U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MAURICE A. DINKINS and DEPARTMENT OF THE NAVY, NAVAL AIR STATION MIRMAR, San Diego, Calif.

Docket No. 97-185; Submitted on the Record;
Issued March 16, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's 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 Office, by its August 28, 1996 decision, abused its discretion by refusing to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128.

On May 20, 1995 appellant, then a 72-year-old retired gardener, filed a notice of occupational disease and claim for compensation (Form CA-2)[1] alleging that he suffers from a pulmonary condition due to exposure to toxic chemicals and herbicides, while performing his job at the Naval Air Station Mirmar in the late 1950s. He stated that he first became aware of his illness and its possible relationship to his employment in the late 1950s. He was last exposed to the implicated employment factor in April 1960.

By letter dated November 16, 1995, the Office requested detailed factual and medical information from appellant.

On December 6, 1995 the record was updated to include various documents such as articles, pictures, social security forms and veterans forms. On March 6, 1996 appellant's February 27, 1996 letter was added to the record. On May 7, 1996 the record was update to include various medical reports.

By decision dated May 14, 1996, after a merit review, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that appellant's claim was timely filed.

[1] The reverse side of the form was not completed. A separate copy of the reverse side was partially completed by an employing establishment injury compensation specialist on July 3, 1995, who indicated that no information was available.

By letter dated August 18, 1996, appellant requested reconsideration of the May 14, 1996 decision. In support, appellant submitted various medical reports.

By decision dated August 28, 1996, the Office denied appellant's claim on the grounds that the evidence submitted was irrelevant and immaterial and insufficient to warrant review of the prior decision.

The Board finds that the Office properly denied appellant's compensation claim for a pulmonary condition on the grounds that his claim was not filed within the applicable time limitation provisions of the Act.

The Act[2] 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) 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 Untied States has not resulted from such failure.[3] The test for whether sufficient cause or reasons 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.[4]

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 between his employment and the compensable disability.[5] In situations where an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.[6]

In the present case, the evidence establishes that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment and the compensable disability prior to April 1960, the time he left the position where he was last exposed to the implicated employment factor. On the Form CA-2 dated May 20, 1995 appellant indicated that he first realized that his claimed condition was caused or aggravated by employment factors in the late 1950s.[7]

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[2] 5 U.S.C. § 8101.

[3] *Edward Lewis Maslowski*, 42 ECAB 839 (1991); *Dorothy L. Sidwell*, 36 ECAB 699, 706 (1985).

[4] *Maxine Leonard*, 39 ECAB 1180, 1184-85) (1988).

[5] *William L. Gillard*, 33 ECAB 265, 268 (1981).

[6] *Id.*

[7] Appellant also indicated that he did not file his claim within 30 days of the date that he realized that he had an employment-related condition because he was not aware of his eligibility for compensation. However, the Board

Appellant's last exposure to the implicated employment factors, *i.e.*, toxic chemicals and herbicides, occurred no later than April 1960. As noted above, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure. Therefore, the time limitation in appellant's case began to run no later than April 1960. Since appellant did not file a claim until May 20, 1995, his claim was not filed within the one-year period of limitation.

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.[8]

In addition, for injuries and deaths occurring between December 7, 1940 and September 6, 1974, the Office procedure manual indicated that written notice of injury should be given within 48 hours as specified in section 8119 of the Act, but that this requirement would be automatically waived if the employee filed written notice within one year after the injury or if the immediate superior had actual knowledge of the injury with 48 hours after the occurrence of the injury.[9] However, there is no evidence of record that appellant filed written notice within one year after the injury as specified in section 8119 or that his immediate superior had actual knowledge of the injury within 48 hours after the occurrence of the injury.

For these reasons, appellant has not established that his claim was filed within the applicable time-limitation provision of the Act.

The Board also finds that the refusal of the Office, in its August 28, 1996 decision, to reopen appellant's case for further consideration of the merits of his claim under 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, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (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.[10] When a claimant fails to meet at least one of the above standards, the Office will deny the application for review without reviewing the merits of the claim.[11]

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has found that an employee's assertion that he was not aware that he could file a claim is unacceptable as sufficient cause or reason for failure to file a timely claim; *see Anthony J. Pusateri*, 36 ECAB 283, 286 (1984).

[8] *Gary W. Hudiburgh, Jr.*, 37 ECAB 423, 425 (1986)

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.7 (September 1990).

[10] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128.

[11] 20 C.F.R. § 10.138(b)(2).

In his request for reconsideration dated August 18, 1996, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did he advance a point of law or a fact not previously considered by the Office. Appellant submitted evidence which did not address the relevant issue of whether or not his claim was timely filed. Therefore, the evidence was irrelevant and immaterial and insufficient to warrant review of the Office's May 14, 1996 decision.

As appellant's August 30, 1996 request for reconsideration does not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office did not abuse its discretion in denying that request.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated August 28 and May 14, 1996 are affirmed.[12]

Dated, Washington, D.C.
March 16, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[12] Following the Office's August 28, 1996 decision, appellant submitted several documents. However, the Board may not consider such evidence for the first time on appeal. 20 C.F.R. § 501.2(c). This decision does not preclude appellant from having such evidence considered by the Office as part of a reconsideration request.