

**United States Department of Labor
Employees' Compensation Appeals Board**

CHARLES WALKER, Appellant

and

**DEPARTMENT OF THE ARMY, FORT POLK
ARMY BASE, Fort Polk, LA, Employer**

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**Docket No. 03-1732
Issued: January 8, 2004**

Appearances:
Charles Walker, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 23, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated June 10, 2003 denying his claim of occupational disease. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this issue.

ISSUE

The issue is whether appellant filed a timely claim for compensation under the Federal Employees' Compensation Act.

FACTUAL HISTORY

On September 20, 2002 appellant filed a notice of occupational disease and claim for compensation (Form CA-2). Appellant indicated that he worked in a building where asbestos was used in the building insulation. He described the nature of the disease as pneumonia, with shortness of breath, coughing, difficulty swallowing, fever, weight loss, as well as back and chest pains. In response to questions as to when he became aware of the illness, and when he first realized that it was caused or aggravated by employment, appellant reported September 21, 1970.

The reverse of the claim form is intended to be completed by the supervisor; although there is information provided, the employing establishment indicated that it did not complete the supervisor's section.

By letter dated October 21, 2002, the Office requested that appellant submit additional factual and medical evidence. By letter dated November 12, 2002, appellant indicated that he worked in 1965-1966 at an employing establishment training center issuing military clothing to soldiers.

In a decision dated February 11, 2003, the Office denied the claim on the grounds that appellant had not submitted sufficient medical evidence. Appellant requested reconsideration of his claim by letter dated February 17, 2003. The record contains a memorandum dated May 19, 2003 indicating that, according to the employing establishment, appellant worked from June 20 to July 8, 1968.

By decision dated June 10, 2003, the Office reviewed the case on its merits and determined that the evidence was insufficient to warrant modification.

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.¹ The Board may raise the issue on appeal even if the Office did not base its decision on the time limitation provisions of the Act.²

For injuries occurring prior to September 7, 1974, the time limitation provisions of the Act require that an injured employee file a claim for compensation within one year after the injury.³ The one-year requirement may be waived provided the claim is filed within five years and: (1) the failure to timely file was due to circumstances beyond the control of the employee; or (2) the employee has shown sufficient cause or reason in explanation of the late filing and material prejudice to the interest of the United States has not resulted.⁴

In a case involving a claim for an occupational illness, the time does not begin to run until the claimant is aware, or reasonably should have been aware, of the causal relationship between his condition and federal employment.⁵ The time limitations do not run against an incompetent individual while he is incompetent and has no duly appointed legal representative.⁶

¹ See *Charles W. Bishop*, 6 ECAB 571 (1954).

² *Id.*

³ 5 U.S.C. § 8122 (1968). Section 8122 was amended as of September 7, 1974 to provide the current three-year time limitation.

⁴ *Id.*; see also *Allen E. Grether*, 24 ECAB 76 (1972).

⁵ *William L. Gillard*, 33 ECAB 265, 268 (1981).

⁶ *Allen E. Grether*, *supra* note 4.

ANALYSIS

The evidence of record reveals that appellant worked in civilian federal employment in June and July 1968; he alleged that he was exposed to asbestos used as insulation in the building where he worked. The time limitation began to run when appellant knew, or reasonably should have known, of causal relationship between a condition and the asbestos exposure. On the claim form appellant clearly indicated that he was aware of the causal relationship between his condition and employment on September 21, 1970. The Board notes that appellant entered military service on September 23, 1970, and was discharged in December 1970.

Based on appellant's statement, the time limitation provision began to run on September 21, 1970. There is no evidence that appellant was incompetent or any other probative evidence of record that would toll the time limitation period beyond September 21, 1970. Accordingly appellant had one year from that date, September 21, 1971, to timely file a claim. Even if appellant were allowed the opportunity to present argument as to whether the one-year requirement should be waived under the pre-1974 section 8122, he must file the claim within five years. The five-year time limitation period is a mandatory maximum period and may not be waived by the Board or the Office for any reason.⁷

Appellant filed his claim on September 20, 2002. The mandatory five-year time limitation period expired on September 21, 1975. The Board accordingly finds that appellant's claim was not timely filed in this case based on the evidence of record.

The Board notes that, for injuries prior to September 7, 1974, a claimant could be entitled to medical benefits despite the failure to timely file a claim if written notice of injury was filed in accord with 5 U.S.C. § 8119 or if the immediate supervisor had actual knowledge of the injury within 48 hours after the occurrence of the injury.⁸ The reverse of the CA-2 filed in this case provides a date of June 1, 1966 as the date the employee first reported the condition to the supervisor. As the Board noted in the factual history, this information was not provided by the employing establishment. Moreover, it is inconsistent with the dates that appellant actually worked and inconsistent with the date appellant indicated that he became aware of the condition. The Board finds that the date provided is of little probative value in this case.

⁷ *James Stevenson Garner*, 26 ECAB 156 (1974).

⁸ *See, e.g., Ida Ambler*, 25 ECAB 116 (1974).

CONCLUSION

Appellant's claim is barred by the applicable time limitation provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 10 and February 11, 2003 be modified to reflect that appellant's claim was barred by the time limitation provisions of the Federal Employees' Compensation Act, and affirmed as modified.

Issued: January 8, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member