

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

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**LENARD MARQUES, Appellant**

**and**

**DEPARTMENT OF THE ARMY, PUEBLO  
ARMY DEPOT, Pueblo CO, Employer**

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**Docket No. 04-2239  
Issued: June 16, 2005**

*Appearances:*  
*Lenard Marques, 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  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On September 15, 2004 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated September 24, 2003 and July 28, 2004 which found that appellant's claim was barred as it was not timely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the time limitation issue in this case.

**ISSUE**

The issue is whether appellant's claim was timely filed.

**FACTUAL HISTORY**

On May 13, 2003 appellant, then a 69-year-old retired production controller, filed an occupational disease claim alleging that in 2000 he was diagnosed with lymphoma cancer. Appellant indicated that in 1969 he was paralyzed on the right side of his face and that in 1970 he was paralyzed on the left side of his face. He noted that in 1975 a tumor above his left eye was removed which was caused by working around chemicals and he was put on disability retirement. He indicated on the form that he first realized that the disease or illness was caused or aggravated by his employment in 1969.

In a form dated October 7, 1975, the employing establishment indicated that appellant was physically unable to perform the duties of his position and retired on disability on October 6, 1975.

Appellant had a biopsy on February 21, 2000 which was interpreted as showing no definite hemangioma, no carcinoma, amyloidosis, changes consistent with chronic hepatitis with Grade 1 activity and stage 0 fibrosis. Appellant saw Dr. Joel D. Ohlsen, a Board-certified radiologist, from February 28, 2000 to October 1, 2001 and received radiation treatment. A hospital discharge summary dated March 11, 2000 indicated that appellant was discharged on March 11, 2000 after receiving a course of chemotherapy and that at that time Dr. Marlow M. Sloan, a Board-certified internist specializing in medical oncology, listed his impression of appellant as: (1) retropharyngeal carcinoma with extensive cervical lymphadenopathy; hypertension, history of transient ischemic attack and abnormal liver scan thought to be due to hemangioma. In a March 18, 2002 report, Dr. Sloan indicated that appellant had undifferentiated carcinoma of the nasopharynx and neck currently without evidence of the disease and loss of teeth related to dryness from the radiation therapy as well as evidence of osteoradiant necrosis based on historical information.

In a statement dated May 13, 2003, appellant stated, "In the year 2000 I was diagnosed with cancer lymphoma (cancer of the lymph node) and the doctor also states that it was caused by the chemicals I was exposed to at the [employing establishment]."

The employing establishment submitted a response to the Office's queries indicating that appellant commenced working for them on May 17, 1951 and worked at various jobs until he took disability retirement on October 6, 1975. The employing establishment indicated that its first awareness of appellant's condition was on April 2, 2003.

By decision dated September 24, 2003, the Office denied appellant's claim as it was not timely filed.

A hearing was held, at appellant's request, on April 28, 2004. The hearing representative also tried to determine from appellant when he became aware of a causal relationship. He indicated that he knew that his previous sickness was caused by chemicals. Then the hearing representative asked appellant's daughter when she made the connection after the diagnosis in January or February 2000. She responded, "It was a while." After being pressed to come up with an exact date, she replied, "I would say it was early 2001."

By decision dated July 28, 2004, the hearing representative affirmed the September 24, 2003 decision, finding that appellant's claim was barred as it was untimely filed. She indicated that appellant has not met his burden for establishing that his claim was filed in a timely manner. She also indicated that the case record was void of any medical opinion supporting that claimant's condition was causally related to his federal employment.

## LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,<sup>1</sup> a claimant has three years to file a claim for compensation.<sup>2</sup> In the case of an occupational disease, the Board has held that the time for filing a claim does not begin to run until the employee first becomes aware, or by the exercise of reasonable diligence should have been aware, of a causal relationship between his condition and his employment.<sup>3</sup> When an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitation period even though he does not know the precise nature of the impairment or whether the ultimate result of such affect would be permanent or temporary.<sup>4</sup>

## ANALYSIS

The Office's September 24 decision finding the claim untimely found that, without any explanation, "You should have been aware of a relationship between your employment and the claimed condition by February 28, 2000 when the medical records you provided show that you had undifferentiated carcinoma..." The hearing representative affirmed this unexplained finding by stating, "The claimant's cancer diagnosis was made in January or February 2000 and the Office found the claimant should have been aware of the connection by February 28, 2000 and the time limitation begins to run on that date." The Board finds that these findings do not adequately explain how appellant, by the exercise of reasonable diligence, should have known of a causal connection between his employment and the diagnosed condition."

Appellant had not been exposed to any damaging chemicals since he retired in 1975. Appellant was informed that he had cancer in February 2000. The Office indicated that this date began the time period running for when appellant was aware or reasonably should have been aware of a possible relationship between his condition and his employment. However, the date that appellant was informed that he had cancer did not start the tolling of the three-year limitation period for filing his claim. Not only did appellant have to be informed of the cancer, but he also needed to be reasonably aware of the connection with his cancer and his employment of some 25 years earlier. Appellant's indication on his claim form that he became aware of the connection between his employment and his injury in 1969 was obviously incorrect. Appellant may have known at that time that the chemicals that he was exposed to at work were having an adverse impact on his health; there is no way that he would be able to tell that 31 years in the future he would develop cancer. Appellant stated on May 13, 2003 that he was diagnosed with cancer in 2000 and that the doctors told him that it was caused by the chemicals he was exposed to during his federal employment. However, the record does not indicate that any physician told appellant

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<sup>1</sup> 5 U.S.C. § 8122.

<sup>2</sup> *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); see 20 C.F.R. § 10.101(b).

<sup>3</sup> *Leo Ferraro*, 47 ECAB 350, 356 (1996).

<sup>4</sup> *Id.* at 357.

that his cancer was causally related to his federal employment. Furthermore, appellant's statement does not indicate when the doctors told him of the alleged connection. The hearing representative attempted to get appellant or his daughter to state when they became aware of the connection between appellant's cancer and his employment. Appellant never indicated when he became aware of the connection; he merely indicated that he knew that his previous illnesses were caused by the chemicals. There is no indication in the record that appellant was aware of the connection prior to that time, nor is there any reason to believe that appellant should have been able to make an immediate connection between his diagnosis of cancer in 2000 and the job he left 25 years prior.

Appellant filed his claim on May 13, 2003. Appellant was not a physician; he could not have been expected to make the connection between his cancer and his prior employment immediately. Accordingly, the Office improperly determined that appellant's claim was untimely filed.

Although the hearing representative indicates that the record is void of any medical opinion supporting that the claimant's condition was related to his employment, the Office has not fully considered or developed the medical evidence. Accordingly, on remand, the Office should consider and, if necessary, further develop, the medical evidence.

#### **CONCLUSION**

The Office improperly determined that appellant's claim was untimely filed.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 28, 2004 and September 24, 2003 are set aside and this case is remanded for further consideration consistent with this opinion.

Issued: June 16, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member