



realized that his employment exposure caused his condition on April 11, 2008. The employing establishment noted that appellant no longer worked at the naval shipyard.<sup>1</sup>

On June 3, 2008 the Office requested additional evidence regarding employment, jobs held, the date his condition began, the date he was first treated for symptoms of his claimed condition, the cause of his realization that his claimed condition was caused by his employment and his first realization that his condition was employment related.

Appellant submitted treatment notes dated from September 1 to October 2, 2006 from Dr. Animesh Sahai, a urologist, regarding a vasectomy performed on September 1, 2006. Dr. Sahai noted that appellant had no history of cancer and listed normal physical examinations at each visit. On October 13, 2006 he found elevated testosterone levels and discussed possible etiologies including prostate cancer or other abdominal etiologies. Dr. Sahai ordered a computerized tomography (CT) scan. In an October 27, 2006 report, he noted that the CT scan revealed a right renal cystic mass. Dr. Sahai diagnosed kidney cancer. On November 16, 2006 he removed appellant's right kidney. A November 21, 2006 surgical pathology report from Dr. Nashwa Abed, a Board-certified pathologist, diagnosed right kidney nephrectomy and renal cell carcinoma. In treatment notes dated from November 27, 2006 to June 15, 2007, Dr. Sahai noted follow-up treatment post right radical nephrectomy for renal mass. He diagnosed malignant neoplasm of the kidney. Dr. Sahai's subsequent treatment notes diagnosed testicular hypogonadism and noted follow-up treatment for that condition.

On July 21, 2008 Dr. Sahai advised that appellant was diagnosed with malignant right kidney neoplasm for which he underwent right kidney removal on November 16, 2006. He advised that the final pathology was renal cell carcinoma with a tumor invading into but not through the renal capsule. Dr. Sahai noted that appellant reported exposure to asbestos and xylene at work. He opined that these chemicals had been reported in studies to show a causal link to kidney cancer.

In an undated response to the Office's request for information, appellant stated that he began working at the employing establishment on June 15, 1988 and worked intermittently as an electrician until July 23, 2004 with the most recent period being January 17, 1999 to July 23, 2004. He noted that the cancer causing agents to which he was exposed consisted of epoxy paints, xylene and glyptal. Appellant indicated that his daily exposure lasted between four to eight hours without the use of protective equipment. He first saw a physician for symptoms of his condition on October 2, 2006 and that October 13, 2006 was the date of onset of his condition. Appellant first became aware of the association between his employment exposure and his cancer when Dr. Sahai advised him of a direct connection during a follow-up conversation.

In an August 6, 2008 decision, the Office denied appellant's claim on the grounds that it was not timely filed. It found that July 23, 2004 was the date of his last exposure and the date he should have been aware of a relationship between his employment and the claimed condition.

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<sup>1</sup> The evidence indicates that appellant previously worked for a naval shipyard before he began working for the employing establishment with whom he filed his notice of occupational disease.

As appellant's claim was filed on May 27, 2008, more than three years of the date of last exposure, it was untimely filed.

On August 13, 2008 appellant's representative requested a telephonic hearing which was held on December 10, 2008. At the hearing, appellant's wife testified that, after appellant worked for the Department of Veterans Affairs from 1994 to 1999, he worked on submarines as an electrician at Port Drift Naval Shipyard.<sup>2</sup> She stated that he currently worked in a different position for the employing establishment. Appellant submitted several treatment notes pertaining to treatment for carpal tunnel release and right knee injury. A July 25, 2008 diagnostic report from Dr. Ross Schwartzberg, a Board-certified diagnostic radiologist, related that appellant was status post nephrectomy and cholecystectomy.

In a March 16, 2009 decision, an Office hearing representative affirmed the August 6, 2008 decision, finding that appellant filed his May 27, 2008 claim more than three years after the date of last exposure on July 23, 2004.

### **LEGAL PRECEDENT**

Section 8122(a) of the Act states that, "[a]n original claim for compensation for disability or death must be filed within three years after the injury or death."<sup>3</sup> 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 between the employment and the compensable disability.<sup>4</sup> 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.<sup>5</sup>

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor had actual knowledge of his alleged employment-related injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of his injury.<sup>6</sup> An employee must show not only that appellant's immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.<sup>7</sup>

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<sup>2</sup> Appellant was unavailable for the hearing due to his deployment to Iraq in October 2008.

<sup>3</sup> 5 U.S.C. § 8122(a).

<sup>4</sup> *Id.* at § 8122(b). See *S.J.*, 60 ECAB \_\_\_\_ (Docket No. 08-2048, issued July 9, 2009).

<sup>5</sup> *Mitchell Murray*, 53 ECAB 601 (2002); *Alicia Kelly*, 53 ECAB 244 (2001); see *Larry E. Young*, 52 ECAB 264 (2001); *Garyleane A. Williams*, 44 ECAB 441 (1993).

<sup>6</sup> 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).

<sup>7</sup> *Charlene B. Fenton*, 36 ECAB 151 (1984).

## ANALYSIS

The Board finds that appellant's claim was timely filed under the applicable time limitation provisions of the Act.

On May 27, 2008 appellant claimed that he developed malignant carcinoma on his right kidney caused by his exposure to chemicals during his federal employment through July 23, 2004. It is not disputed that appellant's last exposure to chemicals at the naval shipyard was July 23, 2004. The Office found that the claim was not timely filed because appellant did not file the claim within three years of July 23, 2004.

However, section 8122(b) of the Act provides that in the case of latent disability "the time for giving notice of injury begins to run 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."<sup>8</sup> In this case, the earliest date by which appellant was made aware of his claimed condition was October 27, 2006 when Dr. Sahai first diagnosed right kidney cancer. His undated statement noted that he first became aware of the association between his employment exposure and his cancer when Dr. Sahai advised him of a direct connection during a follow-up conversation. Appellant did not list a date for this follow-up conversation but, as noted, he was treated on numerous occasions by Dr. Sahai in October and November 2006 after his condition was diagnosed. In his May 27, 2008 claim form, he stated that his first realization of the causal connection between his cancer condition and his employment was on April 8, 2008 but he did not further elaborate. The Board finds that appellant related his first awareness that his kidney cancer was employment related on the date it was first diagnosed, October 27, 2006. Appellant's May 27, 2008 claim was filed within three years of October 27, 2006. There is no evidence to establish that he had any earlier knowledge of his cancer condition or its relationship to his employment. The Board finds that appellant's claim was timely filed. The case will be remanded for further development on the merits of the claim as is necessary.<sup>9</sup>

## CONCLUSION

The Board finds that appellant's claim for compensation was filed within the applicable time limitation provisions of the Act.

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<sup>8</sup> 5 U.S.C. § 8122(b).

<sup>9</sup> The Board notes that the record before the Board does not indicate that the Office attempted to obtain relevant information from the naval shipyard where appellant worked at the time he sustained his claimed chemical exposure. Instead, it sent its inquiries to appellant's current employer, the Corps of Engineers, although none of the claimed exposure occurred with the current employer. *See R.B.*, 60 ECAB \_\_\_ (Docket No. 08-1662, issued December 18, 2008) (while the claimant has the burden to establish his or her claim, the Office also has a responsibility in the development of the evidence; this is particularly true when the evidence is of the character normally obtained from the employing establishment or other government source); 20 C.F.R. § 10.118(a) (the employer is responsible for submitting to the Office all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means).

**ORDER**

**IT IS HEREBY ORDERED THAT** that the Office of Workers' Compensation Programs' decisions dated March 16, 2009 and August 6, 2008 are reversed. The case is remanded to the Office for further proceedings consistent with this decision.

Issued: January 4, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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