

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD M. WHEELER and DEPARTMENT OF THE ARMY,
CORPS OF ENGINEERS, Vicksburg, MS

*Docket No. 98-451; Submitted on the Record;
Issued August 25, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant filed a timely claim for compensation.

The Board has duly reviewed the record on appeal and finds that appellant filed an untimely claim.

Appellant last worked for the employing establishment on May 21, 1973. The Board has previously held that if the employment that allegedly caused injury occurred prior to September 7, 1974, the one-year time limitation provision is applicable.¹ The issue to be decided is when the one-year statute of limitations began to run.

The Federal Employees' Compensation Act requires in cases of occupational disease prior to September 7, 1974 that notice of injury and claim for compensation be filed within one year of the date that the claimant was aware, or reasonably should have been aware, that his condition may have been caused by factors of his federal employment, or within five years if circumstances justifying waiver of the one-year time limitation are shown.² The five-year time limitation is a maximum, mandatory period which neither the Office of Workers' Compensation Programs nor the Board has authority to waive.³

On his claim form, completed on December 11, 1995 and received by the employing establishment on January 9, 1996, appellant indicated that he first realized on November 9, 1994 that his disease or illness (asbestosis) was caused or aggravated by his federal employment. At the hearing held on June 25, 1997, however, he explained that November 9, 1994 was an incorrect date, one that had no significance that he was aware of. Responding to questions from

¹ *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

² 5 U.S.C. § 8122(c) (1966); *Salvatore Previte*, 39 ECAB 316 (1987).

³ *Conrad M. Westerman*, 28 ECAB 109 (1976); *Eugene W. Broadway*, 5 ECAB 33 (1952).

the hearing representative, appellant testified that he saw no doctor on that date and had no x-ray or any kind of medical test on that date. He testified that he first received notice of the results of a November 18, 1994 x-ray on December 22, 1994, when he picked up his mail and argued that the limitations period began at that time.

The record contains reports dated December 5, 1994 from Dr. Ray A. Harron, a Board-certified specialist in radiology and nuclear medicine. Dr. Harron reported that a chest x-ray on November 18, 1994 was consistent with asbestosis.

In a decision dated August 21, 1997, the Office found that the one-year limitations period began to run on November 9, 1994 because it was reasonable to accept appellant's initial statement that he became aware on that date that his condition was causally related to his employment. The Office found that the claim was untimely and that appellant had failed to provide sufficient reason to warrant waiver. The Office found, however, that development of the evidence was warranted to determine whether the immediate superior had actual knowledge of the injury within 48 hours, thereby entitling appellant to medical treatment benefits.

The Board finds that the one-year limitations period began to run on December 22, 1994, when appellant picked up his mail and learned that his test results were consistent with asbestosis. This, together with appellant's assertion that he had handled asbestos insulation in the course of his federal employment, supports that on December 22, 1994 appellant was aware, or reasonably should have been aware, that his condition may have been caused by factors of his federal employment.⁴ The one-year limitation period expired on December 22, 1995. Although appellant completed his claim form on December 11, 1995, the evidence indicates that he filed it with the employing establishment on or about January 9, 1996, thereby rendering it untimely.

The Office duly addressed the issue of waiver and found that appellant had not provided sufficient cause to justify waiver of the one-year limitations period. The Office noted that it would not be expected that it would take more than a year to find a lawyer knowledgeable about federal workers' compensation. Further, the Office noted, it does not require a lawyer to file a notice of injury. As appellant has not established circumstances beyond his control or other sufficient cause for his failure to file a claim within one year of his knowledge of a possible employment-related condition, the Board further finds that the Office did not abuse its discretion in denying waiver of the one-year limitations period.

⁴ See *Edward C. Hornor*, 43 ECAB 834 (1992) (where the claimant had no medical evidence providing a diagnosis of any asbestos-related respiratory condition until February 3, 1990, the limitations period began to run on that date).

The August 21, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
August 25, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member