

40-year-old postmaster, was struck and killed instantly by a train while retrieving a sack of parcels from a rail yard drop point.¹

In an April 14, 2004 letter, appellant recalled that, on December 10, 1954, an employing establishment representative visited the employee's home and made a cash payment of the employee's salary to her husband, John William Etter.² He asserted that, during this visit, the employing establishment failed to inform the employee's family of their possible entitlement to death benefits. Also, he alleged that the employing establishment did not contact the employee's family after December 10, 1954. At the time of her death, the employee had five minor children, ages 4 to 17. Appellant's birth date is December 21, 1939.

By decision dated February 25, 2005, the Office denied appellant's claim on the grounds that it was not timely filed.³ The Office explained the one-year time limitation for filing a survivor's benefits claim for a death occurring prior to September 7, 1974. As appellant was a minor at the time of the employee's death, the one-year time limitation was tolled until one year after his 21st birthday. However, appellant did not file the claim for death benefits until December 27, 2004, more than 40 years after his 21st birthday on December 21, 1960. The Office also found that appellant did not assert or establish that incompetence or exceptional circumstances prevented him from filing a timely claim.

In a March 16, 2005 letter, appellant requested reconsideration. He asserted that his claim for death benefits was timely as the employee's immediate supervisor had actual notice of her death within 48 hours.

In a May 5, 2005 letter, the Office advised appellant that it had reopened his claim. The Office requested that appellant submit "a statement from [his] mother's immediate supervisor that clearly states that he/she was notified of her death within 48 hours of its happening."

Appellant submitted an affidavit from Lawrence G. Moon, a coroner, asserting that, on December 8, 1954, he advised appellant's immediate supervisor, Jerome F. Davenport, of the circumstances of the employee's death.⁴ Appellant also submitted newspaper clippings and forensic photographs indicating that the employee's death was public knowledge by December 10, 1954.

By decision dated October 31, 2005, the Office denied appellant's claim on the grounds that it was not timely filed. The Office explained that, for deaths occurring between December 7, 1940 and September 6, 1974, section 8122(a)(1) of the Federal Employees' Compensation Act provided that an original claim for death benefits "shall be made within one

¹ A December 10, 1954 death certificate confirms that the employee died on December 8, 1954 from massive head trauma after being struck by a train.

² John William Etter, the employee's husband, died on December 23, 1978.

³ The Office noted that it would not address the issue of whether the employee's death occurred in the performance of duty.

⁴ Appellant submitted a death certificate indicating that Mr. Davenport died on November 23, 2003.

year after the death.” Section 8122(d)(1) of the Act provided that the one-year time limitation did not begin to “run against a minor until he [turned] 21 or ha[d] a legal representative appointed.” The Office noted that appellant turned 21 on December 21, 1960. The Office found that, as appellant “did not file a death claim within one year of that date, or even within five years of that date, he did not file his claim in a timely manner. [Appellant had] not established that he was incompetent and therefore that exception d[id] not apply.” The Office apologized for “leading [appellant] to believe that obtaining evidence that the immediate supervisor had within 48 hours, actual knowledge of the injury would be sufficient to establish this claim.” The Office explained that the 48-hour rule applied only to claims for nonfatal injuries and not to claims for death benefits.

LEGAL PRECEDENT

Prior to the September 7, 1974 amendments, section 8122 of the Act provided a maximum five-year limitation for making a claim for compensation. Section 8122(a)(1) of the Act provided that an “original claim for compensation ... for death shall be made within one year after the death.... However, the Secretary of Labor may allow an original claim for disability to be made within one year after the injury for reasonable cause shown.”⁵

Section 8122(c) of the Act⁶ provides:

“(c) The Secretary may waive compliance with the requirements of this subchapter for giving notice of injury and for filing claim for compensation for disability or death if--

- (1) a claim is filed within 5 years after the injury or death; and
- (2) the Secretary finds--
 - (A) that the failure to comply was due to circumstances beyond the control of the individual claiming benefits; or
 - (B) that the individual claiming benefits has shown sufficient cause or reason in explanation of, and material prejudice to the interest of the United States has not resulted from the failure.

“(d) The time limitations in subsections (a)-(c) of this section do not--

- (1) begin to run against a minor until he reaches 21 years of age or has had a legal representative appointed; or

⁵ 5 U.S.C. § 8122(a) (1966).

⁶ 5 U.S.C. § 8122(c) (1966). *See also Aurora L. Palalay (Richard P. Palalay)*, 35 ECAB 1078 (1984).

(2) run against an incompetent individual while he is incompetent and has not duly appointed legal representative....”⁷

ANALYSIS

In this case, the employee died on December 8, 1954. At the time of her death, the Act set forth a one-year time limitation for survivors to file a death benefits claim.⁸ This time limitation did not begin to run against appellant until his 21st birthday on December 21, 1960.⁹ Appellant filed a claim for death benefits on December 27, 2004, significantly after the applicable time limitation ended on December 21, 1961. Thus, his claim was not timely filed.

While the Act extended the time limitation to five years upon proof of exceptional circumstances,¹⁰ appellant did not allege or establish such events. Also, he did not allege that he was prevented from filing his claim due to incompetence, which would have tolled the applicable time limitation if established.¹¹ Instead, appellant contended that he delayed filing the claim as he was unaware he could do so. He asserted that it was the employing establishment’s responsibility to inform him of his right to file a claim for death benefits. The Board has held, however, that neither the failure of the employing establishment to assist in filing for benefits nor a claimant’s lack of awareness of entitlement to benefits is sufficient cause for waiving the one-year time limitation.¹² Thus, appellant has not established an exception to the one-year time limitation. His claim for death benefits was not timely filed.

CONCLUSION

The Board finds that appellant did not file a timely claim for survivor’s benefits within the applicable time limitation.

⁷ 5 U.S.C. § 8122 (1966).

⁸ 5 U.S.C. § 8122(c) (1966).

⁹ 5 U.S.C. § 8122(d)(1) (1966).

¹⁰ 5 U.S.C. § 8122(c)(1) (1966).

¹¹ 5 U.S.C. § 8122(d)(2) (1966).

¹² *Cecile Cormier (Edmond L. Cormier)*, 48 ECAB 436 (1997).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 31 and February 25, 2005 are affirmed.

Issued: April 19, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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