

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GERALD N. JONES and DEPARTMENT OF THE NAVY,  
NAVAL AIR WARFARE CENTER, China Lake, CA

*Docket No. 02-2233; Submitted on the Record;  
Issued February 13, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's requests for reconsideration.

On August 21, 2000 appellant, then a 71-year-old welder, filed a claim asserting that his occupational exposure to asbestos had caused asbestosis. He indicated that he first realized that the disease or illness was caused or aggravated by his federal employment on January 31, 1997.

In a decision dated June 11, 2001, the Office denied appellant's claim on the grounds that he failed to file a timely claim for compensation. The Office found that the three-year period for filing a claim began to run on January 31, 1997, the date appellant first realized that his condition was caused or aggravated by his employment. As he did not file a claim until August 21, 2000, the Office found that his claim was untimely. The Office also found that there was no evidence that appellant's immediate superior had actual knowledge of an injury or work-related condition within 30 days of the claimed events.

In a letter dated August 27, 2001, appellant advised the Office that the Veterans Administration had given him a disability rating of 30 percent for his lungs. He also advised where the Office could obtain his x-rays.

On January 14, 2002 appellant followed up to explain that he was requesting reconsideration. He stated that he had not been in good health, either physically or mentally, since he learned that he had asbestosis. Appellant noted problems getting additional evidence and he questioned how he could be responsible for filing a late claim when he was never properly advised of any time constraints and had no way of knowing the rules. He requested that his claim be accepted as timely and that all of the evidence submitted be considered in rendering a decision on his application.

In a decision dated February 15, 2002, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support thereof was insufficient to warrant a review of its prior decision.

On May 15, 2002 appellant again requested reconsideration. He argued that he was caught in a Catch-22 because he could not obtain the x-rays needed to have his claim reconsidered.

In a decision dated May 31, 2002, the Office denied appellant's claim for reconsideration because his letter neither raised substantive legal questions nor included new and relevant evidence.

An appeal to the Board must be mailed no later than one year from the date of the Office's final decision.<sup>1</sup> Because appellant mailed his August 22, 2002 appeal more than one year after the Office's June 11, 2001 decision denying his claim for compensation as untimely, the Board has no jurisdiction to review that decision. The only decisions the Board may review are the Office's February 15 and May 31, 2002 decisions denying his requests for reconsideration. Therefore, the only issue before the Board is whether the Office properly denied those requests.

The Board finds that the Office properly denied appellant's requests for reconsideration.

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) that receives an adverse decision. The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."<sup>2</sup>

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup>

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the

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<sup>1</sup> 20 C.F.R. § 501.3(d) (time for filing); *see id.* at § 501.10(d)(2) (computation of time).

<sup>2</sup> 20 C.F.R. § 10.605 (1999).

<sup>3</sup> *Id.* at § 10.606.

request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>4</sup>

Appellant's requests fail to meet at least one of the standards for obtaining a merit review of his case. The Office denied his claim on June 11, 2001 because he failed to file a claim within three years of January 31, 1997, the date he first realized that his disease or illness was caused or aggravated by his federal employment. Appellant's disability rating from the Department of Veterans Affairs and the location of his x-rays are irrelevant; they have no bearing on whether he filed a claim for compensation within the applicable time limitation. The x-rays themselves, had appellant obtained them and submitted them to the Office, have nothing to do with the timeliness of his claim.

Section 8122(a) of the Act<sup>5</sup> provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless:

“(1) The immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death; or

“(2) Written notice of injury or death as specified in section 8119 was given within 30 days.”<sup>6</sup>

Section 8122(b) provides that, in a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware or by exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment. In such a case, the time for giving notice of injury begins to run when the employee is aware or by the exercise of reasonable diligence should have been aware, that his condition is causally related to his employment, whether or not there is a compensable disability.<sup>7</sup>

The time limitations in section 8122(a) and (b) do not (1) begin to run against a minor until he reaches 21 years of age or has had a legal representative appointed, (2) run against an incompetent individual while he is incompetent and has no duly appointed legal representative,

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<sup>4</sup> *Id.* at § 10.608.

<sup>5</sup> 5 U.S.C. § 8122(a).

<sup>6</sup> Section 8119 provides that a notice of injury or death shall be given within 30 days after the injury or death; to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury or in the case of death, the employment factors believed to be the cause; and be signed by and contain the address of the individual giving the notice.

or (3) run against any individual whose failure to comply is excused by the Secretary on the ground that such notice could not be given because of exceptional circumstances.<sup>7</sup>

Appellant stated that he had not been in good health, either physically or mentally, since he learned he had asbestosis, but he did not allege mental incompetence for the entire three-year period beginning January 31, 1997. His problems getting additional evidence and his ignorance of the law have no tendency to excuse his failure to file a claim within the applicable limitation period.

Because his requests failed to meet at least one of the standards for obtaining a merit review of his claim, the Board will affirm the denial of those requests.

The May 31 and February 15, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC  
February 13, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>7</sup> *Id.* at § 8122(d).