

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDMOND M. HOOPER and DEPARTMENT OF THE AIR FORCE,
KELLY AIR FORCE BASE, San Antonio, TX

*Docket No. 02-1235; Submitted on the Record;
Issued October 11, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant's claim was filed within the applicable time limitation provisions of the Federal Employees' Compensation Act.¹

On August 20, 2001 appellant, then a 67-year-old former mechanic and metal worker filed an occupational disease claim alleging that he developed limb-girdle muscular dystrophy as a result of his work-related exposure to asbestos for three years at the employing establishment. He asserted that he first became aware of his disease in July 1964 and first realized that the disease was caused or aggravated by his employment in April 1974. Appellant asserted further that he did not submit the claim form within 30 days because in 1964 when his legs collapsed, he was not aware at that time that his exposure to toxic agents was the cause. He left the employing establishment in December 1966 and retired from federal employment in or around 1988.

In support of the claim, the Office of Workers' Compensation Programs received appellant's medical records dated from December 21, 1977 to September 18, 2000, which indicated that he suffered from chronic muscular dystrophy.

In a letter received by the Office on August 30, 2001, the employing establishment challenged appellant's claim as untimely. The employment establishment asserted that appellant's medical records indicated that his illness might have begun in 1977, eleven years after his employment at Kelly Air Force Base and furthermore it challenged the claim, since there is no definite known cause for appellant's disease.

By decision dated October 16, 2001, the Office denied appellant's claim, finding that it was not timely filed. The Office found that appellant's last exposure occurred on December 1966, however, written notice of the injury and claim for compensation was not given until August 20, 2001. The Office further found that the initial evidence of file did not support a

¹ 5 U.S.C. §§ 8101-8193.

finding that appellant's immediate superior had actual knowledge of the injury within 30 days of the date of injury. The Office advised that the Act provide that an original claim for compensation must be filed within three years of the date of injury or date of awareness of a relationship between the condition and employment unless the immediate supervisor had actual knowledge of the injury within 30 days.

In a letter dated October 21, 2001, appellant requested a review of the written record.

By decision dated March 26, 2002, an Office hearing representative found that the Office improperly cited the statutory requirements for claims for injuries occurring on or after September 7, 1974. The Office hearing representative cited Chapter 2.801 of the Federal (FECA) Procedure Manual, the regulations, that should have been applied in this case which states that written notice of injury should be given within 48 hours under 5 U.S.C. § 8119. The Office hearing representative noted that appellant's injury occurred no later than December 1966, the last date he worked at Kelly Air Force Base and was exposed to the substances he claimed was responsible for his condition. The Office hearing representative found, therefore, that appellant had not filed his claim within the period allowable after the last date of possible injury. The Office hearing representative affirmed the prior decision as modified.

In a letter dated May 11, 2002, appellant requested reconsideration and submitted photocopies of new articles entitled: "Stinson: Read this if you worked at Kelly," "Kelly AFB Workers Try to Solve ALS Mystery" and "News Archives-San Antonio Express News."

By merit decision dated July 3, 2002, the Office found that although it had not previously considered the additional evidence, the evidence submitted was insufficient to modify the prior decision. The Office found that the evidence submitted did not show that appellant informed an immediate supervisor of a possible injury of muscular dystrophy within 48 hours. The Office further found that there was no indication in the evidence that appellant notified a supervisor that he believed the 1964 incident when his legs collapsed was due to a work-related medical condition.

The Board finds that appellant has not established that his claim was filed within the applicable time-limitation provisions of the Act.

The Act requires in cases of injuries occurring between December 7, 1940 and prior to September 7, 1974 the following must occur.

- (1) Written notice of injury should be given within 48 hours under 5 U.S.C. § 8119. This requirement is automatically waived if the employee filed notice within one year after the injury or if the immediate superior had actual knowledge of the injury within 48 hours after occurrence.
- (2) An original claim for compensation for disability or death must be filed within one year after the injury or death under 5 U.S.C. § 8122.
- (3) Waiver of the requirements for giving notice and filing a claim within one year could be granted under 5 U.S.C. § 8122 if a claim was filed within five years after the injury or death and

(a) The failure to comply was due to circumstances beyond the control of the individual claiming benefits; or

(b) The individual claiming benefits could show sufficient cause or reason in explanation of the failure to file within one year and material prejudice to the interest of the United States did not result from such failure.”

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.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

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.⁴ In situations where 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.⁵

The factual circumstances in this case, establish that appellant was aware or by the exercise of reasonable diligence should have been aware, by April 1, 1974 that his claimed injury was due to employment factors. Under the Act, time begins to run when a claimant first relates his condition to factors of his employment. If a claimant continues to work, then time begins to run on the date of last exposure to the factors of employment, which he claims were causally related to his occupational disease. The record indicates that appellant’s last possible exposure to the employment factors to which he attributes his injury was in December 1966, the date his employment at Kelly Air Force Base ceased. However on the Form CA-2 dated August 20, 2001, appellant indicated “April 1, 1974” in the portion where he was asked to provide the date that he first realized that his claimed condition was caused or aggravated by employment factors. Regarding the relationship of his claimed condition to his employment and why he came to this realization, appellant stated: “In 1964 when my legs collapsed I knew something was wrong, but I was not aware at that time that these toxic poisonous agents were the cause.” Appellant’s last possible exposure to the implicated employment factors, *i.e.*, asbestosis exposure, occurred no later than 1966, the date that his employment at Kelly Air Force Base ceased. However, the time begins to run when appellant first related his condition to factors of his employment, in this case April 1, 1974. Therefore, the Board finds that the time limitation in appellant’s case began to run

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

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

⁴ *William L. Gillard*, 33 ECAB 265, 268 (1981).

⁵ *Id.* See *William A. West*, 36 ECAB 525, 528-29 (1985).

no later than April 1, 1974. Because appellant did not file a claim until August 20, 2001, his claim was not filed within the one-year period of limitation.

Furthermore, 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 delineated above, for such waiver. The five-year time limitation is a maximum, mandatory period which neither the Office nor the Board has authority to waive.⁶

In addition, 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 superior had actual knowledge of the injury within 48 hours after the occurrence of the injury.⁷ However, there is no evidence 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.

For these reasons, appellant has not established that his claim was filed within the applicable time limitation provisions of the Act.⁸

⁶ Gary W. Hudiburgh, Jr., 37 ECAB 423, 425 (1986).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.7 (September 1990).

⁸ The Board also notes that an employee's failure to file a timely claim for compensation does not foreclose his right to receive medical benefits for a condition causally related to his employment, provided timely notice of injury was given or the employee's immediate supervisor had actual timely knowledge of the condition and its possible relationship to the employment. However, there is no evidence that appellant provided timely written notice of injury or that his immediate supervisor had actual timely knowledge of the injury and its possible relationship to his employment. Therefore, appellant is not entitled to medical benefits.

The decisions of the Office of Workers' Compensation Programs dated July 3 and March 26, 2002 and October 16, 2001 are hereby affirmed as modified.

Dated, Washington, DC
October 11, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member