

reverse of the form, appellant's supervisor indicated that appellant stopped work and retired effective June 21, 1999.

In support of his claim, appellant submitted a report dated May 1, 2001 from Dr. Jay T. Segarra, a Board-certified pulmonologist, which noted that appellant reported exposure to asbestos materials while working at the employing establishment as an electroplater. Appellant also reported smoking up to one pack of cigarettes daily for 40 years. Dr. Segarra found a diffuse interstitial pattern of small irregular linear opacities within the mid and lower lung zones on chest x-ray. There were pleural plaques present some of which were calcified, characteristic of asbestos-related disease. Appellant's pulmonary function testing demonstrated a borderline restrictive defect with very slightly reduced diffusion capacity. Dr. Segarra diagnosed mild pulmonary asbestosis based on the interstitial changes on chest x-ray and the exposure history. He stated that appellant has increased risk for development of bronchogenic carcinoma, mesotheliomas as well as for deterioration in pulmonary function.

In letters dated October 28, 2004, the Office requested additional factual and medical evidence from appellant and the employing establishment. The employing establishment responded on November 29 and December 21, 2004 and denied that appellant had any asbestos exposure while working there. The employing establishment also noted that appellant's claim was not timely filed. The employing establishment provided appellant's health records including pulmonary function testing on June 23, 1980, May 21, 1982, April 10, 1985, May 28, 1986, August 31, 1987, February 28, 1989 and January 10 and August 5, 1991. Appellant passed his pulmonary function test and was approved for unlimited respirator use on January 10, 1991 and May 18, 1993. He was assigned a respirator on January 10, 1991 and May 10, 1993.

The employing establishment also submitted a notification of personnel action dated June 8, 1994 and effective June 21, 1994 noting that appellant retired.

By decision dated February 8, 2005, the Office denied appellant's claim on the grounds that it was not timely filed. The Office found that appellant's claim was not filed within three years of his date of last exposure, June 21, 1999 and that the evidence did not support that his immediate supervisor had actual knowledge of his condition.

Appellant requested a review of the written record on February 14, 2005. By decision dated July 7, 2005, the hearing representative affirmed the Office's February 8, 2005 decision noting that appellant retired on June 21, 1994 rather than June 21, 1999 and that the time for filing his claim began on the date that he retired. The hearing representative further found that there was no evidence in the record that appellant's supervisor had actual knowledge of a relationship between appellant's condition and his employment within 30 days from his retirement.

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

In cases of injury on or after September 7, 1974, 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. Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless:

“(1) the immediate superior had actual knowledge of the injury or death with 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death; or

“(2) written notice of injury or death as specified in section 8119 was given within 30 days.”³

The three-year time period begins to run from the time the employee is aware or by the exercise of reasonable diligence should have been aware, that his or her condition is causally related to the employment. For actual knowledge of a supervisor to be regarded as timely filing, an employee must show not only that the immediate supervisor knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.⁴

Even if an original claim for compensation for disability or death is not filed within three years after the injury or death, compensation for disability or death may be allowed if written notice of injury or death as specified in section 8119 was given within 30 days. Section 8119 provides that a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury or in the case of death, the employment factors believed to be the cause, and be signed by and contain the address of the individual giving the notice.⁵ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.⁶

¹ 5 U.S.C. §§ 8101-8193; *David R. Morey*, 55 ECAB ____ (Docket No. 04-967, issued August 16, 2004); *Charles Walker*, 55 ECAB ____ (Docket No. 03-1732, issued January 8, 2004).

² *Id.*

³ 5 U.S.C. § 8122(a).

⁴ *Duet Brinson*, 52 ECAB 168 (2000).

⁵ *Larry E. Young*, 52 ECAB 2645 (2001).

⁶ *Aura L. Harrison*, 52 ECAB 515 (2001).

In the case of occupational disease, the time for filing a claim begins to run when the employee first becomes aware or reasonably should have been aware, of a possible relationship between his condition and his employment. 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 temporary or permanent.⁷ Where the employee continues in the same employment after he or she reasonably should have been aware that he or she has a condition which has been adversely affected by factors of the federal employment awareness, the time limitation begins to run on the date of the last exposure to the implicated factors.⁸ The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.⁹

ANALYSIS

Appellant filed an occupational disease claim on October 14, 2004 alleging that employment exposures to asbestos caused his asbestosis. The record indicates that his retirement was effective June 21, 1994. As noted above, in an occupational disease claim, the time limitation begins to run on the date of the last exposure to the implicated factors, in this case appellant's last day of employment. Thus, the three-year limitation began to run on June 21, 1994. Appellant's October 14, 2004 claim was not timely filed within three years of June 21, 1994. Additionally, the evidence shows that he was aware of the alleged relationship of his condition to his employment prior to June 21, 1994, as appellant's claim form clearly indicated that he was aware of his condition on July 1, 1992 and first related this condition to his employment on June 10, 1994. Consequently, there is no evidence to support that the time limitation began to run any later than June 21, 1994.

The statute further provides that a claim may be regarded as timely if an immediate superior has actual knowledge of the injury within 30 days, such that the immediate superior was put reasonably on notice of an on-the-job injury.¹⁰ The record contains pulmonary function studies from the employing establishment which indicated that appellant was fully capable of using a respirator. Furthermore, the employing establishment has denied that appellant was exposed to asbestos in his federal job duties. These facts do not establish that appellant's supervisor's knew he had a lung condition nor that they knew or should have known that his condition was caused by his employment.¹¹ There is no probative evidence to establish that appellant's superiors had actual knowledge, sufficient to put them reasonably on notice, that his asbestosis was work related within 30 days of June 21, 1994 the date he retired.

⁷ *Larry E. Young, supra* note 5.

⁸ *Id.*

⁹ *Debra Young Bruce, 52 ECAB 315 (2001).*

¹⁰ *David R. Morey, 55 ECAB ____ (Docket No. 04-967, issued August 16, 2004).*

¹¹ *Id.*

CONCLUSION

The Board finds that appellant's claim is barred by the applicable time limitation provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the June 5 and February 8, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 24, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board