

FACTUAL HISTORY

On June 28, 2002 appellant, then a 50-year-old who had retired from the employing establishment effective October 28, 1996,¹ filed an occupational disease claim alleging that he developed asbestosis as a result of his federal employment. He noted that he had first become aware of the disease on August 15, 1995 and had first realized that it was connected with his employment on December 1, 1995. Appellant indicated that he had a mental problem which kept him from timely filing his claim. The employing establishment controverted the claim. The employing establishment indicated that appellant first notified his supervisor of his condition on July 20, 2002.

In a medical report dated August 8, 1995, Dr. Ray A. Harron, a physician who is Board-certified in nuclear medicine, first indicated that appellant had asbestosis. In answer to questions from the Office, appellant indicated that he first saw a physician regarding respiratory or asbestos-related disease in August 1995.

In a decision dated December 3, 2003, the Office denied appellant's claim as it found that he had not established that his asbestosis was caused by his federal employment. Appellant requested an oral hearing. In a decision dated August 30, 2004, the hearing representative found that this case was not in posture for decision, noting that it appeared that appellant's claim was not timely filed, and that the Office must further develop the factual evidence and determine if the claim was timely filed.

By letter dated December 10, 2004, the Office propounded questions to appellant. The Office inquired as to when appellant first noticed that he had a lung condition and the date that he first realized the lung condition was connected to the work exposure. In an undated response received by the Office on January 6, 2005, appellant indicated, *inter alia*, that when he left the employing establishment he had a mental condition which prevented his timely filing of the claim. Appellant attached a letter that he allegedly had written to the employing establishment on December 15, 1995 noting that he was exposed to asbestosis during his tenure at the employing establishment.

By decision dated February 9, 2005, the Office denied appellant's claim as it was not timely filed. The Office found that, as appellant's date of injury was December 1, 1995, he "should have been aware of a relationship between [his] employment and the claimed condition by December 1, 1998." Additionally, the Office found that the evidence does not establish that the immediate supervisor had knowledge within 30 days.

On April 12, 2005 appellant requested reconsideration. In support thereof, appellant submitted a copy of a settlement between appellant and a private company.

By decision dated May 4, 2005, the Office denied appellant's request for reconsideration on the grounds that the submitted evidence was irrelevant as it failed to establish that he timely notified the employing establishment of his condition and its employment relationship.

¹ In a later statement, the employing establishment indicated that appellant's last day was March 27, 1996.

LEGAL PRECEDENT -- ISSUE 1

Section 8122(a) of the Federal Employees' Compensation Act² states that an original claim for compensation for disability or death must be filed within three years after the injury or death.³ Section 8122(b) 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.⁴ 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.⁵

The claim would still be regarded as timely under section 8122(a)(1) of the Act if the immediate supervisor had actual knowledge of the alleged employment-related injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of appellant's injury.⁶ An employee must show not only that his immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.⁷ The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.⁸

The time limitations do not run against an incompetent individual while he is incompetent and has no duly appointed legal representative.⁹ It is appellant's burden to show that she is incompetent for a given period by submitted medical evidence stating that her condition was such that she was not capable of filling out a form or otherwise furnishing the relatively simple information necessary for filing a claim and satisfying the time limitation requirements.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that the evidence of record establishes that appellant did not timely file a claim for compensation under the Act. Appellant indicated that he first became aware of his medical condition on August 15, 1995 and first realized that it was related to his employment on

² 5 U.S.C. § 8122(a).

³ *Id.*

⁴ 5 U.S.C. § 8122(b).

⁵ See *Larry E. Young*, 52 ECAB 264 (2001); *Garyleane A. Williams*, 44 ECAB 441 (1993); *Alicia Kelly*, 53 ECAB 244 (2001).

⁶ 5 U.S.C. § 8122(a)(1); see also *Jose Salaz*, 41 ECAB 743 (1990); *Kathryn A. Bernal*, 38 ECAB 470 (1987); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(a)(3) (March 1993).

⁷ *Charlene B. Fenton*, 36 ECAB 151 (1984).

⁸ *Debra Young Bruce*, 52 ECAB 315 (2001).

⁹ *Charles Walker*, 55 ECAB ____ (Docket No. 03-1732, issued January 8, 2004).

¹⁰ *Linda J. Reeves*, 48 ECAB 373, 376 (1997).

December 1, 1995. Appellant did not file his claim until June 28, 2002, or six and one-half years after he alleged that he first became aware of his condition's relationship to his employment. Therefore, it was filed outside of the three-year time limitation period under section 8122(b). As appellant continued to work for the employing establishment until, at the latest, October 28, 1996, his claim would have been timely if filed by October 28, 1999; however, the claim was not timely filed under this criteria either.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor had actual knowledge of the injury 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.¹¹ The record contains no evidence that appellant's supervisor had actual knowledge of the injury or that written notice of the injury was given within 30 days, as he did not notify his immediate supervisor until July 20, 2002 of an on-the-job injury. Although appellant submitted a statement purportedly to the employing establishment dated December 15, 1995 indicating his exposure to asbestos, he did not state that he had contracted a condition due to employment exposure. As he must not only claim an injury but also its relationship to his federal employment, the Board finds that appellant's statement is insufficient.¹²

Appellant also contends that the time limitation should not run against him because he had a mental condition which prevented the timely filing of the claim. There is no medical report in the record that establishes that appellant was incompetent at any time within the meaning of the Act. Accordingly, the Board finds that appellant did not timely file his claim.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, 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.¹³

ANALYSIS -- ISSUE 2

Appellant's 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.

The only evidence appellant submitted with his reconsideration request were papers regarding his settlement with a private company with regard to asbestos exposure. These documents are not relevant to the issue in this case, *i.e.*, whether appellant timely filed his claim.

¹¹ 5 U.S.C. § 8122(a)(1); *see Jose Salaz, supra note 6; Kathryn A. Bernal, supra note 6.*

¹² *See Charlene B. Fenton, supra note 7.*

¹³ 20 C.F.R. § 10.606(b)(2)(i-iii).

The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.¹⁴

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's occupational disease claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. The Board further finds that the Office properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 4 and February 9, 2005 are affirmed.

Issued: December 9, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ See *David J. McDonald*, 50 ECAB 185 (1998).