



He described the nature of his injury as a persistent sore throat alleged to be related to asbestos exposure. On June 18, 1985 appellant's supervisor addressed the asbestos issue:

“Investigation revealed that no asbestos material existed where the employee claims to have been exposed. Nonasbestos insulation had been removed from this area prior to this employee working there. Investigation cannot substantiate this claim.”

Appellant reported to the employing establishment health unit on June 12, 1985. He related the history of dust falling onto his face and stated that later in the evening he developed a cough with expectoration of yellow exudate, which was persistent until he saw his private physician, who prescribed Erythracin and a Medrol dosepack. A health unit physician gave an impression of “irritation of throat.” Chest x-rays obtained that date were reported to disclose no evidence of interstitial or pleural fibrosis and were classified as “0/0 according to ILO classification.” Dr. William K. Swann, a radiologist and “B” reader, diagnosed appellant's condition: “X-ray changes are insufficient for a positive diagnosis of asbestos associated chest disease at this time.” In an attending physician's report dated July 17, 1985, Dr. Richard L. Schultz, a Board-certified otolaryngologist, diagnosed chronic pharyngitis “possibly due to asbestos inhalation,” but he noted that the etiology of the condition was undetermined. Asked whether this was in any way related to the history reported, he stated: “Can not be specifically determined either way.”

The Office denied appellant's claim.<sup>1</sup>

On April 12, 2002 appellant, then retired on disability, filed an occupational disease claim alleging that his asbestos disease was a result of his federal employment: “I worked in maintenance in and around asbestos and I started coughing extremely bad. TVA sent me to their doctors in 1985.” He indicated that he first became aware of this disease on May 24, 1985. He indicated that it was also on May 24, 1985 that he first realized the disease was causally related to his federal employment. The manager of claims at the employing establishment received appellant's claim on July 15, 2002. She indicated that appellant first reported his condition to a supervisor on April 22, 2002. She also indicated that appellant was last exposed to the conditions alleged to have caused the disease on December 1, 1989.

On April 3, 2002 Dr. Antoin H. Mardini, a specialist in internal medicine, reported that he saw appellant on December 11, 2001 and March 20, 2002. He stated that appellant had asbestosis: “[Appellant] worked for TVA from 1973 to 1989 in many plants in maintenance and mechanics. He handled asbestos during that time. I believe his exposure to asbestos most likely came from the above-mentioned work environment.” Dr. Mardini reported that chest x-rays obtained on October 29, 2001 showed parenchymal abnormalities consistent with pneumoconiosis. He assessed parenchymal abnormalities consistent with asbestosis, bilateral lung fields.

In a decision dated December 20, 2002, the Office denied appellant's claim of asbestosis on the grounds that it was untimely filed. The Office found that his date of injury was

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<sup>1</sup> OWCP file no. 060373956.

December 1, 1989; that appellant's statement revealed he should have been aware of a relationship between his employment and the claimed condition on May 24, 1985; and that the evidence did not support that appellant's immediate supervisor had actual knowledge within 30 days of the date of injury.

Appellant requested an oral hearing before an Office hearing representative. At the hearing, which was held on July 30, 2003 he testified that he did not know about his lung condition in 1985, that he first became aware that he had asbestosis when he received a telephone call a few days prior to a medical report dated November 21, 2001.

In a decision dated December 15, 2003, the hearing representative affirmed the Office's December 20, 2002 decision.

Appellant requested reconsideration. He argued that he did report his injury immediately after becoming aware of the relationship between his job and his injury: "However, because the asbestosis did not show up in tests at the time, I was forced to wait until April 22, 2002 to file a claim with the proper evidence."

In a decision dated November 15, 2004, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. In a decision dated April 20, 2005, the Office again reviewed the merits of appellant's claim and denied modification.

### **LEGAL PRECEDENT**

A claimant seeking compensation under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,<sup>3</sup> including that he filed his claim within the applicable time limitation.<sup>4</sup>

Section 8122(a) of the Act provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.<sup>5</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 the exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment.<sup>6</sup>

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

<sup>4</sup> *Paul S. Devlin*, 39 ECAB 715 (1988); *Emmet L. Pickens*, 33 ECAB 1807 (1982); *Kathryn A. O'Donnell*, 7 ECAB 227 (1954).

<sup>5</sup> 5 U.S.C. § 8122(a).

<sup>6</sup> *Id.* at § 8122(b).

## ANALYSIS

The incident on May 24, 1985, in which dust fell onto appellant's face as he was letting down a circulator pump, is not dispositive. No physician at that time suggested to appellant that he had any pulmonary condition that was possibly related to asbestos exposure at work. The impression of a health unit physician on June 12, 1985 was simply "irritation of throat." Chest x-rays obtained that date were reported to disclose no evidence of interstitial or pleural fibrosis. A specialist interpreted x-ray changes to be insufficient for a positive diagnosis of asbestos-associated chest disease. And Dr. Schultz, the otolaryngologist, diagnosed chronic pharyngitis, "etiology unknown." He stated that it could not be determined whether this condition was in any way related to the history appellant reported.

It is inconsequential that appellant indicated on his April 12, 2002 claim form that he first became aware of his asbestos disease on May 24, 1985 or that this was the date he first realized that his asbestos disease was causally related to his federal employment. Based on the medical evidence, appellant did not have an asbestos-related disease in 1985, nor was it reasonable for him to believe that he had such a compensable disability, as that phrase is used in the Act.

The Board has held that an employee's "concern" with regard to his history of asbestos exposure at work is not sufficient to begin the three-year period for filing a claim in the absence of medical evidence providing a diagnosis of some asbestos-related respiratory condition and raising the possibility that exposure to asbestos in the workplace caused or contributed to that condition.<sup>7</sup> It would be patently unjust, the Board has stated, to require an employee to file a claim for an asbestos-related respiratory ailment "without positive medical evidence in support of his claim merely upon his concern for his history of asbestos exposure in his employment."<sup>8</sup>

In this case, appellant was not aware, nor should he reasonably have been aware, that he had any asbestos-related pulmonary condition possibly related to his former federal employment until he received a telephone call a few days before a November 21, 2001 medical report. According to his testimony on July 30, 2003, this was the first he learned that he was diagnosed with an asbestos-related pulmonary condition. Dr. Mardini reported that chest x-rays on October 29, 2001 showed parenchymal abnormalities consistent with pneumoconiosis and asbestosis. On April 3, 2002 he stated that appellant had asbestosis and that his exposure to asbestos most likely came from his work environment at the employing establishment. From this evidence the Board finds that the three-year statute of limitations for filing a claim did not begin to run until October 29, 2001, at the earliest, because appellant's prior suspicions were not earlier supported by a medical diagnosis of an asbestos-related condition. For this reason, his April 12, 2002 claim for compensation, received on July 15, 2002, is considered timely filed.

The Board will set aside the Office's November 5, 2004 and April 20, 2005 decisions and remand the case for further development and an appropriate final decision on appellant's claim for compensation.

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<sup>7</sup> *Edward C. Hornor*, 43 ECAB 834 (1992) (distinguishing other cases).

<sup>8</sup> *Id.* at 840.

**CONCLUSION**

The Board finds that appellant filed a timely claim for compensation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 20, 2005 and November 5, 2004 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this opinion.

Issued: August 16, 2005  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board