

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROCCO FABIANO and DEPARTMENT OF THE ARMY,
USA ARMY SOLDIERS COMMAND, Natick, MA

*Docket No. 02-1271; Oral Argument Held May 22, 2003;
Issued December 3, 2003*

Appearances: *Rocco Fabiano, pro se; Tom Giblin, Esq.*, for the Director,
Office of Workers' Compensation Programs.

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
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 January 15, 2000 appellant, then an 87-year-old retired guard, filed a notice of occupational disease and claim for compensation, Form CA-2. Appellant alleged that he developed a chronic lung disease caused by exposure to asbestos while performing his duties at the Boston Naval Shipyard. Appellant stated that he became aware of the disease on July 1, 1985 when he was sent for chest x-rays during a physical and related it to his employment on August 5, 1986 when he was diagnosed with the condition by his physician. Accompanying the claim was an August 5, 1986 medical note from Dr. Gustave Laurenzi, a Board-certified internist, who diagnosed pulmonary fibrosis or scar tissue on the lungs.

By letter received January 25, 2000, appellant stated that while employed at the Boston Naval Shipyard as a shipfitter he used asbestos material to cover machinery and was exposed to asbestos fibers in the air. Appellant acknowledged that he was diagnosed with chronic lung disease in 1985 and that he had intended to file a claim at that time but put it off due to personal problems. The record contains an incomplete notice of occupational disease and claim for compensation, Form CA-4, dated May 6, 1987, which was received by the Office on January 25, 2000, which was never filed with the Office.

In a January 3, 2000 medical report, Dr. Deborah Hadley, a Board-certified internist, stated that appellant had been her patient since 1997 and had a diagnosis of asbestosis and chronic obstructive pulmonary disease (COPD) since the mid eighties. She related that, while

appellant worked at the naval shipyard, he did welding, construction and labor-type activities, which she reasoned might explain his chest x-rays and pulmonary test findings.

By letter dated May 9, 2000, the Office requested additional factual and medical information from appellant. Specifically, the Office requested an employment history outlining his position, work duties, the type of asbestos materials used and period of exposure. The Office further requested medical documentation including a description of all previous pulmonary conditions, symptoms, x-ray and diagnostic results, diagnosis, treatment and an opinion with medical reasons on the cause of his condition. By another letter dated May 9, 2000, the Office requested factual information from the employing establishment, including asbestos exposure data.

On January 20, 2001 the Office advised appellant that on review of the claim, the only federal exposure to asbestos would possibly have occurred at the Boston Naval Shipyard when he was employed between May 29, 1967 and November 11, 1975 and that because the CA-4 claim form of record indicated that he was aware of a relationship between his lung condition and employment by May 6, 1987, appellant might not have met the statutory requirements for filing the claim. The Office, therefore, requested information regarding whether appellant informed successors to the Boston Naval Shipyard of his condition and when, or if they were ever aware of his condition as related to his employment. No further evidence was received.

By decision dated February 23, 2001, the Office denied appellant's claim finding that the claim for compensation benefits was barred by the applicable time limitation provision of the Act. The Office determined that appellant was aware of a relationship between the employment and the claimed condition by January 31, 1987, the date of last exposure. In a letter received March 12, 2001, appellant requested an oral hearing.

The Office later received personnel information from the employing establishment, additional medical documents dated from January 25, 1995 to January 4, 2000, which confirmed a lung condition consistent with asbestos exposure and an undated statement from appellant regarding his exposure.

In the statement, appellant indicated that, in July 1985, while working as a security guard for the Army, he was sent for a mandatory chest x-ray, which revealed chronic lung disease and a slight pulmonary blockage. He stated that he was thereafter referred to a specialist who found that he had fibrosis or scar tissue on the lungs. Appellant indicated that, in 1996, he changed jobs and became a sheet metal mechanic. He further stated that, while working as a sheet metal mechanic in 1987, he was told to dismantle an asbestos chimney; however, he thought about it, refused and later decided to retire. Appellant concluded that he was exposed to asbestos at the Boston Naval Shipyard when working as a ship fitter and that the asbestos had scarred his lungs.

Appellant testified at the requested hearing held November 1, 2001, regarding his claim for compensation due to asbestos exposure. Following the hearing, the employing establishment submitted remarks regarding appellant's claim and whether or not it should be considered timely filed.

By decision dated January 25, 2002, an Office hearing representative affirmed the denial of the claim on the basis that it was not timely filed. The Office hearing representative further modified the prior decision to reflect that time for filing a claim in this case began to run on August 5, 1986 the date appellant acknowledged that he was aware of a possible relationship between his lung condition and his work at the Boston Naval Shipyard. The Office hearing representative further found that there was no evidence of record, which establishes that appellant gave actual notice of a work-related injury within 48 hours of the date of injury, thus appellant was not entitled to medical benefits under 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.

The Act¹ requires in cases of injury prior to September 7, 1974² that a claim for compensation be filed within one year of the date of the injury or death. 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.³ 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.⁴ Because appellant was last exposed to asbestos on October 27, 1973, that is the date of injury.

However, if the injury is latent, the time for filing a claim does not begin to run until the employee has a compensable disability. 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.⁵

¹ 5 U.S.C. § 8101.

² 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).

³ *Edward Lewis Maslowski*, 42 ECAB 839 (1991); *Dorothy L. Sidwell*, 36 ECAB 699, 706 (1985).

⁴ *Maxine Leonard*, 39 ECAB 1180, 1184-85 (1988).

⁵ *See id.*

In the present case, the record suggests that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment and the compensable disability on August 5, 1986 the date appellant indicated on his claim form that he realized a causal relationship between his lung condition and his federal employment. The record contains a medical note from Dr. Laurenzi dated August 5, 1986, which diagnosed pulmonary fibrosis and appellant had acknowledged in oral and written statements that following chest x-rays in 1985 and a diagnosis in 1986 that he was aware of his lung condition. In a January 3, 2000 report, Dr. Hadley reported that appellant had a diagnosis of asbestosis and COPD since the mid eighties. Furthermore, appellant acknowledged that he had intended to file a claim in 1985, of which the incomplete CA-4 form dated May 6, 1987 is of record; however, he put it off due to personal problems. Despite the fact that no medical report containing a diagnosis, other than the 1986 report by Dr. Laurenzi, was provided by appellant with his claim, it is quite clear that appellant was aware of the possible relationship between his condition and his employment by August 5, 1986. The statute of limitations commenced on that date. Since appellant did not file a claim until January 15, 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 August 5, 1986.

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

The decision of the Office of Workers' Compensation Programs dated January 25, 2002 is hereby affirmed.

Dated, Washington, DC
December 3, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member