Office procedure manual indicates that written notice of the injury should be given within 48 hours as specified in section 8119 of the Act, but that this requirement will be waived if the employee filed written notice within one year after the injury or if the immediate superior had actual knowledge of the injury within 48 hours after the occurrence of the injury.<sup>6</sup> There is, however, no evidence that appellant filed written notice within one year after the injury as specified in section 8119. Moreover, appellant failed to establish that his immediate supervisor had actual knowledge of the injury within 48 hours after the occurrence of the injury. In fact, by

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Edward Lewis Maslowski*, 42 ECAB 839 (1991); *Dorothy L. Sidwell*, 36 ECAB 699, 706 (1985).

<sup>3</sup> *Maxine Leonard*, 39 ECAB 1180, 1184-85 (1988).

<sup>4</sup> *William L. Gillard*, 33 ECAB 265, 268 (1981).

<sup>5</sup> *Albert K. Tsutsui*, 44 ECAB 1004 (1993).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.7 (September 1990).

letter dated July 16, 1996, the employing establishment was unable to provide any employment information on appellant during the time frame in which he alleged he was exposed to asbestos.<sup>7</sup> Finally, the record is devoid of any documentation establishing that appellant's immediate supervisor had actual knowledge of his injury within 48 hours of its occurrence. Consequently, the Board finds that appellant's claim was not timely filed in accordance with the time limitation provisions of the Act.

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 24, 1996 is hereby affirmed.

Dated, Washington, D.C.  
October 6, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

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<sup>7</sup> Appellant stated that he had left the shipyard in 1944. However, the record does not reflect that he was aware of any medical condition at that time. The record also reflects that appellant had served in the navy, and had worked as a construction worker and as a welder prior to the 1956 x-ray.