

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

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**J.B., Appellant**

**and**

**DEPARTMENT OF THE NAVY, PUGET  
SOUND NAVAL SHIPYARD, Bremerton, WA,  
Employer**

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**Docket No. 07-274  
Issued: April 23, 2007**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 19, 2006 appellant filed a timely appeal of a September 14, 2006 decision of an Office of Workers' Compensation Programs' hearing representative, affirming the denial of his claim on the grounds that it was untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant's claim was filed within the appropriate time limitation period.

**FACTUAL HISTORY**

On July 15, 2005 appellant, then a 79-year-old retired federal employee, filed an occupational disease claim (Form CA-2) alleging that he sustained asbestosis as a result of asbestos exposure in federal employment as a machinist. He worked as a machinist at the

employing establishment from August 1950 to July 1955 and then worked in a personnel office until 1981.

Appellant indicated on the claim form that the date he first realized the disease or illness was causally related to employment “estimated 1999.” He stated in a narrative statement that he became aware of asbestos in his lungs around 1999 when he discussed his asbestos exposure with his physician.

In a treatment note dated November 5, 1999, Dr. Bruce Kimbel indicated that appellant was seen with a persistent cough and appellant was concerned because he had a history of asbestos exposure. Dr. Kimbel’s diagnoses included cough and postnasal drip and asbestos exposure. In a brief note dated November 8, 2000, a radiologist indicated that x-rays showed pleural plaques bilaterally due to previous asbestos exposure. The radiologist stated that the chest was otherwise negative. An x-ray report dated November 19, 2001 stated that there was no change from November 8, 2000. In a note dated November 19, 2001, Dr. Kimbel stated that appellant had “normal pulmonary function studies a year ago.” He noted pleural plaques on chest x-rays, “previous borderline tendency towards dyspnea with exertion. No cough.” By treatment note dated November 20, 2002, Dr. Kimbel again noted pleural plaques on chest x-ray, normal pulmonary studies from two years earlier, no cough and a minimal tendency towards dyspnea on exertion.

Dr. Kimbel reported in a March 21, 2005 treatment note that appellant had some stable scarring in the right upper lobe of the lungs and some pleural plaques which he believed were due to asbestos exposure. He stated that he was satisfied that appellant did not have any active pulmonary infection and needed only routine rechecking of the lungs.

By decision dated November 30, 2005, the Office denied the claim for compensation on the grounds that it was untimely filed. The Office stated that the date of injury was January 1, 1999 and appellant did not file the claim within three years pursuant to 5 U.S.C. § 8122.

Appellant requested a hearing before an Office hearing representative, which was held on July 25, 2006. The medical evidence submitted included reports dated June 1, 2004 and July 27, 2005 from Dr. Kittredge Baldwin, an osteopath, who noted pleural-based plaques primarily in the right lung with thickened pleural mass. The diagnoses included chronic rhinitis.

In a decision dated September 14, 2006, the hearing representative affirmed the November 30, 2005 decision. The hearing representative found that the date of injury was November 5, 1999, when appellant was treated by Dr. Kimbel.

### **LEGAL PRECEDENT**

Where an injury is sustained over a period of time, the date of injury is the date of last exposure to those work factors causing injury.<sup>1</sup>

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<sup>1</sup> *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

### ANALYSIS

The evidence of record indicates that appellant alleges that he was exposed to asbestos while working as a machinist at the employing establishment from August 1950 to July 1955. The Office refers to the “date of injury” as occurring in 1999 and applies the current provisions of 5 U.S.C. § 8122 on time limitations. The date of injury and the date a time limitation period begins to run are different issues. As noted above, the date of injury in a case of exposure to asbestos over a period of time is the date of last exposure.<sup>2</sup> In this case, the date of injury would be July 1955, based on the evidence of record.

Since the date of injury was prior to September 7, 1974, the effective date of the current provisions of 5 U.S.C. § 8122, the applicable time limitation provision is the pre-1974 section 8122.<sup>3</sup> The case will be remanded to the Office for a proper determination on the issue. The Office should discuss the medical evidence (including the diagnoses) and clearly explain its findings with regard to the time limitation issue. After such further development as the Office deems necessary, it should issue an appropriate decision.

### CONCLUSION

The case is remanded for application of the time limitation provision appropriate for injuries prior to September 7, 1974.

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<sup>2</sup> See *Edward C. Hornor*, 43 ECAB 834 (1992) (appellant was exposed to asbestos until September 9, 1974 and therefore the time limitation period of section 8122 effective September 7, 1974 was applicable).

<sup>3</sup> See *Charles Walker*, 55 ECAB 238 (2004) (asbestos exposure was in 1968 and the pre-1974 time limitation provisions were applicable).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 14, 2006 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: April 23, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board