



as his doctors never told him that he had lung disease until 2007. Counsel noted that this was consistent with the medical records and declaration by appellant and his wife.

### **FACTUAL HISTORY**

On September 9, 2008 appellant, then a 78-year-old former general helper, filed an occupational disease claim alleging that he sustained asbestosis due to his work for the employing establishment removing asbestos out of ship compartments. He first realized that he had the disease and that it was caused or aggravated by his employment on March 3, 2008. The employing establishment controverted the claim, alleging that it was very doubtful that appellant's current medical condition arose from any exposure to asbestos while he was working for the Federal Government. The employing establishment noted that he worked for 2 years and 11 months and last worked on December 30, 1955. Appellant's service card indicated that he was hired on February 19, 1953 to work as a general helper and was let go on December 30, 1955 as a result of a reduction-in-force (RIF).

In a June 5, 2008 report, Dr. Jordan Firestone, a physician Board-certified in occupational medicine, stated that he first saw appellant on March 6, 2008 for asbestosis in his lungs. There were objective findings to support this diagnosis, specifically a computerized tomography (CT) scan of the chest on April 16, 2007 which showed pleural plaques and interstitial fibrosis as well as lung function tests on March 27, 2008 which showed moderate restrictive abnormality.

On December 10, 2008 OWCP denied appellant's claim finding that it was not filed within the requisite three-year time limitation period. Moreover, appellant should have been aware of a causal relationship between his claimed condition and employment by 2002 and that the supervisor did not have actual knowledge within 30 days.

On November 23, 2009 appellant's attorney filed a request for reconsideration and submitted new documentation.

On November 4, 2002 a CT scan of appellant's chest was obtained in response to his claims of chest pain. There was an acute or chronic aortic dissection and extensive bilateral calcified pleural plaques. The report also noted mild centrilobular emphysema and patchy lung opacities adjacent to the pleural plaques which probably represent atelectasis or scar as well as extensive coronary artery calcification indicating atherosclerosis. Accompanying reports from a hospital visit on that date indicate that appellant was seen for abdominal pain.

In a November 21, 2007 note to appellant, Dr. Michael N. Hayden, a Board-certified internist, stated that his chest CT scan did show signs of past exposure to asbestos. He noted that this would increase appellant's chances of lung disease or lung cancer, and recommended that he see a pulmonary specialist. Dr. Hayden noted that there was no urgency for this consultation.

In a March 6, 2008 report, Dr. Firestone reviewed appellant's medical records. He noted that a chest CT scan on November 4, 2002 showed bilateral pleural calcification and with a typical appearance of asbestos-related pleural plaques with blunting of the costophrenic angles. An October 3, 2005 x-ray was interpreted as showing calcified pleural plaques with dense calcification of bilateral hemidiaphragms with normal pulmonary distinction. An

October 25, 2005 CT scan showed stable calcified pleural plaques and no identifiable pulmonary nodule. An x-ray taken on June 15, 2006 showed stable appearance of asbestos-related pleural disease. A CT scan of appellant's chest on November 1, 2007 that was obtained for surveillance of asbestos exposure showed calcified pleural plaquing compatible with prior asbestos exposure with subtle interstitial disease compatible with early changes of pulmonary asbestos. Dr. Firestone concluded that appellant had radiologic evidence of asbestosis. He noted that serial radiologic evaluation has demonstrated stable findings of asbestos-related pleural plaques and mild interstitial fibrosis. Dr. Firestone indicated that appellant's asbestos exposure while working at the Navy shipyards was much more substantial than the possible exposure from asbestos blanket during his work as a refrigerator technician. He concluded that appellant's shortness of breath with exertion is likely multifactorial with his history of coronary artery disease, tobacco related emphysema and asbestosis all contributing to his respiratory limitation.

In a declaration of October 30, 2009, appellant stated that when he went to the hospital in November 2002 it was for abdominal pain that was worse with deep breathing. He stated "No one said anything to me about asbestos disease or evidence of asbestos exposure or anything about asbestos or any other work-related problem." Appellant was concerned at that time about abdominal pain and was told by the doctor at the hospital that whatever it was not life-threatening and that he should come back or see his primary doctor if he had additional problems. The first time he knew he had possible asbestos-related disease was when he received a letter from Dr. Hayden in November 2007 about the results of a chest CT scan recently obtained which showed signs of past exposure to asbestos. Appellant stated that he saw Dr. Firestone in early 2008 and that he told him that he had asbestos related disease and that he should file a workers' compensation claim. His wife also filed an affidavit supporting appellant's statements. She noted that she goes with her husband to all of his doctor's appointments and that before 2007 she did not recall ever hearing that he had signs of asbestos-related disease or changes on his x-rays or CT scans related to previous asbestos exposure.

By decision dated March 5, 2010, OWCP reviewed the new evidence submitted by appellant but denied modification of its decision denying appellant's claim due to untimely filing.

On June 25, 2010 appellant, through his attorney, again requested reconsideration.

By decision dated August 23, 2010, OWCP reviewed the evidence but determined that appellant's claim remained denied as it was untimely filed.

### **LEGAL PRECEDENT**

Where an injury was sustained over a period of time, the date of the injury is the date of last exposure to those work factors causing injury.<sup>2</sup> 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

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<sup>2</sup> *J.B.*, 58 ECAB 468 (2007); *Patrick K. Cummings*, 53 ECAB 623, 626 (2002).

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.<sup>3</sup>

### ANALYSIS

In this case, appellant filed a claim for asbestosis causally related to asbestos exposure in his Federal Government employment from 1951 to 1953. OWCP found that his claim was untimely filed noting the November 2, 2002 CT scan which showed bilateral pleural calcification with a typical appearance of asbestos-related pleural plaques. It also noted subsequent x-rays in 2005 and 2006 showed findings consistent with asbestos-related pleural disease. These reports, however, do not make a finding of asbestosis and make no connection between the findings in the x-ray and appellant's federal employment. It is not until an employee receives a confirmation of the diagnosis of asbestosis that the time limitation period begins to run.<sup>4</sup> The record shows that in November 21, 2007 Dr. Hayden stated that appellant's chest CT scan showed signs of past exposure to asbestos, and recommended that he see a pulmonary specialist. In a March 13, 2008 report, Dr. Florence reviewed the progression of pleural plaques on appellant's diagnostic studies and concluded that appellant had radiographic evidence of asbestosis. He also discussed the possibility that this asbestosis was related to appellant's work for the employing establishment in the shipyards. This is the first medical report sufficient to give appellant notice that he had a condition, *i.e.*, asbestosis, that may be related to his federal employment. The fact that appellant was not aware of his condition and its relationship to his employment is further supported by affidavits of appellant's wife indicating that they were not aware of the fact that he had asbestosis until, at the earliest, Dr. Hayden's November 2, 2007 note. Appellant's claim was filed on September 9, 2008, well within the one-year time limitation which commenced, at the earliest, with the November 21, 2007 note by Dr. Hayden. There is no probative evidence of record to support that appellant was aware of his asbestosis and its relation to his federal employment over one year prior to the filing of his claim. The Board finds that 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 September 9, 2008 was untimely.

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<sup>3</sup> *Marcelo Crisostomo*, 42 ECAB 339, 341 (1991); *J.B.*, Docket No. 08-1098 (issued September 16, 2008).

<sup>4</sup> *J.B.*, *supra* note 3.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 23, 2010 is reversed and the case is remanded for further action consistent with this decision.

Issued: January 6, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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