

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FLORE LEKANOFF, SR. and DEPARTMENT OF COMMERCE,
NATIONAL MARINE FISHERIES SERVICE, St. George Island, Alas.

*Docket No. 96-789; Oral Argument Held April 2, 1998;
Issued June 24, 1999*

Appearances: *Sandy MacNabb*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's compensation claim on the grounds that his claim was not filed within the applicable time limitation provisions of the Federal Employees' Compensation Act; and (2) whether the refusal of the Office to reopen appellant's case for a merit review pursuant to 5 U.S.C. § 8128 constituted an abuse of discretion.

On November 5, 1994 appellant, then a 68-year-old former fur harvester, filed a claim alleging that he sustained pulmonary tuberculosis due to factors of his federal employment from 1940 to 1944. On his claim form appellant stated that he first realized that his claimed condition was causally related to his employment in March 1944. Appellant stated that he was not aware of his right to file a compensation claim until 1994. In a statement attached to his claim form, appellant alleged that he contracted tuberculosis due to unsanitary conditions at the Aleut internment camp at Funter Bay, Alaska.

An unsigned hospital record dated April 27, 1944, indicated that appellant had sustained active primary tuberculosis while living in the camp at Funter Bay, Alaska.

In clinical notes dated March 21, 1969, Dr. Richard S. Chao, an orthopedic surgeon, related that appellant had been hospitalized for tuberculosis from 1944 to 1945 and again in 1947 and 1955. He diagnosed minimal inactive pulmonary tuberculosis.

In an affidavit dated August 19, 1993, Robert Booth, appellant's former fur sealing operations supervisor, stated that appellant had been employed by the federal government from 1940 through 1944.

By letter dated May 1, 1995, the Office asked appellant to provide additional factual and medical evidence regarding his claim, including evidence showing that he had timely submitted his claim.

By letter dated May 25, 1995, appellant stated that he was exposed to tuberculosis at the internment camp in Funter Bay, Alaska during World War II due to unsanitary health conditions. He stated that he was diagnosed with tuberculosis in January 1944. Appellant stated that, even though he had been diagnosed with tuberculosis, he was required to work eight hours per day for seven days a week during the summer of 1944 harvesting seals until he was hospitalized for treatment. He stated that he was an employee of the federal government from May 1, 1940 through 1944 and during this time he was aware that he was ill with tuberculosis. Appellant stated that he had personally notified the medical officer in charge on St. George Island that he had tuberculosis and was treated by him.

In a letter dated May 10, 1995, Dr. Thomas S. Nighswander, appellant's attending Board-certified family practitioner of professorial rank, related that appellant had been a patient for a number of years and had recently asked him to review some old records in reference to his tuberculosis sustained while he was employed by the federal government. He stated that he had reviewed a note dated April 27, 1944 from the Office of Indian Affairs in which appellant's active tuberculosis was documented. Dr. Nighswander related that appellant returned to full-time work at St. George Island in the Pribilof Islands in July 1944 but was again hospitalized in the fall 1944.

By decision dated September 10, 1995, the Office denied appellant's claim for compensation benefits on the grounds that he had not timely filed a claim for compensation benefits within the mandatory five-year time limitation period applicable to the pre-September 7, 1994 injury. The Office noted that appellant's statement that he was not aware, at the time the claimed injury was sustained, that he had the right to file a claim, did not negate the time limitation requirement.

By letter dated September 30, 1995, appellant alleged that he could not timely file his claim for compensation benefits because he was not aware of his right to file a compensation claim until the fall of 1993 when he learned of the Indian Self-Determination and Education Assistance Act, Public License Number 93-638, 88 Stat. 2203 (January 4, 1975)¹ (codified as amended at 25 U.S.C. § 450 *et seq.*), and the Fur Seal Act Amendments of 1983, Public License 98-129, 97 Stat. 835 (October 14, 1983)² (codified as amended at 16 U.S.C. § 1151 *et seq.*). He asserted that the people of the Pribilof Islands were not treated equally as civil service employees

¹ The purpose of the Act was to "provide maximum Indian participation in the Government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government for Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes."

² The purpose of the Act was to provide for the "termination of Federal management of the Pribilof Islands, Alaska and its associated sealing activities by setting up a trust fund to be used by Pribilof Island residents to enable them to develop new livelihoods not based on sealing."

prior to enactment of these Acts. Appellant requested reconsideration of the Office's denial of his claim.

In support of his request for reconsideration appellant provided documents previously submitted and considered by the Office as well as new evidence. Included in the new evidence was a copy of a document entitled "The Relocation and Internment of the Aleuts During World War II" by John C. Kirtland and David F. Coffin, Jr. Appellant also provided a portion of a book entitled "Aleutian Warriors, a History of the 11th Air Force and Fleet Air Wing 4" by John Haile Cloe. He submitted clinical records from St. George Clinic which noted a diagnosis in January 1944 of active primary tuberculosis and hospitalization from October 1946 to May 1949 for pulmonary tuberculosis and an October 4, 1993 letter from appellant to the Office of Personnel Management requesting that additional years, 1940 to 1949, be credited to his civil service retirement.

By decision dated November 22, 1995, the Office denied appellant's request for reconsideration of the denial of his claim.

The Board finds that the Office properly denied appellant's claim for compensation benefits on the grounds that the claim was not filed within the applicable time limitation period of the Act.

The Act³ requires in cases of injury prior to September 7, 1974 that a claim for compensation be filed within one year of the date the claimant was aware or reasonably should have been aware that the condition may have been caused by 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.⁴ 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 ordinarily prudent person would have exercised in protecting his right under the same or similar circumstances.⁵

In a case involving a claim for an occupational illness, the time limitation does not begin to run until the claimant is aware, or reasonably should have been aware, of the causal relationship or possible causal relationship between his employment and the disability.⁶ In the present case, appellant stated in his claim form filed in 1994 that he first realized that his condition was causally related to his employment in March 1944. The date of injury in an

³ 5 U.S.C. §§ 8101-8193.

⁴ *Roseanne S. Allexenberg*, 47 ECAB 498, 500 (1996); *Edward Lewis Maslowski*, 42 ECAB 839, 845 (1991); *Dorothy L. Sidwell*, 36 ECAB 699, 706 (1985).

⁵ *Roseanne S. Allexenberg*, *supra* note 4 at 500-01.

⁶ *William A. West*, 36 ECAB 525, 528-29 (1985); *William L. Gilliard*, 33 ECAB 265, 267 (1981).

occupational disease is the date of last exposure to the injurious work factors.⁷ Since appellant was last exposed to such factors sometime during the fall of 1944 when he stopped work and was hospitalized, the time limitation in appellant's case began to run no later than December 31, 1944. Since appellant did not file a claim until November 5, 1994, his claim was not filed within the one-year time limitation period.⁸ Furthermore, as the claim was not filed within five years of the date that appellant acknowledges he was aware of the possible causal relationship between his claimed condition and his employment, the waiver provisions of the pre-1974 Act are not applicable in this case. The five-year time limitation is a maximum, mandatory period which neither the Office nor the Board has the authority to waive regardless of the reasons for, or the circumstances surrounding, the failure to file within the prescribed time.⁹

On appeal, appellant asserted that he was unable to timely file a claim for compensation benefits because of "incapacity." He alleged that he was incompetent and a minor during the time limitations period¹⁰ and his failure to timely file his claim should be excused by section 8122(d)(1) and (2) of the Act.¹¹ However, Congress directed that these tolling provisions apply only to injuries sustained after July 4, 1966.¹² As noted above, the date of injury in an occupational disease is the date of last exposure to the injurious work factors and, since appellant was last exposed to such factors no later than December 31, 1944, the 1966 amendments to the Act do not apply to appellant's claim. Furthermore, the Board has held that neither failure of the employing establishment to assist a claimant in filing for compensation, nor the claimant's ignorance of the possible entitlement to compensation is sufficient cause for waiving the one-year time limitation period.¹³

Appellant also argued that the time limitation did not begin to run until November 1993 when he was able to gain federal recognition that he was in fact an employee during the period when he contracted tuberculosis. However, as noted above, the five-year time limitation began to run on the date of injury, the date that he was last exposed to injurious work factors, not the

⁷ *William L. Gilliard*, *supra* note 6; *Pedro Laguer*, 35 ECAB 981, 982 (1984).

⁸ *See Francis B. Burgess*, 32 ECAB 702 (1981).

⁹ *Armando Spadetti*, 46 ECAB 812, 817 (1995); *Albert K. Tsutsui*, 44 ECAB 1004, 1008 (1993); *Angelo Fabris*, 26 ECAB 438, 440 (1975).

¹⁰ Appellant also argued that his "incapacity" was exacerbated by a "trustee-ward" relationship between the United States and Native-Americans such as the Aleuts and that the employing establishment had an obligation to not only treat his medical condition, but to "point him toward any other recourse."

¹¹ Section 8122(d)(1) provides that the time limitations of section 8122(a) and (b) do not begin to run against a minor until "he reaches 21 years of age or has had a legal representative appointed." Section 8122(d)(2) provides that the time limitations do not "run against an incompetent individual while he is incompetent and has no duly appointed legal representative."

¹² Federal Employees' Compensation Act Amendments of 1966, Public License Number 89-488, § 16(e), 80 Stat. 252, 257 (1966).

¹³ *Cecile Cormier (Edmond L. Cormier)*, 48 ECAB, __ (Docket No. 95-536, issued April 11, 1997); *Francis B. Burgess*, *supra* note 8 at 707.

date that the Office of Personnel Management determined that he was an employee for the purposes of entitlement to retirement benefits. As noted above, the five-year time limitation is a maximum, mandatory period which neither the Office nor the Board has the authority to waive.

For these reasons, the Board finds that appellant has not established that he filed his claim for compensation within the applicable time limitation period of the Act.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁴ section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; or (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.¹⁵ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.¹⁶ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹⁷

In support of his September 30, 1995 reconsideration request, appellant submitted documents previously submitted and considered by the Office as well as new evidence. Included in the new evidence was a copy of a document entitled "The Relocation and Internment of the Aleuts During World War II" by John C. Kirtland and David F. Coffin, Jr. He also provided a portion of a book entitled "Aleutian Warriors, a History of the 11th Air Force [and] Fleet Air Wing 4" by John Haile Cloe. These documents are not pertinent and relevant evidence specifically addressing the issue as to whether appellant filed his compensation claim within the applicable time limitation period and therefore are not sufficient to warrant further merit review of the case.

Appellant also submitted clinical records from St. George Clinic noting a diagnosis in January 1944 of active primary tuberculosis and hospitalization from October 1946 to May 1949 for pulmonary tuberculosis and an October 4, 1993 letter from appellant to the Office of Personnel Management requesting credit for additional years, 1940 to 1949, be credited to civil service retirement. These documents do not address the critical issue in this case of whether appellant timely filed his claim under the time limitation period of the Act and are insufficient to warrant further merit review.

¹⁴ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

¹⁵ 20 C.F.R. § 10.138(b)(1).

¹⁶ 20 C.F.R. § 10.138(b)(2).

¹⁷ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

Appellant also argued in his request for reconsideration that he could not timely file his claim for compensation benefits because he was not aware of his right to file a compensation claim until the fall of 1993 when he learned of the Indian Self-Determination and Education Assistance Act, Public License Number 93-638, 88 Stat. 2203 (January 4, 1975) (codified as amended at 25 U.S.C. § 450 *et seq.*) and the Fur Seal Act Amendments of 1983, Public License 98-129, 97 Stat. 835 (October 14, 1983) (codified as amended at 16 U.S.C. § 1151 *et seq.*). However, although these two pieces of legislation were not mentioned until appellant's September 30, 1995 request for reconsideration, the Office, in its September 10, 1995 merit decision, had already addressed appellant's argument that his claim should be considered as timely filed because he was not aware until 1993 or 1994 that he had the right to file a claim. The Office rejected that argument in its decision. As appellant did not submit relevant and pertinent evidence not previously considered by the Office, did not show that the Office erroneously applied or interpreted a point of law and did not advance a point of law or a fact not previously considered by the Office, the Office did not abuse its discretion in denying his request for further merit review of his case.

Appellant argued on appeal that, even if he is not entitled to monetary benefits, he is entitled to medical benefits because his superiors had actual timely knowledge of his tuberculosis condition and the possible relationship of this condition to his employment.¹⁸ He submitted documents in support of his contention. However, this evidence was not submitted to the Office at the time it rendered its November 22 and September 10, 1995 decisions and the Board has no jurisdiction to consider this evidence on appeal.¹⁹

The Board notes that, on appeal, appellant requested that his attorney be compensated for work performed on his behalf. However, there is no provision in the Act or its implementing regulations for payment of a claimant's attorney fees.²⁰ Section 10.145(f) of the Office's regulations implementing the Act provides that the "Office will not pay ... any representative fee."²¹ The Code of Federal Regulations section mentioned by appellant in his request for compensation for his attorney, 20 C.F.R. § 501.11(d), does not authorize payment of compensation to a claimant's attorney by the Office or the Board. This regulation concerns the requirement that an attorney fee be approved by the Board after review of the extent and character of the work performed. The payment of an attorney fee is solely the responsibility of the claimant.

The decisions of the Office of Workers' Compensation Programs dated November 22 and September 10, 1995 are affirmed.

¹⁸ An employee's failure to timely file a claim for compensation does not foreclose his right to receive medical benefits for a condition causally related to his employment, provided that timely written notice of injury was filed in accordance with section 8119 of the Act or the immediate superior had actual knowledge of the injury and its possible relationship to the employment within 48 hours; *see Albert K. Tsutsui, supra* note 9 at 1008-09 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(b)(4) (March 1993).

¹⁹ 20 C.F.R. § 501.2(c).

²⁰ 5 U.S.C. § 8127; 20 C.F.R. § 10.145(a)-(i).

²¹ 20 C.F.R. § 10.145(f).

Dated, Washington, D.C.
June 24, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member