

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL N. INFINGER and DEPARTMENT OF THE NAVY,
CHARLESTON NAVAL SHIPYARD, Charleston, SC

*Docket No. 02-110; Submitted on the Record;
Issued March 24, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant's occupational disease claim was timely filed; and (2) whether appellant timely filed a request for an oral hearing.

On June 18, 2001 appellant, then a retired federal employee, filed a claim for occupational disease alleging that his asbestosis was casually related to his prior federal employment. Appellant noted that he was initially aware of his condition and its causal relationship to his employment on November 15, 1995. The employing establishment noted that appellant's last exposure was in 1992. In an attached narrative, appellant stated that he had been employed intermittently by the employing establishment from 1962 to 1970 and again from 1975 to 1992. Appellant noted that during his employment he was required to work frequently with asbestos-containing materials and noted that after 1975 the employing establishment was aware of the hazards of asbestos and provided him with protective equipment, air monitoring and medical surveillance.

In a report dated November 15, 1995, Dr. Stephen Schabel, Board-certified in radiology, stated that x-rays taken that day revealed a condition consistent with pneumoconiosis.

In a March 6, 1996 report, Dr. Cary E. Fechter, Board-certified in pulmonary medicine, noted that appellant's lung bases had fibrotic cackles, "but with the paucity of symptoms, I would not classify him at this time as having asbestosis."

In a July 23, 1999 report, Dr. Fechter noted a familiarity with appellant's history of employment including his unprotected exposure "to airborne asbestos articles" while employed by the Charleston Naval Shipyard from 1962 to 1970. He noted that appellant's job duties included removing and replacing asbestos-insulation in naval vessels in this time period. From 1975 to 1992 appellant was again exposed to asbestos-related materials while employed by the employing establishment as an installer and later as an instructor. Upon examination, Dr. Fechter related that appellant noted a shortness of breath from two years prior. He noted that pulmonary function tests revealed a mild reduction in his pulmonary function and parameter

abnormalities “which are consistent with a restrictive lung disease, as seen with asbestosis.” The physician noted that July 9, 1999 x-rays revealed an increased prominence of opacities, which is “consistent with asbestosis.” Dr. Fechter further noted that appellant’s forced expiratory volume in one second (FEV-1) was 81 percent of predicted levels and his FEV1/FVC (forced vital capacity) ratio was consistent with restrictive lung disease. He added that appellant has asbestosis.

By decision dated June 29, 2001, the Office of Workers’ Compensation Programs noted that appellant’s date of injury was November 15, 1995 and that since his claim was dated June 18, 2001, it denied the claim on the grounds that it did not meet the guidelines for timeliness. Specifically, the Office noted that the Federal Employees’ Compensation Act¹ requires a claim to be filed within three years of the date of injury, or three years after the date of awareness of a relationship between a claimant’s condition and his employment, unless the supervisor was aware of the injury within 30 days of the incident. Appellant’s claim was filed on June 18, 2001; the Office noted that appellant should have been aware of a causal relationship between his condition and his employment on November 15, 1995 and thus his claim was filed beyond the three-year time limit.

By letter postmarked August 4, 2001, appellant requested an oral hearing.

By decision dated September 6, 2001, the Branch of Hearings and Review, denied appellant’s request for an oral hearing on the grounds that it was untimely filed and noted that the claimant could request reconsideration from the Office and introduce new evidence at that time.

The Board finds that the case is not in posture for decision.

In cases of injury on or after September 7, 1974, section 8122(a) of the Act states that “an original claim for compensation for disability or death must be filed within three years after the injury or death.” Section 8122(b) of the Act provides that, in latent disability cases, the time limitation does not begin to run until the claimant is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between the employment and the compensable disability. The Board has held that, if 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.

Appellant indicated that he first became aware of a possible connection between his asbestosis and his employment in 1995, however, the record reveals that the initial diagnosis of a work-related asbestosis was on July 23, 1999 when his physician, on the basis of diagnostic tests, so advised him. As appellant filed his occupational claim within three years of his date of awareness, his claim of June 18, 2001 is timely filed under section 8122(b).

Since the claim was timely filed, the Office’s decisions must be reversed and set aside. The case is remanded to the Office for a decision on the merits.

¹ 5 U.S.C. §§ 8101-8193.

The decisions of the Office of Workers' Compensation Programs dated September 6 and June 29, 2001 are reversed and set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
March 24, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member