

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of THOMAS D. SALINAS and DEPARTMENT OF THE AIR FORCE,  
KELLY AIR FORCE BASE, TX

*Docket No. 03-1691; Submitted on the Record;  
Issued January 20, 2004*

---

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim on the grounds that he failed to file his claim within the applicable time limitation of the Federal Employees' Compensation Act; and (2) whether the Office properly denied appellant's request for reconsideration.

On March 8, 2001 appellant, then a 59-year-old former machine shop helper, filed an occupational disease claim (Form CA-2) alleging that he developed a seizure disorder due to exposure to hazardous chemicals during his federal employment.<sup>1</sup> He stated that he first became aware of his seizure condition and its relationship to his employment on September 5, 1967. Appellant left federal employment in February 1968 after 11 months of service.

Accompanying his claim, appellant submitted a report from an acting chief at the employing establishment, James L. Warrington, dated June 12, 1967 which noted that appellant underwent a physical examination to determine his ability to perform his job as a machine shop helper and advised that appellant suffered a seizure while at work on May 5, 1967. A medical consultation report dated June 21, 1967, prepared by Dr. O. Wilson, an internist, indicated that appellant's seizure episode in May 1967 was the result of being drunk the night before, sleep deprivation and working with a chemical solution which contained heavy fumes. Appellant further reported that he had episodes of weakness while serving in the military from April 1964 to April 1966. In a report dated September 5, 1967, Dr. Robert A. Masters, a family practitioner, noted that appellant was treated for headaches and convulsions which occurred when he was at work. He noted that appellant did not have a history of seizures and noted that his physical examination was essentially normal. Dr. Masters diagnosed appellant with convulsive disorder of an undetermined etiology. An electroencephalogram (EEG) report dated August 13, 1992 noted a history of seizure disorder since 1968. A report from Dr. Manuel Farina, a psychiatrist, dated March 13, 2001 advised that appellant had been under his care since 1987 for treatment of

---

<sup>1</sup> Appellant filed a similar claim on March 20, 2001.

a panic disorder after developing seizures. He noted that appellant was exposed to gas chemicals while working at the employing establishment in 1967. Appellant also submitted a narrative statement dated October 18, 1994 and advised that he was exposed to a strong chemical while working at the employing establishment in May 1967 and resigned one year later. He noted that he had developed grand mal seizures, phobia and amnesia as a result of this exposure. Appellant also noted that he was exposed to trichloroethylene, a chemical he used to clean aircraft parts.

By letter dated May 22, 2001, the employing establishment controverted appellant's claim. The employing establishment questioned whether appellant had workplace chemical exposure and whether he had a preexisting condition. The employing establishment also asserted that appellant did not file a timely claim because he stated on his Form CA-2 that he was aware that his condition was caused or aggravated by his employment on September 5, 1967.

By letter dated August 10, 2001, the Office requested additional information from appellant noting that the information submitted was insufficient to establish appellant's claim.

Appellant submitted a report from Dr. Masters dated May 10, 1967 noting that appellant was hospitalized for observation and was off work from May 8 to 11, 1967. In a narrative statement dated August 28, 2001, appellant noted his job duties and symptoms. On a separate statement dated August 31, 2001, appellant noted that he was exposed to a full concentration of the chemical substance eight hours a day and indicated that he first noticed his condition in 1967. He advised that the last day he was exposed to the chemical was in 1967 and that he gave notice to his employer of the condition in 1968.

By decision dated September 27, 2001, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that appellant's claim was timely filed in accordance with 5 U.S.C. § 8122.

In a letter dated October 24, 2001, appellant requested an oral hearing before an Office hearing representative. The hearing was held on July 30, 2002. Appellant submitted medical reports previously of record and several newspaper articles. The newspaper articles noted evidence of an incidence of illnesses from exposure to chemicals from the employing establishment. Appellant testified that he failed to file a claim for over 30 years because his condition caused him to have memory loss and anxiety. He noted that from 1967 to 1987 he did not have a regular physician and in 1987 he began treatment with Dr. Farina, a psychiatrist.

In a decision dated October 3, 2002, the hearing representative denied appellant's claim on the grounds that appellant failed to file his claim in a timely manner.

In a letter dated October 29, 2002 appellant filed a request for reconsideration. Appellant noted that, even though his claim was not filed in a timely manner, this would not negate his condition. He advised that he did not have a family physician to diagnose his condition and that he sustained memory loss as a result of the chemical exposure.

In a decision dated May 20, 2003, the Office denied appellant's application for review without conducting a merit review on the grounds that he had not submitted evidence relevant to the issue in the case, specifically the timely filing of the claim, and thus was insufficient to warrant review of the prior decision.

The Board finds that the Office properly denied appellant's claim on the grounds that he had not filed the claim within the applicable time limitation of the Act.

The Act requires in cases of occupational disease occurring prior to September 7, 1974 that a claim for compensation be filed within one year of the date that the claimant is aware, or reasonably should have been aware, that his condition may have been caused by factors of his employment. The requirement may be waived: (1) if the claim is filed within five years, and it is found that the failure to file 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 had not resulted from such failure.<sup>2</sup> The test for whether sufficient cause or reason was shown to justify the waiver of the one-year time limitation is whether a claimant prosecuted the claim with the degree of diligence which an ordinary prudent person would have exercised in protecting his right under the same or similar circumstances.<sup>3</sup>

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.<sup>4</sup> 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 exposure.<sup>5</sup> The Board notes that an employee need only be aware of a possible relationship between his "condition" and his employment to commence the running of the applicable statute of limitations.<sup>6</sup>

Appellant did not make a timely claim for an occupational disease. The record indicates that appellant's last exposure to the employment factors to which he attributed his injury was in February 1968, when he ceased working for the employing establishment. In the instant case, appellant stated that he had known since September 5, 1967 that his disease or illness was caused or aggravated by his employment. The time limitation in occupational disease claims where the employee continues to be exposed to injurious working conditions after such awareness runs on the date of injury which is the date of last exposure, in this case February 1968. Therefore, the Board finds that he had knowledge of the possible work-related nature of his illness as early as February 1968. Appellant, however, did not file his claim until March 8, 2001; more than 33 years after he ceased working for the employing establishment. Therefore, his claim was not filed within one year of the date of last exposure which appellant indicated on his Form CA-2 to be February 1968. The one-year filing requirement expired in February 1969. Even assuming waiver of the one-year filing requirement, appellant did not timely file within five years of February 1968. Appellant contends that he was unable to file any sooner because he lost his

---

<sup>2</sup> 5 U.S.C. § 8122(a) (1966); *see also* *Conrad M. Westerman*, 28 ECAB 109 (1976); *Eugene W. Broadway*, 5 ECAB 33 (1952).

<sup>3</sup> *Albert K. Tsutsui*, 44 ECAB 1004, 1006-07 (1993).

<sup>4</sup> *Emanuel T. Posluszny*, 47 ECAB 651, 654 (1996).

<sup>5</sup> *See William A. West*, 36 ECAB 525, 528-29 (1985).

<sup>6</sup> *Maxine Leonard*, 39 ECAB 1180 (1988).

memory. However, the Board has held that the five-year filing provision applicable to this case is a maximum, mandatory requirement, which may not be waived regardless of the reasons for, or the circumstances surrounding, the failure to file a claim within the prescribed time.<sup>7</sup>

The Board further finds that the Office properly denied appellant's request for reconsideration.<sup>8</sup>

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.<sup>9</sup> Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>10</sup>

Appellant's October 29, 2002 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant did not submit any relevant and pertinent new evidence along with his October 29, 2002 request for reconsideration.<sup>11</sup> Accordingly, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied appellant's October 29, 2002 request for reconsideration.

---

<sup>7</sup> *Ida Ambler*, 25 ECAB 116 (1974).

<sup>8</sup> 20 C.F.R. § 10.606(b)(2)(i-iii).

<sup>9</sup> 20 C.F.R. § 10.606(b)(2) (1999).

<sup>10</sup> 20 C.F.R. § 10.608(b) (1999).

<sup>11</sup> The record includes a certificate of appreciation from the Disabled American Veterans that was received on November 4, 2002. However, this certificate is not relevant to the issue of whether appellant filed a timely claim for compensation.

The decisions of the Office of Workers' Compensation Programs dated May 20, 2003 and October 3, 2002 are hereby affirmed.

Dated, Washington, DC  
January 20, 2004

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member