

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANCIS M. RICHESON and DEPARTMENT OF THE NAVY,
NAVY-MILITARY SEALIFT, Washington, DC

*Docket No. 98-2296; Submitted on the Record;
Issued July 14, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's claim for compensation is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act.

The Board finds that the Office properly determined that appellant's claim for compensation is barred by the applicable time limitation provisions of the Act.

The Act¹ requires in cases of injury prior to September 7, 1974 that a claim for compensation be filed within one year of the date claimant was aware or reasonably should have been aware that the condition may have been caused by the employment factors. The one-year 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 such failure.² 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.³

On September 26, 1995 appellant, then a 67-year-old retired carpenter, filed a claim alleging that he sustained asbestosis due to exposure to asbestos at work. Appellant indicated that he sustained such exposure while employed as a fireman by the Army Transport Service

¹ 5 U.S.C. §§ 8101-8193.

² *Edward Lewis Maslowski*, 42 ECAB 839, 845 (1991); *Dorothy L. Sidwell*, 36 ECAB 699, 706 (1985).

³ *Maxine Leonard*, 39 ECAB 1180, 1184-85 (1988).

from 1944 to 1946.⁴ He noted on the claim form that he first became aware of his condition in June 1992. By decision dated March 12, 1996, the Office denied appellant's claim on the grounds that it was untimely. By decisions dated and finalized December 11, 1996 and dated April 16, 1998, the Office denied modification of its March 12, 1996 decision.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 between his employment and the compensable disability.⁶ The evidence establishes that appellant was aware, or reasonably should have been aware, of the causal relationship between his employment and the compensable disability as early as July 1992. The totality of the factual circumstances of record, including the medical evidence and appellant's statements regarding his awareness of the asbestos risk to his health in July 1992, establish that appellant was aware, or reasonably should have been aware, as early as July 1992 that his claimed injury was due to employment factors.

The record contains a July 15, 1992 report in which Dr. Jill Ohar, an attending Board-certified internist, indicated that appellant had significant exposure to asbestos while working as a carpenter. Dr. Ohar discussed appellant's pulmonary problems and stated, "[Appellant] has a history of asbestos exposure, pulmonary function abnormalities and a chest x-ray consistent with this exposure. He is additionally at risk for the development of fibrotic interstitial lung disease as well as lung and gastrointestinal carcinoma. I have advised him regarding these risks...." Appellant also admitted, at the hearing before an Office hearing representative, that Dr. Ohar discussed with him at the time of her July 1992 evaluation that his asbestosis was possibly related to his exposure at work. The Board has found that the statute of limitations begins to run on the date that an employee actually knows of the possible relationship between the employee's condition and his employment, or reasonably should have known of the possible relationship.⁷

Appellant later asserted that he was not aware of the relationship between his condition and exposure to asbestos at working until he was examined by attending physicians in April 1994. In a report dated April 1, 1994, Dr. Daniel M. Raybin, an attending Board-certified internist, discussed appellant's exposure to asbestos at work and indicated that appellant had asbestos-related pleural plaque due to this exposure. In a report dated April 24, 1994, Dr. Gerald B. Levine, an attending Board-certified internist, stated that appellant's asbestos-related pleural condition was due to his exposure at work. The Board notes, however, that, even if it were accepted that appellant did not learn of his employment-related condition until April 1994, appellant's September 1995 filing of his claim still would not have fallen within the one-year filing requirement. Appellant asserted that he was not an attorney and did not know that he

⁴ Appellant later suggested that he was exposed to asbestos while he worked as a carpenter for the employing establishment from the 1950's until the time he retired in the late 1970's. The record does not support a finding that appellant was exposed to asbestos after September 7, 1974.

⁵ Appellant passed away after the issuance of the Office's April 16, 1998 decision.

⁶ *William L. Gillard*, 33 ECAB 265, 268 (1981).

⁷ *William A. West*, 36 ECAB 525, 528-29 (1985).

could file a claim. The Board 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.⁸

Furthermore, appellant is not entitled to waiver of the one-year filing requirement because he has not met the requirements, as delineated above, for such waiver. Appellant has not shown that he 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.

Appellant has contended that the time limitations of sections 8122(a) and 8122(b) do not run against him due to the fact that he was incompetent. Section 8122(d)(2) provides that the time limitations of sections 8122(a) and 8122(b) do not "run against an incompetent individual while he is incompetent and has no duly appointed legal representative."⁹

Appellant submitted medical evidence in support of his contention that he was incompetent within the meaning of the Act. In a report dated October 30, 1997, Dr. Abdel M. El-Tomi, an attending Board certified psychiatrist, stated that he began to treat appellant in 1993 at which time he was "irritable and depressed" and was treated with antidepressant and anxiolytic medications. Dr. El-Tomi provided a current diagnosis of bipolar affective disorder and stated, "The question about whether this condition has been related to him not being aware of the dates and that he did not file in a reasonable time, I believe there is a great probability that this happens and this is related to his psychiatric condition, periods of being in despair, depressed and he mentioned to me the times he felt like letting everything go."

Although the report of Dr. El-Tomi shows that appellant was treated for depression, it does not establish that he was incompetent within the meaning of the Act during the relevant period. The Board has held that it is appellant's burden to show that he is incompetent for a given period by submitting medical evidence stating that his condition was such that he was not capable of filling out a form or of otherwise furnishing the relatively simple information necessary for filing a claim and satisfying the limitation requirements.¹⁰ The opinion of Dr. El-Tomi does not establish that appellant's condition rendered him incapable of performing these or similar tasks such that he would be considered incompetent within the meaning of the Act.¹¹ Moreover, his assessment of appellant's condition is not adequately supported by objective findings or medical rationale; nor does the opinion provide a clear opinion regarding appellant's emotional condition during the relevant period, *i.e.*, the period after appellant learned of his employment-related condition in July 1992. In addition, there is other medical evidence of record which shows that appellant was not incompetent within the meaning of the Act during the

⁸ *Anthony J. Pusateri*, 36 ECAB 283, 286 (1984).

⁹ 5 U.S.C. § 8122(d)(2).

¹⁰ *Paul S. Devlin*, 39 ECAB 715, 726 (1988).

¹¹ Furthermore, appellant has not shown that he is entitled to have the time limitations toll due to "exceptional circumstances" as provided by section 8122(d)(3) of the Act; *see* 5 U.S.C. § 8122(d)(3). For instance, an "exceptional circumstance" recognized by the Secretary of Labor is where an employee is a prisoner of war. Appellant has not shown that he was under that type of circumstance; *see Paul S. Devlin, supra* note 10 at 726.

relevant period. In a report dated January 19, 1993, Dr. Robert N. Schneider, a clinical psychologist for the Veterans Administration, stated that appellant did not have any major psychopathology. He indicated that appellant had personality, situational and adjustment problems which affected his pain level. Therefore, appellant has failed to show that the time limitations of sections 8122(a) and 8122(b) do not run against him.

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

The decision of the Office of Workers' Compensation Programs dated April 16, 1998 is affirmed.

Dated, Washington, D.C.
July 14, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member