

period for filing a claim does not begin to run until appellant has medical documentation showing that he had the disease and that it was related to his federal employment. In the alternative, he argues that exceptional circumstances would permit an untimely filing.

FACTUAL HISTORY

On July 15, 2008 employee, then an 80-year-old former coal mine health and safety inspector, filed an occupational disease claim alleging that he developed pneumoconiosis as a result of exposure to coal dust during his federal employment. The employing establishment indicated that on the claim form that the employee retired in 1989. In a statement, the employee indicated that he worked in coal mines for about 28 years, more than half of that time as a federal mine inspector. He also acknowledged that he started smoking when he was 20 years old and smoked ½-pack of cigarettes a day until 1993. The employee stated that he first became aware that he had pneumoconiosis when he received a September 25, 2007 report by Dr. Robert A.C. Cohen, a Board-certified surgeon. He submitted a copy of this report wherein Dr. Cohen opined that the employee suffered from pneumoconiosis as a result of his underground coal mine employment.²

The employee previously filed a claim for black lung benefits on July 14, 2003. At that time, he noted that he last worked in the coal mines on October 1, 1989. The employee stated that he had respiratory problems and “can’t breathe very well.” He noted that tests were taken at the Good Samaritan Hospital about one year before and at that time he was informed that he had spots on his lungs. Medical records were submitted which indicated that chest x-rays taken on April 29, 1974, September 2, 1977 and August 25, 1986 showed some tenting of the pericardium in the base and slight fibrosis at the base. A report of an August 25, 1986 pulmonary function was interpreted as showing 68 percent of vital capacity and a study from April 29, 1974 showed 77.2 percent vital capacity. After an initial denial, the black lung claim was accepted on March 31, 2008 and the employee was paid compensation from the Black Lung Disability Trust Fund commencing July 2003.

By decision dated April 23, 2009, OWCP denied the employee’s claim as it was untimely filed.

On May 15, 2009 the employee requested an oral hearing. At the hearing held on September 21, 2009, counsel argued that he had heavy exposure to coal dust in the mines. He argued that, although the employee did file a federal black lung claim on July 14, 2003, it was very common for ex-coal miners to file black lung claims and develop the evidence thereafter. Counsel did not at that time have evidence of the disease much less a disability from the disease. He noted that pneumoconiosis is a latent disease and that after the employee’s retirement it

² Dr. Cohen opined that appellant suffered from pneumoconiosis, noting 28 years of underground coal mine employment with jobs that resulted in significant coal mine dust exposure; symptoms consistent with chronic lung disease including cough, sputum production, dyspnea and wheezing; physical examination which showed chronic lung disease including decreased sounds and prolonged expiration; and pulmonary function testing showing severe obstructive lung disease with severe diffusion impairment. He also noted that appellant’s x-rays were positive for pneumoconiosis.

became progressively worse. Counsel argued that the time for filing a claim does not begin to run until a physician gives a claimant a reasoned opinion telling him that he has a claim.

The employee died on September 20, 2009. His widow pursued his claim.

By decision dated December 9, 2009, an Office hearing representative affirmed the April 23, 2009 denial of the employee's claim as it was untimely filed.

LEGAL PRECEDENT

Section 8122(a) of FECA³ states that an original claim for compensation for disability or death must be filed within three years after the injury or death.⁴ Section 8122(b) provides that, in latent disability cases, the time limitation does not begin to run until the employee is aware or by the exercise of reasonable diligence should have been aware of the causal relationship between the employment and the compensable disability.⁵ 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.⁶

An employee's claim would still be regarded as timely under section 8122(a)(1) of FECA if the employee's 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.⁷ An employee must show not only that his immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.⁸

ANALYSIS

In its December 9, 2009 decision, the Office hearing representative affirmed the Office's denial of the employee's claim for compensation on the grounds that it was not timely filed in accordance with 5 U.S.C. § 8122. Initially, the Board finds that there is no evidence that the employee's supervisor had actual knowledge of the employment-related injury within 30 days. Furthermore, as the employee last worked as a federal mine inspector in 1989, the claim filed on July 15, 2008 was not filed within three years of his last exposure. Accordingly, the issue is whether the employee's July 15, 2008 claim was filed within three years of the date he knew or should have known of a causal relationship between his employment and his pneumoconiosis.

³ 5 U.S.C. § 8122(a).

⁴ *Id.*

⁵ *Id.* at § 8122(b).

⁶ *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).

⁷ 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).

⁸ *Charlene B. Fenton*, 36 ECAB 151 (1984).

OWCP found that the employee should have known of the connection as of July 14, 2003 when he filed a claim for black lung benefits. Appellant, through counsel, contends that the time period for filing the claim did not begin until after the employee had medical notice that he had pneumoconiosis and that it was related to his federal employment. Appellant's counsel contends that, as this first occurred when the employee received a copy of Dr. Cohen's September 25, 2007 report, the employee's claim was timely filed.

The Board finds that the employee's claim was timely filed. Section 8122(b) provides that, in latent disability cases, the time limitation begins to run when the employee is aware or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment and the compensable disability.⁹ The Board has held that 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 employment, such awareness is competent to start the running of the time limitations period event though he does not know the precise nature of the impairment or whether the ultimate result of such adverse effect would be temporary or permanent.¹⁰ However, the mere fact that the employee filed a claim under the Black Lung Act does not establish such knowledge. Although the employee filed a claim for black lung benefits on July 14, 2003, the Board has held that mere concern about a history of exposure to dangerous substances without positive medical evidence does not begin the three-year time period for filing a claim.¹¹ At the time the employee filed his claim for benefits under the Black Lung Act, he did not have any positive medical evidence establishing pneumoconiosis. The x-rays and pulmonary function tests taken in the 1970's and 1980's never contained a definitive diagnosis of pneumoconiosis. Thus, these reports would not be an appropriate starting point to determine if the claim was timely filed.¹² There are no medical records that indicate a positive diagnosis of pneumoconiosis until Dr. Cohen's September 25, 2007 report.

The Board finds that the evidence does not establish that the employee was aware of the causal relationship between his federal employment and his pneumoconiosis until the September 25, 2007 report by Dr. Cohen. There is no evidence that the employee was aware of a causal relationship or should have been aware of the relationship prior to that time. As the employee filed his claim on July 15, 2008, the Board finds that his claim was timely filed within the three-year period after September 25, 2007.

CONCLUSION

The Board finds that the employee's occupational disease claim was timely filed within the applicable time limitations provisions of FECA.

⁹ *Supra* note 3; *Corey W. Davis*, 57 ECAB 674 (2006).

¹⁰ *L.C.*, 57 ECAB 740 (2006).

¹¹ *E.B.*, 58 ECAB 642 (2007); *Edward C. Horne*, 43 ECAB 834 (1992); *G.S.*, claiming as a widow of *M.S.* 06-1882 (2006).

¹² *Virginia D. King*, 57 ECAB 143 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 9, 2009 is reversed. The case is remanded to the Office for further proceedings regarding the merits of the claim.

Issued: May 25, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board