

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

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G.S., Appellant )

and )

DEPARTMENT OF THE NAVY, NAVAL )  
SHIPYARD, Portsmouth, NH, Employer )

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**Docket No. 08-190  
Issued: April 18, 2008**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 23, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 20, 2006 and September 20, 2007 merit decisions finding that his compensation claim was untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether the Office properly denied appellant's claim for several employment-related conditions on the grounds that it was untimely filed.

**FACTUAL HISTORY**

On November 18, 2006 appellant, then an 83-year-old retired machinist, filed an occupational disease claim alleging that he sustained several conditions due to his federal employment. Regarding the nature of these conditions, he stated: "Sigmoid resection, gall bladder, serious hand exposure, heart problems...." Appellant indicated that he did not have any problems for 22 years but then had a series of problems after his "exposure." He first became

aware of his conditions on November 7, 1968 and first aware of their relationship to his employment on November 7, 1968.<sup>1</sup> Appellant retired from the employing establishment on disability retirement effective July 24, 1975.

In several statements and notations made on medical and administrative documents, appellant argued that he sustained a series of ailments beginning in late 1968 due to his exposure to radiation prior to late 1968 while working in the Portsmouth Naval Shipyard. He claimed that this exposure caused him to sustain dermatitis of his upper extremities beginning in late 1968 and caused him to develop conditions which led him to have a sigmoid resection in 1971, a partial gall bladder removal in 1972, quadruple heart bypass surgery in 1977 and triple heart bypass surgery in 1977.

Appellant submitted documents detailing his medical treatment since 1968. A number of these pertain to his skin problems and his heart surgeries in 1977 and 1990.<sup>2</sup> In a May 3, 2006 statement, an employing establishment official stated that appellant was exposed to ionizing radiation while working at the Portsmouth Naval Shipyard between July 1967 and August 1968.<sup>3</sup> The official observed that the radiation dose appellant received during that period was only three percent of the current federal limit for workers.

On May 11, 2006 the Office requested that appellant submit additional factual and medical evidence in support of his claim. Appellant submitted additional medical documents as well as statements regarding the cause of his claimed conditions. He asserted that he did not have any medical problems for 22 years prior to his exposure to radiation even though he had been exposed to oil and other contaminants. Appellant claimed, however, that his health problems started in late 1968 after he had been exposed to radiation. He indicated that the physicians who treated him at the Portsmouth Naval Shipyard “are and were aware of my nuclear exposure.”

In a December 20, 2006 decision, the Office denied appellant’s claim for several employment-related conditions on the grounds that it was untimely filed. The Office found that appellant knew or should have known about the relationship between his radiation exposure and his claimed conditions around the time he developed each condition.

Appellant requested reconsideration of his claim and argued that he did not file his claim sooner because he was incompetent for the entire period between November 11, 1968 and February 1, 2006. He indicated that he was incompetent due to his upper extremity skin condition between 1969 and 1972, the effects of his 1971 sigmoid resection surgery between 1971 and 1976, the effects of his 1972 gall bladder surgery between 1972 and 1976, the effects of his 1977 heart bypass surgery between 1977 and 1999 and the effects of his 1999 heart bypass

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<sup>1</sup> The record contains a November 7, 1968 medical record notation indicating that appellant complained in that date of having a left palm rash since the prior week.

<sup>2</sup> None of the documents referred to appellant’s sigmoid resection or gall bladder removal.

<sup>3</sup> The official indicated that appellant worked at the Portsmouth Naval Shipyard between 1950 and 1975.

surgery between 1999 and 2002,<sup>4</sup> and the effects of multiple minor heart procedures between 2000 and 2006.<sup>5</sup> Appellant asserted that he was unable to care for himself for much of this period.

In a September 20, 2007 decision, the Office affirmed the December 20, 2006 decision. The Office found that appellant did not show that he was incompetent within the meaning of the Federal Employees' Compensation Act for any period.

### **LEGAL PRECEDENT**

A claimant seeking compensation under the Act<sup>6</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,<sup>7</sup> including that he is an "employee" within the meaning of the Act<sup>8</sup> and that he filed his claim within the applicable time limitation.<sup>9</sup>

The Act requires in cases of injury prior to September 7, 1974 that a claim for compensation be filed within one year of the date claimant was aware or reasonably should have been aware that the condition may have been caused by the employment factors. The one-year 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 such failure.<sup>10</sup> 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 ordinarily prudent person would have exercised in protecting her right under the same or similar circumstances.<sup>11</sup>

Section 8122(b) provides that, in a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware or by exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to his employment. In such a case, the time for giving notice of injury begins to run

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<sup>4</sup> Appellant indicated that he attempted to work on weekends at a farm museum during this period but was unable to continue to do so.

<sup>5</sup> Appellant indicated that after he had a pacemaker surgically installed in 2002 he "could finally resume to some normal activities.

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

<sup>8</sup> *Kenneth W. Grant*, 39 ECAB 208 (1987); *James E. Lynch*, 32 ECAB 216 (1980); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357 (1951); see 5 U.S.C. § 8101(1).

<sup>9</sup> *Paul S. Devlin*, 39 ECAB 715 (1988); *Emmet L. Pickens*, 33 ECAB 1807 (1982); *Kathryn A. O'Donnell*, 7 ECAB 227 (1954).

<sup>10</sup> *Edward Lewis Maslowski*, 42 ECAB 839, 845 (1991); *Dorothy L. Sidwell*, 36 ECAB 699, 706 (1985).

<sup>11</sup> *Maxine Leonard*, 39 ECAB 1180, 1184-85 (1988).

when the employee is aware or by the exercise of reasonable diligence should have been aware, that his condition is causally related to his employment, whether or not there is a compensable disability.<sup>12</sup> The Board has found that the statute of limitations begins to run on the date that appellant actually knows of the *possible relationship* between the employee's condition and his employment or reasonably should have known of the *possible relationship*.<sup>13</sup>

In a case involving a claim for an occupational illness, the time limitation does not begin to run until the claimant is aware or reasonably should have been aware, of the causal relationship between her employment and the compensable disability.<sup>14</sup> In situations where 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.<sup>15</sup>

In addition, for injuries and death occurring between December 7, 1940 and September 6, 1974, Office procedure indicates that written notice of injury should be given within 48 hours as specified in section 8119 of the Act, 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.<sup>16</sup> However, 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.<sup>17</sup>

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.<sup>18</sup> 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 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; or

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<sup>12</sup> 5 U.S.C. § 8122(b).

<sup>13</sup> *William A. West*, 36 ECAB 525, 528-29 (1985).

<sup>14</sup> *William L. Gillard*, 33 ECAB 265, 268 (1981).

<sup>15</sup> *Id.*

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3b(1) (March 1993).

<sup>17</sup> *See id.* at Chapter 2.801.3a(3)(b).

<sup>18</sup> 5 U.S.C. § 8122(a).

“(2) written notice of injury or death as specified in section 8119 was given within 30 days.”<sup>19</sup>

Section 8122(d)(2) provides that the time limitations of sections 8122(a) and 8122(b) do not “run against an incompetent individual while he is incompetent and has no duly appointed legal representative.”<sup>20</sup> The Board has held that it is the claimant’s burden to show that he is incompetent for a given period by submitting medical evidence establishing that his condition was such that he was not capable of filling out a form or of otherwise furnishing the relatively simple information necessary for filing a claim and satisfying the limitation requirements.<sup>21</sup> Time limitations will also toll due to “exceptional circumstances” as provided by section 8122(d)(3) of the Act. For instance, an “exceptional circumstance” recognized by the Secretary of Labor is where an employee is a prisoner of war.<sup>22</sup>

### ANALYSIS

On November 18, 2006 appellant filed an occupational disease claim alleging that he sustained several medical conditions due to his work. He claimed that his federal radiation exposure caused him to sustain dermatitis of his upper extremities beginning in late 1968 and to develop conditions which led him to have a sigmoid resection in 1971, a partial gall bladder removal in 1972, quadruple heart bypass surgery in 1977 and triple heart bypass surgery in 1990. In December 20, 2006 and September 20, 2007 decisions, the Office denied appellant’s claim for these employment-related conditions on the grounds that it was untimely filed.

The Board notes that the timeliness standards for evaluating injuries alleged to have developed prior to September 7, 1974 is applicable to appellant’s claim that radiation exposure prior to late 1968 caused him to sustain dermatitis of his upper extremities beginning in late 1968 and caused him to develop other medical conditions necessitating surgery. The Board will apply the timeliness standards for evaluating injuries alleged to have developed after September 7, 1974 to evaluate his claims that such radiation exposure caused him to develop conditions which led him to have heart surgeries in 1977 and 1990.

The Board finds that the evidence establishes that appellant was aware or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment and the compensable disability as early as November 11, 1968. The evidence of record establishes that appellant was aware or by the exercise of reasonable diligence should

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<sup>19</sup> 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.

<sup>20</sup> 5 U.S.C. § 8122(d)(2).

<sup>21</sup> *Paul S. Devlin*, 39 ECAB 715, 726 (1988).

<sup>22</sup> *See* 5 U.S.C. § 8122(d)(3).

have been aware, as early as November 11, 1968, that his first claimed injury was due to the alleged employment factors, *i.e.*, exposure to radiation at work prior to late 1968.<sup>23</sup>

Appellant became aware of the first of his claimed conditions and its relationship to his employment on November 7, 1968. He repeatedly asserted that he did not have any medical problems for 22 years prior to his exposure to radiation even though he had been exposed to oil and other contaminants. Appellant claimed, however, that his health problems started in late 1968 after he had been exposed to radiation. The advancement of this argument combined with his statement regarding when he first realized his medical condition was related to radiation exposure shows that appellant was aware beginning in November 1968 of the possible relationship of his medical problems to work conditions. Therefore, appellant should have been aware of the possible employment cause for his several claimed medical conditions around the time each claimed condition manifested itself. He should have been aware of the possible employment cause of his claimed skin condition in late 1968, his claimed intestinal condition in 1971, his claimed gall bladder condition in 1972, his claimed 1977 heart condition in 1977 and his claimed 1990 heart condition in 1990.

Appellant did not file any claim for these conditions until November 2006. Therefore, with respect to his claims that radiation exposure caused him to sustain dermatitis of his upper extremities beginning in late 1968 and caused him to develop conditions which led him to have a sigmoid resection in 1971 and a partial gall bladder removal in 1972, he did not file his claim within one year of the time he became aware of a possible employment-related cause for each condition.<sup>24</sup> Furthermore, appellant is not entitled to waiver of the one-year filing requirement because his claim was not filed within five years of the claimed injuries; nor has he met the other requirements, as delineated above, for such waiver.<sup>25</sup> The five-year time limitation is a maximum, mandatory period which neither the Office nor the Board has authority to waive.<sup>26</sup> Appellant has not made any claim that he has provided timely written notice of injury or that his immediate superior or supervisor had actual timely knowledge of the claimed injuries and their possible relationship to his employment, nor does the record support a finding that he has satisfied either of these conditions.<sup>27</sup>

With respect to appellant's claims that radiation exposure caused him to develop conditions which led him to have heart surgeries in 1977 and 1990, he did not file his claim within the three-year period of limitation for these two conditions. As explained above, he should have been aware of the possible employment cause of these conditions in 1977 and 1990, respectively, but he did not file his claim until November 2006.<sup>28</sup> Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate superior had actual

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<sup>23</sup> The record reveals that appellant was exposed to radiation at work only between July 1967 and August 1968.

<sup>24</sup> See *supra* note 10 and accompanying text.

<sup>25</sup> See *supra* notes 10 and 11 and accompanying text.

<sup>26</sup> Gary W. Hudiburgh, Jr., 37 ECAB 423, 425 (1986).

<sup>27</sup> See *supra* note 17 and accompanying text.

<sup>28</sup> See *supra* notes 18 and 19 and accompanying text.

knowledge of the injuries within 30 days or under section 8122(a)(2) if written notice of the injuries was given to his immediate superior within 30 days as specified in section 8119. He has not made any claim that he has satisfied either of these provisions, nor does the record support a finding that he has satisfied either of them.<sup>29</sup>

Appellant has contended that the time limitations of sections 8122(a) and 8122(b) did not run against him due to the fact that he was incompetent. He argued that he did not file his claim sooner because he was incompetent for the entire period between November 11, 1968 and February 1, 2006. Appellant alleged that he was incompetent due to his upper extremity skin condition between 1969 and 1972, the effects of his 1971 sigmoid resection surgery between 1971 and 1976, the effects of his 1972 gall bladder surgery between 1972 and 1976, the effects of his 1977 heart bypass surgery between 1977 and 1999 and the effects of his 1999 heart bypass surgery between 1999 and 2002 and the effects of multiple minor heart procedures between 2000 and 2006.

Appellant has not submitted any medical evidence which establishes that he was incompetent within the meaning of the Act for any period between 1968 and 2006. Although he has submitted some medical evidence showing that his heart conditions in 1977 and 1990 might have impaired his ability to perform certain tasks, he has not submitted any evidence to establish that he was incompetent at any time. The medical reports do not establish that appellant was in capable of filling out a form or of otherwise furnishing the relatively simple information necessary for filing a claim and satisfying the time limitation requirements such that he would be considered incompetent within the meaning of the Act.<sup>30</sup> Therefore, he has failed to show that the time limitations of sections 8122(a) and 8122(b) do not run against him.

### CONCLUSION

The Board finds that the Office properly denied appellant's claim for several employment-related conditions on the grounds that it was untimely filed.

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<sup>29</sup> There is no indication in the record that appellant provided a statement to his immediate superior such that he satisfied the provisions of sections 8119 and 8122(a) of the Act. *See supra* note 19 and accompanying text.

<sup>30</sup> *See supra* notes 20 and 21 and accompanying text. The Board further notes that the fact that appellant was able to work between 1968 and 1975 and for several periods thereafter shows that he was not incompetent for the entire claimed period between 1968 and 2006. In addition, appellant has not shown that he is entitled to have the time limitations toll due to "exceptional circumstances" as provided by section 8122(d)(3) of the Act. *See supra* note 22 and accompanying text.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' September 20, 2007 and December 20, 2006 decisions are affirmed.

Issued: April 18, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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