

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of PETER S. ELLIOTT and DEPARTMENT OF THE NAVY,  
NAVAL SUPPLY CENTER, Oakland, CA

*Docket No. 99-1628; Submitted on the Record;  
Issued August 21, 2000*

---

DECISION and ORDER

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

The issue is whether appellant's claim for compensation is barred by the time limitation provisions of the Federal Employees' Compensation Act.

On March 13, 1997 appellant, then a 76-year-old former purser, filed an occupational disease claim alleging that he had recurrent basal cell carcinoma which he attributed to factors of his federal employment.<sup>1</sup> Appellant indicated that he first became aware of his disease on September 7, 1965 and realized then that it was caused or aggravated by employment factors. Appellant underwent surgery on September 7, 1965 for a biopsy of tissue beneath his lower lip. The postoperative diagnosis was basal cell carcinoma. Appellant retired from the employing establishment on July 1, 1980.

In support of his claim, appellant submitted medical reports and documents related to his application for benefits under the Radiation Exposure Compensation Act.<sup>2</sup> A July 23, 1990 consultative note by Dr. Clayton D.K. Chong, a Board-certified internist, noted appellant's history of possible radiation exposure and a history of five surgeries of his trunk and upper extremities for removal of ten basal cell carcinomas. Appellant was noted as having multiple remaining basal cell tumors which would require resection. Dr. Chong noted, "The patient is concerned that he may have had radiation exposure while working as a civil service worker on a freighter." Dr. Chong listed his findings on examination of appellant and provided a diagnosis of recurrent basal cell carcinoma, "etiology undetermined." He noted that the treatment of choice was for surgical or cryotherapy in the removal of each lesion on an individual basis. He noted, from history, that the carcinoma was growing locally and was not invasive or metastatic.

---

<sup>1</sup> The record indicates that during the Spring and Summer of 1962 appellant was employed on the U.S.S. Alanta which participated in Operation Dominic, at which time he may have been exposed to radiation due to atmospheric nuclear testing.

<sup>2</sup> See 42 U.S.C. § 2210. This claim was denied on July 1, 1993.

By letter dated March 6, 1998 the Office of Workers' Compensation Programs requested that appellant submit additional evidence pertaining to his skin condition within 30 days concerning the nature of any exposure which he believed contributed to his condition; length and frequency of an exposures, duration, and a comprehensive medical report from a treating physician. Appellant did not respond.

By decision dated April 29, 1998, the Office found that the evidence of record was insufficient to establish fact of injury.<sup>3</sup>

The Board finds that appellant's claim for compensation under the Federal Employees' Compensation Act is barred by the applicable time limitation provisions.

The Act<sup>4</sup> 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 the employment factors.<sup>5</sup> 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 United States has not resulted from the failure.<sup>6</sup> 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 ordinary prudent person would have exercised in protecting his right under the same or similar circumstances.<sup>7</sup>

In a case involving a claim for an occupational disease or illness, the time 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.<sup>8</sup> If his exposure to the implicated employment factors extends beyond the date of such awareness, the time limitation begins to run on the last date of such exposure.<sup>9</sup> In the present case, appellant has related his recurrent basal cell carcinoma skin condition to his employment during the spring and summer of 1962 when he served onboard a navy vessel -- the only time period during which he has claimed exposure to radiation in his federal employment. Appellant noted that he realized his skin condition was caused or aggravated by his employment factors on September 7, 1965, the date which corresponds to his biopsy and diagnosis of basal cell carcinoma. Therefore, the time

---

<sup>3</sup> The memorandum accompanying the decision noted that "[t]imely notice of occupational disease was filed March 13, 1997 claiming recurrent basal cell carcinoma." Subsequent to the April 29, 1998 decision, the Office reissued the decision on September 1, 1998 following notification from appellant as to a new address.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> See *Eugene L. Turchin*, 48 ECAB 391 (1997); *Roseanne S. Allexenberg*, 47 ECAB 498 (1996).

<sup>6</sup> See *Edward Lewis Maslowski*, 42 ECAB 839 (1991); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

<sup>7</sup> See *Maxine Leonard*, 39 ECAB 1180, 1184-85 (1988).

<sup>8</sup> See *William L. Gillard*, 33 ECAB 265, 268 (1981);

<sup>9</sup> See *Jack O. Rose*, 28 ECAB 201 (1977).

limitation in appellant's case began to run no later than September 7, 1965. Since appellant did not file his claim until March 13, 1997, the claim was not filed within the one-year period of limitation.

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 noted above, for such waiver. It is well established that the five-year time limitation is a maximum, mandatory time period which neither the Office nor the Board has the authority to waive.<sup>10</sup>

For injuries and death occurring between December 7, 1940 and September 6, 1974, the Office Procedure Manual indicates 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 supervisor had actual knowledge of the injury within 48 hours after the occurrence of the injury.<sup>11</sup> However, knowledge merely of an employee's illness is not sufficient: it must be shown that the circumstances were such as to put the supervisor on notice that the alleged injury was actually related to the employment or that the employee attributed it thereto.<sup>12</sup> Appellant has failed to establish by the evidence of record that he provided timely written notice or that his immediate supervisor had actual timely knowledge of the injury and its possible relationship to his employment, such as to satisfy either of these conditions.

For these reasons, the Board will modify the April 29, 1998 decision of the Office to find that appellant has not established that he filed his claim for compensation within the applicable time limitation provisions of the Act. The decision denying benefits will be affirmed, as modified.

---

<sup>10</sup> See *Albert K Tsutsui*, 44 ECAB 1004 (1993); *William A. West*, 36 ECAB 525 (1985); *Walter Denmon*, 22 ECAB 8 (1970); *Kathleen T. Liscum*, 15 ECAB 348 (1964).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 - Claims, *Time*, Chapter 2.801.3(b)(1) (March 1993).

<sup>12</sup> *Id.* at Chapter 2.801.3a(3)(b).

The April 29, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed, as modified.

Dated, Washington, D.C.  
August 21, 2000

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member