

FACTUAL HISTORY

On May 27, 2003 appellant's daughter, who has his power-of-attorney, filed a Form CA-2, occupational disease claim alleging that appellant's peripheral neuropathy was caused by his federal employment. Appellant was then an 86-year-old former supervisory management specialist who had retired on November 30, 1970. The claim form indicated that appellant first became aware of his condition in 1980 and stated: "my father has been under the impression his pension would be reduced if he put in a claim." The portion of the claim form for indicating the date the claimant first became aware that the condition was caused by employment was left blank.

In a February 17, 2004 report, Dr. Henry Atkins, Board-certified in family and geriatric medicine, provided a history that appellant had spent four years in Viet Nam where he was exposed to Agent Orange. Appellant had been his patient in the Maine Veterans' Home since 2002 and had diagnoses of Type 2 diabetes with peripheral neuropathy and many skin cancers.¹ He advised that appellant required total care and opined that these were diseases which were associated with Agent Orange exposure. The record contains employing establishment records showing that appellant was in Viet Nam for the periods February 25 to May 24, 1966 and March 25 to December 24, 1967 and that he resigned on November 30, 1970 during a reduction in force.

By letter dated March 3 and May 11, 2004, the Office informed appellant of the evidence needed to support his claim and requested that the employing establishment provide information concerning the alleged exposure to Agent Orange.

In a decision dated June 1, 2004, the Office denied the claim on the grounds that it was not timely filed. The Office noted that appellant's date of last exposure was November 30, 1970, his retirement date and that he had not responded to the requested information.

On August 18, 2004 appellant's wife, who also has a power-of-attorney, requested reconsideration, stating that she had asked him in the past to file a claim, "but he was always unsure about the ramifications of what a claim would have on his retirement pay." Their daughter "has said for years that Agent Orange could be responsible for [appellant's] medical problems." She noted that appellant had diabetes, peripheral neuropathy and skin cancers and opined that Agent Orange caused latent conditions. She submitted additional medical evidence, including a treatment note dated December 11, 1997 in which Dr. William F. Gallagher, a Board-certified dermatologist, noted a history of Viet Nam service and diagnosed a skin cancer. On February 23, 1998 he diagnosed diabetic neuropathy and additional notes dated January 29 and February 28, 2002 noted multiple tumors. Pathology reports dated May 2 and December 20, 2000 and March 22 and June 4, 2001, provided diagnoses of basal cell and squamous cell carcinoma. Reports from a hospitalization in November 2002, which included imaging studies, provided a diagnosis of diabetic neuropathy. In a discharge summary, Dr. George L. Rymph, Board-certified in family medicine, noted that appellant was admitted on November 22 and discharged on November 26, 2002 with a history of coronary artery disease and diagnoses of hyperlipidemia, diabetes and pulmonary embolus. In a May 2, 2004 report, Dr. Atkins listed

¹ The Maine Veterans' Home is not affiliated with the VA.

diagnoses of acute respiratory hypoxia with pulmonary emboli, Type 2 diabetes with diabetic neuropathy and skin neoplasms. He advised that appellant “suffers from medical conditions that could be related to exposure to Agent Orange. This correlation is supported in the publication titled, Agent Orange, Environmental Agency Services, Department of Veterans Affairs July 2003, which describes medical conditions related to Agent Orange exposure.”

Also submitted was an August 2001 VA publication, which provides that acute and subacute peripheral neuropathy were added to the VA’s presumptive list for inclusion of veterans’ care for Agent Orange exposure in March 1996 and Type 2 diabetes was added on July 9, 2001.

By decision dated December 10, 2004, the Office again found the claim for peripheral neuropathy untimely because, although a latent condition, the evidence established that the relationship between the disease and exposure was considered for many years prior to filing. The Office, however, found that the claim for skin cancers to be timely filed, noting that appellant did not become aware of this condition until March 2001, but denied this claim because the medical evidence did not establish any relationship between the skin cancer and work exposure.

In a letter dated January 25, 2005, appellant’s representative asserted that the claim should be considered timely and on April 25, 2005 requested reconsideration. She submitted information obtained from an Agent Orange website.² By decision dated July 25, 2005, the Office denied modification of the December 10, 2004 decision.

LEGAL PRECEDENT

The Act³ requires, in cases of injury prior to September 7, 1974, that a claim for compensation be filed within one year of the date the claimant was aware or reasonably should have been aware that the condition may have been caused by the employment factors. The one year filing requirement may be waived if the claim is filed within five years and (1) it is found that such failure was due to circumstances beyond the control of the person claiming benefits; or (2) that such person has shown sufficient cause or reason in explanation thereof and material prejudice to the interest of the United States has not resulted from the failure. The test for whether sufficient cause or reason was shown to justify waiver of the one-year time limitation is whether a claimant prosecuted the claim with that degree of diligence which an ordinary prudent person would have exercised in protecting his right under the same or similar circumstances.⁴

For injuries and death occurring between December 7, 1940 and September 6, 1974, Office procedures indicate that written notice of injury should be given within 48 hours as specified in section 8119, but that this requirement would be automatically waived if the employee filed written notice within one year after the injury or if the immediate supervisor had actual knowledge of the injury within 48 hours after the occurrence of the injury. However,

² Appellant’s wife died April 11, 2004.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Peter S. Elliott*, 51 ECAB 627 (2000).

knowledge merely of an employee's illness is not sufficient: it must be shown that the circumstances were such as to put the supervisor on notice that the alleged injury was actually related to the employment or that the employee attributed it thereto. In a case involving a claim for an occupational disease or illness, the time does not begin to run until the claimant is aware or reasonably should have been aware, of the causal relationship between his employment and the compensable disability. If exposure to the implicated employment factors extends beyond the date of such awareness, the time limitation begins to run on the last date of such exposure.⁵

ANALYSIS

In this case, appellant claimed that exposure to Agent Orange in Viet Nam in the 1960s caused skin cancers and Type 2 diabetes mellitus with peripheral neuropathy and that his claim was timely filed because the medical conditions did not become manifest for many years. The Board, however, finds that appellant's claim for compensation under the Act is barred by the applicable time limitation provisions. In a case involving a claim for an occupational disease or illness, the time does not begin to run until the claimant is aware or reasonably should have been aware, of the causal relationship between his employment and the compensability disability.⁶ If his exposure to the implicated employment factors extends beyond the date of such awareness, the time limitation begins to run on the last date of such exposure.⁷ The record provides that appellant's last possible exposure to Agent Orange was on the date of his retirement, November 30, 1970.

Appellant's representative contends that the claim was timely filed because appellant was unaware that his medical conditions were related to Agent Orange exposure until VA added these conditions to its presumptive list.⁸ The record, however, does not support this contention. On the claim form, which was prepared by appellant's daughter, she stated that her father "has been under the impression his pension would be reduced if he put in a claim," and did not indicate on the claim when he first became aware that his condition was employment related. In an August 18, 2004 letter, appellant's wife stated that their daughter had stated for years that Agent Orange could be responsible for appellant's medical problems but that when she would ask him to file a claim, he declined as he was unsure about the ramifications on his retirement pay. These facts demonstrate that appellant and his representatives had been or should reasonably have been aware of the relationship between his medical conditions and any employment-related Agent Orange exposure.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ In 1979 VA established an advisory committee to examine issues surrounding the possible health effects of herbicides on Viet Nam veterans and a list of service-connected illnesses caused by Agent Orange exposure has been established. In 1991 Congress directed VA to request the National Academy of Sciences to review diseases associated with herbicide exposure and in March 1996 acute and subacute peripheral neuropathy were added to the presumptive list and Type 2 diabetes was added, effective July 9, 2001. Department of Veterans Affairs Fact Sheet, "Agent Orange and Related Issues," August 2001.

Appellant is not entitled to waiver of the one-year filing requirement because his claim was not filed within five years of the claimed injury and he has not presented evidence to meet the other requirements, as noted above, for such waiver. It is well established that the five-year time limitation is a maximum, mandatory time period which neither the Office nor the Board has the authority to waive.⁹

To permit waiver of the one-year period of limitation, “sufficient cause or reason” has to be shown in explanation of failure to file a claim within one year. The test of whether such cause or reason has been shown is whether the claimant prosecuted the claim with that degree of diligence, which an ordinarily prudent person would have exercised in protecting his or her rights under the same or similar circumstances.¹⁰ The Board finds that from the date of appellant’s last possible exposure in 1970 to the time his claim was filed in May 2003, he provided no medical evidence to establish that he was exposed to Agent Orange or that his medical conditions were caused by such exposure and thus did not establish a causal relationship between his condition and his employment. The record supports that appellant was diagnosed with skin cancers and diabetic neuropathy in 1997 and 1998, respectively and that this evidence was not submitted to the Office until September 13, 2004. While appellant’s representative asserts that his claim was timely filed based on VA’s addition of Type 2 diabetes to its list of diseases presumed to have been caused by Agent Orange exposure, his representatives initially indicated that he delayed in pursuing his claim because he was unsure of its effect on his retirement pension. Under these circumstances, the Board cannot find that appellant prosecuted his claim with that degree of diligence, which an ordinarily prudent person would have exercised in protecting his rights under the same or similar circumstances.¹¹ Because of the Board’s finding regarding the first issue, the second issue need not be addressed. Accordingly, appellant’s claim was not timely filed. The Board will therefore affirm as modified the December 10, 2004 decision of the Office, which found that appellant’s claim regarding skin cancers was timely filed.

CONCLUSION

The Board finds that appellant’s case is barred by the time limitation provisions of the Act.

⁹ *Peter S. Elliott, supra* note 4.

¹⁰ *See Roseanne S. Allexenberg, 47 ECAB 498 (1996); Francis Robert Boyer, 27 ECAB 670 (1976).*

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 27, 2005 is affirmed. The decision dated December 10, 2004 is affirmed as modified.

Issued: March 7, 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