

that the date of injury is the date of last exposure, which in this case was July 1955. The appropriate time limitation provision was therefore the pre-1974 5 U.S.C. § 8122, and the case was remanded for a proper decision applying the relevant time limitation provisions. The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

By decision dated August 3, 2007, the Office denied the claim as untimely filed. It found the time limitation provision "began to run in or around 1999" and appellant did not file the claim until July 15, 2005. Appellant requested reconsideration on October 5, 2007.

In a decision dated January 4, 2008, the Office again denied he claim was untimely filed. It stated the November 5, 1999 medical report from Dr. Kimbel clearly indicated that appellant was advised of the presence of pleural plaques in his lungs and discussed the history of asbestos exposure. According to the Office, appellant was aware, or should have been aware that his federal employment was related to his asbestos illness as of November 5, 1999.

LEGAL PRECEDENT

In cases of injury prior to September 7, 1974, a claim must be filed within one year of the date that the claimant is aware, or reasonably should have been aware, that his condition may have been caused by factors of his federal employment. The requirement may be waived if the claim is filed within five years and it is found that such failure was due to circumstances beyond the control of the person claiming benefits, or 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.²

ANALYSIS

In this case, appellant filed a claim on July 15, 2005 for asbestosis causally related to asbestos exposure in his federal employment from 1950 to 1955. The Office made a finding that appellant reasonably should have been aware that his condition may have been caused by federal employment on November 5, 1999, when he was treated by Dr. Bruce Kimbel. That report, however, indicated only that appellant reported a persistent cough and was concerned because he had a history of occupational asbestos exposure. Dr. Kimbel noted that previous chest x-rays had shown pleural plaques, and that appellant had previously smoked cigarettes.

Dr. Kimbel did not diagnose asbestosis or similar pulmonary condition on November 5, 1999. While he noted pleural plaques on prior x-rays, he did not diagnose asbestosis. In *Edward Lewis Maslowski*, for example, there was a specific medical report stating that x-rays showed pleural and parenchymal asbestosis.³ This report, along with evidence as to the claimant's awareness of the relationship between the condition and federal employment, was sufficient to begin the time limitation period as of the date of the report. In *Virginia D. King (Charles B. King)*, the Board found that the possibility of asbestosis was not sufficient to begin

² *Marcelo Crisostomo*, 42 ECAB 339, 341 (1991).

³ 42 ECAB 831 (1991).

the time limitation period.⁴ It was not until the employee received confirmation of the diagnosis of asbestosis that the time limitation period began to run.

In this case, there is no medical report of record with a diagnosis of asbestosis. As the Board noted in its prior decision, Dr. Kimbel reported on November 19, 2001 “normal pulmonary function studies a year ago” and on March 21, 2005 stated that appellant did not have any active pulmonary infection. While the lack of a diagnosis may be relevant to establishing the claim, there is no evidence establishing that the claim was untimely filed. There is no probative evidence of record to support the Office’s finding that the time limitation period for the condition claimed, asbestosis, began to run on November 5, 1999. The Board finds the claim for asbestosis was timely filed based on the evidence of record.

CONCLUSION

The evidence does not establish that the claim for asbestosis filed on July 15, 2005 was untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated January 4, 2008 and August 3, 2007 are reversed.

Issued: September 16, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees’ Compensation Appeals Board

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

⁴ 57 ECAB 143 (2005).