

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOSEPH C. GUARNIERI and DEPARTMENT OF THE NAVY,  
NAVAL UNDERSEA WARFARE CENTER, Newport, RI

*Docket No. 98-568; Submitted on the Record;  
Issued September 23, 1999*

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DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's compensation claim on the grounds that he did not establish that his claim was filed within the applicable time limitation provisions of the Federal Employees' Compensation Act; and (2) whether the Office abused its discretion in denying a merit review under section 8128(a) of the Act.

In an undated claim form received on May 24, 1995 appellant, then a retired 72-year-old mechanical engineering technician, filed an occupational disease claim alleging that on May 10, 1967 he first realized that his enlarged heart and rapid heart beats were due to working with Otto Fuel.<sup>1</sup>

By letter dated July 21, 1995, the Office requested appellant to submit additional information. The Office also requested appellant to explain why he waited over 25 years to file his claim when he was aware on May 10, 1967 that his disease or illness was aggravated by factors of his employment.

In a statement received by the Office on August 15, 1995, appellant related that he had been exposed to Otto Fuel on June 30, 1966 when he suffered shortness of breath, nervousness, dizziness, loss of energy, headaches, aches and pains. Appellant indicated that he was diagnosed as having high blood pressure, a slightly enlarged heart and heart palpitations.

By decision dated November 14, 1995, the Office denied appellant's claim on the grounds that appellant had not timely filed his claim as required by 5 U.S.C. § 8122.

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<sup>1</sup> The employing establishment forwarded the unsigned claim form indicating that appellant worked from March 12, 1967 until his retirement on July 18, 1980. The letter also noted that appellant participated in the Otto Fuel Surveillance Program.

Appellant requested an oral hearing before an Office hearing representative in a letter dated December 11, 1995.

A hearing was held on June 26, 1996 at which appellant described the nature of his employment, his last exposure and the conditions he claimed were due to his exposure to Otto Fuel. Appellant also testified that he had filed a claim in 1988 for injuries to his nervous system and heart which the Office denied for lack of supporting evidence.

By decision dated September 4, 1996, the Office hearing representative affirmed the November 14, 1995 Office decision, finding that appellant had failed to timely file his claim.

Appellant submitted additional information with a letter dated November 16, 1996. In a letter dated January 25, 1997, appellant requested reconsideration. On April 30, 1997 the Office denied modification on the grounds that the evidence submitted in support of reconsideration failed to establish that his claim was timely filed within the applicable time limitation provisions of the Act.

In a letter dated August 18, 1997, appellant requested reconsideration of the Office's April 30, 1997 decision, arguing that the Navy was negligent in failing to provide adequate ventilation after appellant had been exposed to Otto Fuel. On November 13, 1997 the Office denied appellant's request on the grounds that appellant failed to provide any evidence to support his request and the information submitted was immaterial.

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

Section 8122(a) of the Act states, "An original claim for compensation for disability or death must be filed within three years after the injury or death."<sup>2</sup> Section 8122(b) provides that in latent disability cases, the time limitation does not begin to run until the claimant is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between the employment and the compensable disability.<sup>3</sup> The Board has held that, 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.<sup>4</sup>

In the instant case, appellant stated that he first became aware on June 30, 1966 of the connection between his condition and his federal employment. Appellant retired from his employment on July 18, 1980 and thus ceased to be exposed to the implicated conditions at least by that date. Since appellant did not file a claim until May 1995, he is clearly outside the three-year limitation period and his claim is, therefore, untimely.

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<sup>2</sup> 5 U.S.C. § 8122(a).

<sup>3</sup> 5 U.S.C. § 8122(b).

<sup>4</sup> *Garyleane A. Williams*, 44 ECAB 441 (1993).

Appellant contended that he was unaware of the time limitation provision because of the lack of information disseminated by the employing establishment. The Board finds that this contention is tantamount to ignorance of the law, which provides no basis for tolling the time limitation.<sup>5</sup>

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of appellant's injury.<sup>6</sup> An employee must show not only that his immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.<sup>7</sup> However, there is no evidence in the record which indicates that appellant's immediate supervisor had actual knowledge of appellant's injury within 30 days of the date of the injury. The employing establishment indicated that no person, such as a supervisor, could be found with knowledge of the incident. Nor has appellant submitted any evidence establishing that his immediate supervisor had actual knowledge.

Consequently, the exception to the statute is not met and appellant's claim for compensation is untimely filed.

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's case for further merit review.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or a fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>8</sup>

In this case, appellant requested reconsideration of the Office's April 30, 1997, denial of his claim by letter dated August 18, 1997, but he did not submit any new evidence, nor did he advance any point of law or fact not previously considered by the Office, nor did he argue that the Office had erroneously applied or interpreted a point of law. Therefore, the Office properly denied his request for reconsideration.

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<sup>5</sup> *Charlene B. Fenton*, 36 ECAB 151 (1984).

<sup>6</sup> 5 U.S.C. § 8122(a)(1); *see also Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987).

<sup>7</sup> *Charlene B. Fenton*, *supra* note 5; *Richard E. Jacobson*, 33 ECAB 1571 (1982).

<sup>8</sup> 20 C.F.R. § 10.138(b)(2).

The decisions of the Office of Workers' Compensation Programs dated November 13 and April 30, 1997 are affirmed.

Dated, Washington, D.C.  
September 23, 1999

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member