

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSEMARY SARAH FOSTER and DEPARTMENT OF THE ARMY,
U.S. ARMY MATERIAL COMMAND, Arlington, VA

*Docket No. 98-865; Submitted on the Record;
Issued November 22, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant's compensation claim was timely filed within the applicable time limitation provisions of the Federal Employees' Compensation Act.

On December 18, 1993 appellant, then a 68-year-old former budget analyst, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she sustained chronic obstructive pulmonary disease (COPD) in the performance of duty causally related to factors of her federal employment. Appellant indicated that during her employment at the employing establishment from 1955 to 1967, she was a victim of an experiment in which she was exposed to a bacteria resulting from tests conducted in 1965. Appellant also noted that she had not filed her claim earlier due to the secret nature of the chemical experiments and tests.¹ Appellant stated that she initially became aware of the condition in May 1965 but did not relate it to her employment until 1985.

In support of her claim, appellant submitted, *inter alia*, employment records, news reports regarding the secret germ warfare tests that were conducted in several locations, including Washington National Airport and a copy of a statement made by the Deputy Assistant Secretary of Defense on March 10, 1993, in which he stated that the army was concerned about those individuals unwittingly exposed to chemical weapons programs prior to 1986 and as a result, will immediately begin procedures to declassify documentation concerning locations, dates and individuals exposed through chemical weapons programs.

Appellant also submitted a narrative to accompany her claim form dated December 18, 1993 in which she stated that she filed the claim as a result of a statement made by Lieutenant General Robert M. Alexander at a congressional hearing on March 10, 1993. Lieutenant General Alexander stated that the Secretary of Defense "is committed to ensuring that

¹ Appellant commenced working for the U.S. Marine Corps in December 1967 and retired on December 26, 1980.

all military and civilian employees of the Defense Department receive benefits to which they are entitled as a result of their exposure to chemical weapons through testing programs....” Appellant also states, “It was 1985 when I first realized that I was a possible victim of the army’s experiment at Washington National Airport in 1965,” that she worked across the street from national airport and that in the spring of 1965 she suffered a severe case of pneumonia.

Appellant also submitted assorted medical reports and tests with her claim. Included is a medical report dated February 16, 1989 by Dr. John W. Roark, a Board-certified internist, who stated that he reviewed his office records and noted that appellant’s first visit to him was November 12, 1968, that appellant did report having a bout of pneumonia in 1965, that she did not mention respiratory problems prior to 1965 and that the first reference he has to wheezing occurred on July 17, 1979.

Appellant also submitted numerous pulmonary function tests. A pulmonary function test dated March 3, 1986 indicated “severe fixed airflow limitation.” A pulmonary function test dated June 22, 1993 indicated “severe obstructive airways disease.” A pulmonary function test dated September 20, 1993 indicated “room air resting oxygen saturation mildly decreased.”

In a report dated November 16, 1993, Dr. Michael Tsun, a Board-certified internist, wrote that he followed appellant for chronic obstructive lung disease of emphysematous and bronchospastic type since October 1991. He noted that her pulmonary history dated back to 1965, when she developed pneumonia after exposure at work to bacteria from military experiments. Dr. Tsun’s impressions were severe chronic obstructive lung disease with bronchospastic and emphysematous components, cholelithiasis, currently not active hypertension, low back pain, muscular type and dyspepsia.

In response to the Office’s request for further information appellant sent copies of obituaries of her coworkers. Appellant also submitted other medical reports, including a report from Dr. Tsun dated August 22, 1995, wherein Dr. Tsun stated:

“[A]fter reviewing [appellant’s] medical record and the material supplied to me from different news articles, I can only conclude that [appellant] has emphysema dating back perhaps to as early as December 1968. Whether her emphysema was the result of exposure to the microbe *Bacillus subtilis* or from previous cigarette smoking is difficult for me to determine. I am not an expert in lung diseases related to such as *Bacillus subtilis*. However, if [appellant’s] statement regarding her cigarette smoking is correct, the degree of her lung dysfunction appears to be out of proportion to the amount of cigarettes she smoked in the past.”

By letter of August 7, 1995, the employing establishment replied to an Office of Workers’ Compensation Programs’ inquiry, stating that appellant’s supervisor is deceased; therefore, it was unable to comment on the accuracy of appellant’s statements. The employing establishment also noted that it has “no knowledge of the environmental condition at [the] time of [the] claim which was during 1965.”

Subsequently, on September 6, 1995 appellant submitted another statement setting forth her position, including, *inter alia*, her smoking history, the fact that she was not knowledgeable

of any experiments performed in 1965 while she worked for the employing establishment's covert operation and that most of her medical problems (emphysema, hypertension, a nervous disorder, arthritis and gastric discomfort) began in the late 1960s.

By decision dated September 29, 1995, the Office denied appellant's claim for compensation for the reason that written notice of the injury was not provided within five years after 1985, when she became aware of a relationship between her claimed condition and employment factors, pursuant to 5 U.S.C. § 8122.

By letter dated October 30, 1995, appellant requested an oral hearing before an Office hearing representative. Appellant also submitted statements outlining the various attempts she made to confirm her exposure to the employing establishment's covert germ warfare testing in 1965 at Washington National Airport. Appellant reiterated that, "in 1985 I became aware, initially of the *possibility* of a connection between my illness and the employing establishment's biological testing in 1965." (Emphasis in the original.)

A hearing was conducted by an Office hearing representative on April 30, 1996, at which time appellant testified that in June 1965 she had pneumonia, that the reason the claim was not filed earlier was because she had to get information from various places, that her brother was sick and then died and that she was undergoing medical treatment for several conditions. She also testified that no one at the employing establishment had knowledge of the work relatedness of her illness.

By decision dated August 20, 1996, the Office hearing representative found that the claim for chronic obstructive pulmonary disease was not filed within the three-year period of limitation provided by 5 U.S.C. § 8122 as amended in 1974. The Office found that the time limitations began to run on December 26, 1980, the date she voluntarily retired from the federal government.

On August 18, 1997 appellant requested reconsideration of the Office's decision, contending that her immediate supervisor was aware that in 1965 she became suddenly ill with pneumonia, although he could not have known the cause of the illness at that time and that it was not until 1993 that chronic obstructive pulmonary disease was publicly listed as one of the long-term effects resulting from exposure to the germ warfare agents used by the army in their experiments. Appellant also contended that there was no time limit by which veterans must file for disability compensation.

By decision dated October 21, 1997, the Office determined that the evidence submitted was insufficient to warrant modification of the August 20, 1996 decision.

The Board finds that the Office properly denied appellant's compensation claim on the grounds that she did not establish that her claim was filed within the applicable time limitation provisions of the Act.

Under the Act,² as amended in 1974, a claimant has three years to file a claim for compensation.³ Section 8122(a) provides that “an original claim for compensation for disability or death must be filed within three years after the injury or death.”⁴ In a case of occupational disease, the Board has held that the time for filing a claim begins to run when the employee first becomes aware, or reasonably should have been aware, of a possible relationship between her condition and her employment.⁵ When an employee becomes aware, or reasonably should have been aware that she has a condition which has been adversely affected by factors of her federal employment, such awareness is competent to start the limitation period even though she does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.⁶

In her December 18, 1993 claim form, appellant indicated that she became aware of her COPD in 1965, that she first realized that her claimed condition was caused or aggravated by her employment in May 1985. She reiterated this awareness in her request for an oral hearing. Appellant explained that she delayed filing the claim because she was not “significantly aware” of the employment relationship until December 1993 when she was able to secure documentation of the testing. However, this statement of awareness by appellant was competent to start the running of the time limitation period under section 8122(a).⁷ Thus, appellant by her own admission, indicated that she was aware of a possible causal relationship between her symptoms and factors of her federal employment in May 1985, approximately eight years before she filed a claim on December 13, 1993.⁸ This interval is clearly outside the three-year time limitation under section 8122 of the Act.

Appellant’s claim would still be timely under 5 U.S.C. § 8122 if it was established that her immediate supervisor had actual knowledge of the injury within 30 days. The knowledge must be such as to put the immediate supervisor reasonably on notice of an on-the-job injury.⁹ There is evidence that may indicate that appellant’s supervisor was aware of appellant’s pneumonia in 1965. However, there is no evidence of record indicating that appellant’s supervisor had actual knowledge, sufficient to put him reasonably on notice of appellant’s contention that her condition was work related within 30 days of appellant’s alleged exposure to dangerous material. In fact, appellant stated that the employing establishment was not aware of

² 5 U.S.C. § 8122.

³ *William A. Dotson*, 47 ECAB 253, 257.

⁴ *Id.*

⁵ *Leo Ferraro*, 47 ECAB 350, 356 (1995).

⁶ *Id.* at 357.

⁷ *Id.* at 357; *see also John Giovanni Carollo*, 41 ECAB 778, 794 (1990).

⁸ As stated *supra*, appellant’s time for filing began to run as of the date the employee first became aware, or reasonably should have been aware, of a possible relationship between her condition and her employment. *William A. Dotson*, *supra* note 3.

⁹ *Emanuel T. Posluszny*, 47 ECAB 651, 655 (1995).

the work relatedness of her illness at that time. As the Board has held, knowledge on the part of a supervisor of a condition alone is insufficient to place the supervisor on notice of an employment relationship.¹⁰

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

Dated, Washington, D.C.
November 22, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ See, e.g., *John Giovanni Carollo*, *supra* note 7; *Charlene B. Fenton*, 36 ECAB 151 (1984).