

FACTUAL HISTORY

On April 21, 2004 appellant, then a 56-year-old plumber, filed an occupational disease claim (Form CA-2), alleging that he developed silicosis as result of his federal employment. Appellant first became aware of his condition on April 15, 1988. He retired on March 24, 1997.

In a May 6, 2004 letter, the Office advised appellant of the factual and medical evidence needed to establish his claim. In a letter of the same date, the Office requested that the employing establishment address appellant's allegations and provide any information regarding any harmful substances to which he may have been exposed.

Appellant submitted a report from Dr. Mark S. Klepper, a Board-certified internist, dated October 9, 1998, who noted that he reviewed appellant's chest x-ray dated June 22, 1995, which revealed parenchymal abnormalities consistent with pneumoconiosis. He noted small opacities of shape and size in the mid and lower lung fields bilaterally with a profusion of 1/0. He reported right chest wall plaques and left diaphragm pleural thickening consistent with pneumoconiosis. In an April 6, 2000 report, the physician noted that appellant had worked as a plumber, welder and sandblaster for the employing establishment from 1970 to 1997, where he sandblasted in booths, small enclosures and inside sandblasting rooms while wearing air fed hoods and land suits. Appellant reported that he always wore some sort of respiratory protection, whether it was an air fed hood, a bodysuit or a tight fitting canister respirator. Appellant further advised that he did not regularly handle asbestos and occasionally handled small jobs wearing only a paper mask. Dr. Klepper indicated that appellant's medical history was significant for pneumonia in 1990, three open heart surgeries in December 1998 and cerebral palsy. He noted an essentially normal physical examination with some fine rales posteriorly and a normal pulmonary function test. Dr. Klepper advised that a chest x-ray dated April 6, 2000 revealed bilateral interstitial infiltrates in all zones with small and medium-sized irregular opacities and bilateral pleural plaques. He opined that appellant had been exposed to sand and silica in the workplace over many years and diagnosed interstitial fibrosis due to silicosis exposure in the workplace. Also submitted was appellant's response to interrogatories in an private lawsuit against Pulmosan Safety Equipment Corporation, *et al.*

The employing establishment submitted a statement from Rosie Flores, a compensation specialist, dated May 21, 2004. Ms. Flores noted that appellant worked in the plating shop from September 19, 1993 to March 24, 1997 and was fitted with a respirator on February 1, 1996. At that time, appellant completed a form advising that he did not have any breathing problems and noted that he smoked a pack of cigarettes per day for 30 years. Ms. Flores advised that appellant never worked with asbestos and was never exposed to any unsafe levels of any airborne particles. She advised that all air samples from appellant's work areas were well below the Occupational Safety and Health Administration (OSHA) permissible exposure level. Ms. Flores attached a report from Cape Environmental Management Incorporated dated September 2002 prepared for Corpus Christi Army Depot, which monitored the air of selected buildings at the Corpus Christi Army Depot. The report concluded that the airborne asbestos fiber concentrations were well below the OSHA permissible limit. The employing establishment also submitted a statement from Elva D. Solis, a labor relations specialist, dated May 24, 2004, who noted that the employees of the Corpus Christi Army Depot were not exposed to levels of asbestos above the OSHA permissible exposure limits.

On June 10, 2004 the Office denied appellant's claim on the grounds that the evidence was not sufficient to establish that he sustained an injury as required by the Act.¹ The Office found that the evidence was insufficient to establish that the events occurred as alleged.

In a letter dated June 17, 2004, appellant requested a review of the written record.

In a decision dated December 3, 2004, the hearing representative affirmed the June 10, 2004 decision.

In a letter dated February 18, 2005, appellant requested reconsideration but did not submit any additional evidence.

By a nonmerit decision dated March 4, 2005, the Office denied appellant's reconsideration request on the grounds that he neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

In an April 13, 2005 letter, appellant requested a review of the written record.

In a decision dated June 21, 2005, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record. The Branch of Hearings and Review found that, since appellant had previously requested reconsideration on the same issue, he was not entitled to a review of the written record as a matter of right. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the Office and submitting evidence not previously considered.

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.² 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.³

Section 8122(a) of the Act⁴ states that "[a]n original claim for compensation for disability or death must be filed within three years after the injury or death."⁵ 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

¹ 5 U.S.C. §§ 8101-8193.

² *Charles Walker*, 55 ECAB ____ (Docket No. 03-1732, issued January 8, 2004); see *Charles W. Bishop*, 6 ECAB 571 (1954).

³ *Id.*

⁴ 5 U.S.C. § 8122(a).

⁵ *Id.*

between the employment and the compensable disability.⁶ 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.⁷

An employee'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 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.⁸ 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.⁹

In a 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.¹⁰ 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.¹¹ The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.¹²

ANALYSIS

The Board finds that appellant did not timely file a claim for compensation under the Act. He asserted that he developed silicosis due to his federal employment and submitted an occupational disease claim on April 21, 2004 alleging that occupational exposure caused his condition. Appellant indicated on his April 21, 2004 claim form that he first became aware of a connection between his claimed silicosis condition and his employment on April 15, 1988. The record reveals also that appellant was last exposed to work factors in March 1997, the day he retired. The evidence shows that appellant reasonably was aware of the relationship of his

⁶ 5 U.S.C. § 8122(b).

⁷ See *Larry E. Young*, 52 ECAB 264 (2001); *Garyleane A. Williams*, 44 ECAB 441 (1993); *Alicia Kelly*, 53 ECAB 244 (2001); *Mitchell Murray*, 53 ECAB 601 (2002).

⁸ 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).

⁹ *Charlene B. Fenton*, 36 ECAB 151 (1984).

¹⁰ *Larry E. Young*, *supra* note 7.

¹¹ *Id.*

¹² *Debra Young Bruce*, 52 ECAB 315 (2001).

claimed condition to his employment no later than April 6, 2000. Appellant submitted a medical report from Dr. Klepper, dated April 6, 2000, which advised that a chest x-ray of the same date revealed bilateral interstitial infiltrates in all zones with small and medium-sized irregular opacities and bilateral pleural plaques and he opined that appellant had been exposed to sand and silica in the workplace over many years and diagnosed interstitial fibrosis due to silicosis exposure in the workplace. Because the report specifically addresses workplace exposure to suspected causes of his illness, this report clearly made appellant aware of his condition in April 2000 and its relationship to his employment. Consequently, there is no evidence to support that the time limitation began to run any later than April 6, 2000. Therefore, the time limitations began to run on April 6, 2000, the date that appellant became aware of the relationship between his claimed injury and his employment. Since appellant did not file a claim until April 21, 2004 his claim was filed outside the three-year time limitation period under section 8122(b).

Appellant's claim, however, 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.¹³ Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days.¹⁴

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. Therefore, the Board finds that the record is devoid of any indication that appellant's immediate supervisor had written notice of his injury within 30 days. The exceptions to the statute have not been met and thus, appellant has failed to establish that he filed a timely claim on April 21, 2004.

CONCLUSION

The Board finds that appellant's claim is barred by the applicable time limitation provisions of the Act.¹⁵

¹³ *Supra* note 8.

¹⁴ 5 U.S.C. § 8122(a)(1) and (2).

¹⁵ The Board finds that it is unnecessary to address the second and third issues in this case in view of the Board's disposition of the first issue which modifies the basis for the denial of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 21, 2005 be affirmed, as modified to reflect that appellant's claim is barred by the time limitation provisions of the Act.

Issued: March 14, 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