

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROY P. PEARSON and DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

*Docket No. 01-1428; Submitted on the Record;
Issued June 17, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for compensation benefits on the grounds that his claim was not filed within the applicable time limitation provisions of the Federal Employees' Compensation Act.

On November 29, 2000 appellant, then an 82-year-old retired welder, filed a notice of occupational disease and claim for compensation, Form CA-2. Appellant alleged that he developed a respiratory ailment caused by exposure to asbestos while performing his duties at the employing establishment, *i.e.*, welding stud bolts and clips to hold asbestos to walls and ceilings from 1941 to 1944. Appellant stated that he became aware of the disease in November 1967 and related it to his employment in 1989.

On a form questionnaire appellant stated that he became aware in 1995 that his condition could possibly be due to asbestos exposure.

By letter dated February 13, 2001, the Office requested additional factual and medical information from appellant. Specifically, when appellant became aware of an asbestosis condition and when he related his condition to work exposure. By another letter dated February 13, 2001, the Office requested factual information from the employing establishment, including asbestos exposure data.

By letter dated March 16, 2001, appellant responded that to his knowledge his only exposure to asbestos was during his employment with the employing establishment from 1941 to 1944. Appellant acknowledged that he started smoking in the 1940s while in the army and stopped completely in 1963. Appellant stated that Dr. Kenneth Graham suspected problems with his left lung and questioned his work history, but the impact of asbestos was not well known. Appellant stated that in 1995 "Dr. M[aureen] Nuccio discovered the reason that I have been so vulnerable to any virus. Dr. Nuccio asked where I had worked and when and suggested that my problems were most likely the result of the asbestos I had been exposed to when I worked for the

employing establishment.” Appellant also stated that “No doctor has ever determined that I have asthma or bronchitis, and only exposure to a virus creates problems with my breathing.”

By decision dated April 4, 2001, the Office denied appellant’s claim finding that the claim for compensation benefits is barred by the applicable time limitation provision of the Act.

The Board finds that the Office properly denied appellant’s compensation claim for an asbestos-related condition on the grounds that his claim was not filed within the applicable time limitation provisions of the Act.¹

The Act² requires in cases of injury prior to September 7, 1974³ 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. 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 such failure.⁴ 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.⁵

The Board has previously noted that when an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his employment, such awareness is competent to start the running of the time limitations period. This is true even if the employee is not aware of the precise nature of the impairment.⁶

In the present case, the record suggests⁷ that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment

¹ The Board notes that the Office made no finding on whether the claim was filed within five years and whether the one-year filing requirement may be waived.

² 5 U.S.C. § 8101.

³ In addition, for injuries and death 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 within 48 hours after the occurrence of the injury. 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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.7 (September 1990).

⁴ *Edward Lewis Maslowski*, 42 ECAB 839 (1991); *Dorothy L. Sidwell*, 36 ECAB 699, 706 (1985).

⁵ *Maxine Leonard*, 39 ECAB 1180, 1184-85 (1988).

⁶ *See supra* note 4.

⁷ The Board notes that the record does not contain a report by Dr. Nuccio which discusses appellant’s history of

and the compensable disability in October 1995, when Dr. Nuccio, a Board-certified internist who specialized in pulmonary disease, performed a fiberoptic bronchoscopy, diagnosed chronic bronchitis and chronic obstructive pulmonary disease and allegedly advised appellant that the most likely cause of his condition was his exposure to asbestos during his federal employment.

Despite the fact that no medical report, other than an operative report and surgical record by Dr. Nuccio, was provided by appellant, it is quite clear that appellant was aware of the possible relationship between his condition and his employment by October 1995. The statute of limitations commenced on that date. Since appellant did not file a claim until November 29, 2000, his claim was not filed within the one-year period.

Additionally, appellant does not meet the qualifications for the waiver of the one-year filing requirement as his claim was not filed within five years of October 25, 1995.

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

Accordingly, the decision of the Office of Workers' Compensation Programs dated April 4, 2001 is affirmed.

Dated, Washington, DC
June 17, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

exposure to asbestos during his federal employment nor is there a discussion on causal relationship between appellant's condition and his exposure. However, appellant, in response to the Office's request for information, as to when he became aware of a connection between his condition and employment factor, stated "in 1995 ... Dr. M. Nuccio discovered the reason that I have been so vulnerable to any virus. Dr. Nuccio asked where I had worked and when, and suggested that my problems were most likely the result of the asbestos I had been exposed to when I worked for the employing establishment."