



within 30 days because he was “unaware of being able to file such claim.” The record reveals that he retired on March 31, 1993.

In an October 4, 2007 letter, appellant stated that he began work for the employing establishment on November 15, 1960 doing custodial work. He noted that about six months later he was transferred to aircraft loading where he worked for roughly 18 years loading and unloading aircraft with different kind of freight consisting of explosives as well as chemicals. Appellant noted that he handled radioactive materials during this time with no protective gear. He stated that he was treated for throat cancer and that Dr. Aoki, the physician who removed his thyroid, told him that the exposure to radiation caused the cancer. Appellant stated that there were three different kinds of cancer that was on the gland. He noted that, after that operation, he underwent an operation for prostate cancer. Appellant noted that he was confident that these conditions were caused by his employment, noting that many coworkers who were employed in the same conditions have passed away from various types of cancer. In an employment history received by the Office on November 14, 2007, he indicated that he began work for the employing establishment on November 15, 1960 as a janitor, that about six months later he was transferred to air freight loading where he worked for 18 years and that he then transferred to plumbing maintenance department until he retired from federal employment in March 1993. Appellant noted that, after this, he worked for a government contractor for about one year and then worked part time as a janitor at Adams Elementary School until his retirement 2006.

In support of his claim, appellant filed notes from Dr. John S. Friden, a Board-certified family practitioner, dated from December 6, 1993 to October 16, 2006. During this time, Dr. Friden reported that appellant was treated for a plethora of conditions, including thyroid cancer (for which he had a thyroidectomy in 1984) and prostate cancer (radical prostatectomy in August 1998).<sup>1</sup>

In an October 13, 1993 report, Dr. Jon Richard Aoki, a Board-certified otolaryngologist, indicated that 10 years earlier he had performed a total thyroidectomy for papillary carcinoma. He noted no sign of recurrent papillary carcinoma of the thyroid.

On August 19, 1998 Dr. Curtis M. Campbell, a Board-certified urologist, performed a bilateral pelvic lymphadenectomy and radical retropubic prostatectomy for treatment of adenocarcinoma of the prostate. On October 14, 1998 he performed a cystoscopy, direct vision urethrotomy and incision bladder neck contracture.

By decision dated September 9, 2008, the Office denied appellant’s claim as it found that he had not filed the claim in a timely manner.

In a November 26, 2008 note, Dr. Aoki stated that appellant was diagnosed in approximately 1984 with papillary carcinoma of thyroid. He stated that this was treated with

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<sup>1</sup> Dr. Friden also treated appellant for, *inter alia*, sinusitis, patellofemoral syndrome, benign essential hypertension, chronic cervical strain, hiatal hernia, obstructive sleep apnea, peripheral edema, perennial rhinitis, mild gastric reflux disease, Type 2 diabetes and degenerative arthritis of the left knee. He noted multiple surgeries, including, *inter alia*, coronary artery bypass grafting in February 1984 and 1997, bilateral ventilatory tube replacement in 1974 and submucous resection of turbinates in 1965.

total thyroidectomy and postoperative I-131 treatment and that appellant was now free of the disease. Dr. Aoki further noted, "There is a well known increased risk of developing thyroid cancer in individuals who have had irradiation of the neck."

By letter dated January 18, 2009, appellant stated that in the 1960s he was exposed to radiation. He contended that cancer does not have a time limit, that he was exposed daily to radioactive material as an airfreight loader and that in the 1960's cancer was not as well studied as it is today. Appellant contended that his supervisors could not have provided documentation of the injury at the time of exposure because there was no injury for another 20 or so years. He noted that the information requested by the Office was unobtainable.

By form dated March 10, 2009 and marked by the carrier on March 11, 2009, appellant requested an oral hearing.

By decision dated August 11, 2009, the Office denied appellant's request for an oral hearing as it was not filed within 30 days of the issuance of a final decision by the Office. It also reviewed the request under its discretionary authority and denied the request for the further reason that the case could equally well be addressed by requesting reconsideration.

In a September 13, 2002 report, received on October 19, 2009, Dr. Gary L. Whipple, a Board-certified radiation oncologist, noted that appellant had pathologic Stage III high grade adenocarcinoma of the prostate, which had a positive surgical margin at the time of surgery. He noted that appellant was diagnosed with prostate cancer in 1998. Dr. Whipple noted that given the slow rate in the rise of his prostate-specific antigen (PSA) this was consistent with a recurrence and as such was appropriate for postoperative radiation therapy. Also on October 19, 2009 appellant submitted an April 9, 2003 report wherein Dr. Whipple noted that appellant was approximately six months out of radiation therapy for postprostatectomy PSA rise and that he had no significant side effects from the treatment.

Appellant submitted additional progress notes from Dr. Frieden from August 26, 2002 to October 8, 2009. In a note dated October 8, 2009, Dr. Frieden noted that appellant had hypothyroidism as a result of a total thyroidectomy for thyroid cancer many years ago. He noted that appellant was exposed to significant levels of radiation when he was loading radioactive materials on aircraft. Dr. Frieden also noted a history of prostate cancer with radical prostatectomy in 1998 with negative lymph nodes. He noted that it was thought that radiation exposure may have contributed to his prostate cancer as well. Dr. Frieden noted numerous other medical problems that were not work related.

Appellant also submitted other recent medical reports indicating numerous ongoing medical issues, including obstructive sleep apnea, multiple hypoechoic liver lesions and ischemic heart disease.

On September 8, 2009 appellant, through his granddaughter, requested reconsideration.

By decision dated December 7, 2009, the Office denied modification of the September 8, 2008 decision as it found that the claim was untimely filed.

## LEGAL PRECEDENT

Section 8122(a) of the Federal Employees' Compensation Act<sup>2</sup> states, "An original claim for compensation or death must be filed within three years after the injury or death."<sup>3</sup> This section also indicates that a claim not filed within three years will not be allowed unless the immediate supervisor had actual knowledge of the injury or death within 30 days or written notice of injury was given within 30 days.<sup>4</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 be aware, of the causal relationship between his employment and the compensable disability.<sup>5</sup>

In a case of occupational disease, the time for filing a claim begins to run when the employee first becomes aware or reasonably should have been aware, of a possible relationship between his condition and his employment. When an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitation period even though the employee does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent. Where the employee continues in the same employment after he or she reasonably should have been aware that he or she has a condition which has been adversely affected by factors of the federal employment awareness, the time limitation begins to run on the date of the last exposure to the implicated factors. The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.<sup>6</sup>

## ANALYSIS

The Board finds that appellant's claim was not timely filed.

This claim for an occupational disease was filed on October 4, 2007. Appellant indicated on the form that he first became aware that his illness or disease was caused by his federal employment on November 15, 1960. The Board notes that his claim alleges that he suffered from thyroid cancer, prostate and skin cancer as a result of handling radioactive material while working as a missile loader for the employing establishment. The record indicates that appellant worked as a missile loader from 1961 through approximately 1979. He continued to be employed for the employing establishment until May 1993, but was in a position that did not require him to be exposed to radioactive material. Accordingly, it is clear that appellant was last exposed to radioactive material through his federal employment in 1979.

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Id.* at § 8122(a).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at § 8122(b).

<sup>6</sup> *W.L.*, 59 ECAB 362 (2008).

With regards to his dates of awareness, appellant was aware that he had thyroid cancer in 1984, at which point Dr. Aoki performed a total thyroidectomy for papillary carcinoma. He was aware that he had prostate cancer at least by August 19, 1998 when he underwent a bilateral pelvic lymphadenectomy and radical retropubic prostatectomy for treatment of adenocarcinoma of the prostate. Accordingly, the Board finds that appellant knew that he had thyroid cancer in 1984 and prostate cancer in 1998, the time of his respective surgeries. Appellant indicated that Dr. Aoki told him that his thyroid cancer was related to his exposure to radiation around the time of his surgery in 1984. The Board finds that he knew or should have known that his thyroid cancer was related to his federal employment in 1984 and that his prostate cancer was related to his employment in 1998. In an occupational disease claim, such as this one, appellant's claim can be found timely filed if its filed within three years of when an employee became aware or should have become aware that his condition was adversely affected by factors of his employment. As he knew or should have known of the relationship between his thyroid cancer and his federal employment in 1984, he should have filed his claim by 1987, *i.e.*, within three years of the time he knew or should have reasonably known of the connection between his employment and his cancer. As appellant knew or should have known of the relationship between his prostate cancer and his federal employment in 1998, he should have filed his claim by 2001, *i.e.*, within three years from the time he knew or should have reasonably known of the connection.<sup>7</sup>

The Board finds that there is no evidence that appellant's supervisor had knowledge of appellant's injury within 30 days and accordingly, there is no evidence of constructive knowledge on the part of the employing establishment. Therefore, the Office properly determined that appellant's claim was not timely filed based on the evidence of record.

### **CONCLUSION**

The Board finds that appellant's claim for compensation was not timely filed.

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<sup>7</sup> As the Office never adjudicated appellant's claim with regards to skin cancer, that issue is not properly before the Board at this time. 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 29, 2010 is affirmed.

Issued: January 14, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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