

Regarding the nature of the disease, he stated, “Asbestos identified by the [Veterans Administration].” Appellant indicated that he first became aware of the disease on June 8, 2007 and that he first realized that the disease was caused or aggravated by his employment on June 8, 2007. Regarding the relationship of the claimed condition to his employment and how he came to this realization, appellant stated, “Individual did not receive a physical or chest x-ray for his discharge April 30, 2007. I found out through the [Veterans Administration]. They found [seven] spots. If I missed a time frame that was not my fault because of lack of information prior to retirement.” On the portion of the form to be completed by supervisors, an injury compensation assistant indicated that appellant first reported the claimed condition to her on July 9, 2012.²

Based on statements and documents from appellant and the employing establishment, it was determined that appellant worked in the disposal division of Davis-Monthan Air Force Base from March 1, 1986 until his retirement on April 30, 2007. He worked primarily as an aircraft worker (later as a supervisor) and was responsible for removing and disposing of asbestos from all types of aircraft, removing black boxes contaminated with radiation, draining all fluids and fuel from aircraft, and removing engines and other components inside the body of the aircraft. Safety precautions and protective equipment were available when handling hazardous material, including locking down where asbestos was visible and wearing hooded masks, special overalls and gloves. Appellant was in military service with the U.S. Air Force from July 9, 1964 to July 8, 1968 as a mechanic servicing and maintaining aircraft. From 1970 to 1986, he was employed as a drill operator for a private copper mining company from 1970 to 1986.

In a September 25, 2012 statement, appellant indicated that he first became aware of his claimed condition in May 2007 when the Veterans Administration discovered seven spots of asbestos on his lungs.³ He submitted numerous documents from the period of his employment with Davis-Monthan Air Force Base, including air quality reports, respiratory function studies and asbestos questionnaires.⁴

In a November 12, 2012 report, Dr. Carl F. Diener, a Board-certified pulmonologist serving as an OWCP physician, detailed his evaluation of appellant’s pulmonary condition. He determined that the diagnosis of asbestosis was not confirmed and that there was no indication that appellant sustained a pulmonary condition due to his federal employment. Dr. Diener posited that appellant’s pulmonary limitations were related to age, obesity, a May 2007 heart attack, and exposure to harmful substances while he worked as a drill operator for a private company.

² Appellant’s immediate supervisor at the time he retired in April 2007, Thomas P. Dunleavy, has also retired from the employing establishment. Mr. Dunleavy is appellant’s representative in the present appeal.

³ In a May 11, 2011 letter to his senator, appellant indicated that the Veterans Administration found asbestos fibers in his lungs during an x-ray examination on or about August 10, 2007. He asserted that he had not been properly apprised of the time limits for filing compensation claims.

⁴ In the asbestos questionnaires (dated between 1993 and 2001), appellant did not provide any indication that he felt he might have an asbestos-related condition caused by his work. The respiratory function studies do not provide any indication of pulmonary disease.

In a January 16, 2013 decision, OWCP denied appellant's claim on the grounds that he had not submitted sufficient medical evidence to establish a pulmonary condition due to his federal employment. It determined that he had been exposed to asbestos and other harmful substances during his federal employment, but that the medical evidence did not establish a medical condition due to this exposure.

LEGAL PRECEDENT

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.⁵ In cases of injury on or after September 7, 1974, section 8122(a) of FECA provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless:

“(1) the immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death; or

“(2) written notice of injury or death as specified in section 8119 was given within 30 days.”⁶

Section 8119 of FECA provides that a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury, or in the case of death, the employment factors believed to be the cause; and be signed by and contain the address of the individual giving the notice.⁷ Actual knowledge and written notice of injury under section 8119 serve to satisfy the statutory period for filing an original claim for compensation.⁸

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. 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.⁹ 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 federal employment, the time

⁵ *Charles Walker*, 55 ECAB 238 (2004); see *Charles W. Bishop*, 6 ECAB 571 (1954).

⁶ 5 U.S.C. § 8122(a).

⁷ *Id.* at § 8119; *Larry E. Young*, 52 ECAB 264 (2001).

⁸ *Laura L. Harrison*, 52 ECAB 515 (2001).

⁹ *Larry E. Young*, *supra* note 7.

limitation begins to run on the date of the last exposure to the implicated factors.¹⁰ Section 8122(b) of FECA provides that the time for filing in latent disability cases 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.¹¹ The requirement to file a claim within three years is the claimant's burden and not that of the employing establishment.¹²

ANALYSIS

On June 25, 2012 appellant filed an occupational disease claim alleging that he sustained an asbestos-related pulmonary condition due to his exposure to asbestos at work. The Board finds that appellant did not establish that he sustained a work-related pulmonary condition due to his federal employment because his claim was filed in an untimely manner.

On the form for his occupational disease claim, appellant indicated that he first became aware of the disease on June 8, 2007 and that he first realized that the disease was caused or aggravated by his employment on June 8, 2007. Regarding the nature of the claimed disease, appellant stated, "Asbestos identified by the [Veterans Administration]." Regarding the relationship of the claimed condition to his employment and how he came to this realization, appellant noted, "Individual did not receive a physical or chest x-ray for his discharge April 30, 2007. I found out through the [Veterans Administration]. They found 7 spots." In a September 25, 2012 statement, appellant indicated that he first became aware of his claimed condition in May 2007 when the Veterans Administration discovered seven spots of asbestos on his lungs.¹³

The evidence establishes that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the possible causal relationship between his employment and the compensable disability as early as mid-2007.¹⁴ Appellant's explicit linking of his exposure to harmful substances at work with his development of a possible pulmonary condition shows that he knew as early as mid-2007 of the possible relationship between these employment conditions and the claimed medical condition.

The totality of the factual circumstances of record establish that appellant was aware or should have been aware as early as mid-2007 that his claimed injury was due to employment factors. Appellant did not file his claim for an employment-related emotional condition until June 25, 2012 and therefore he did not file his claim within the requisite three years of his

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8122(b); *see Luther Williams, Jr.*, 52 ECAB 360 (2001).

¹² *Debra Young Bruce*, 52 ECAB 315 (2001).

¹³ In a May 11, 2011 letter to his senator, appellant indicated that the Veterans Administration found asbestos fibers in his lungs during an x-ray examination on or about August 10, 2007.

¹⁴ The record does not contain a copy of the Veterans Affairs x-rays referenced by appellant as giving him notice of his claimed pulmonary condition. However, appellant has indicated that the x-rays were taken at some point between May and August 2007.

awareness of the possible relationship between the implicated employment factors and the claimed medical condition.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of FECA if his immediate superior had actual knowledge of the injury within 30 days or under section 8122(a)(2) if written notice of injury was given to his immediate superior within 30 days as specified in section 8119. Appellant has not made any claim that he has satisfied either of these provisions, nor does the record support a finding that he has satisfied either of them.¹⁵

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a work-related pulmonary condition due to his federal employment because his claim was filed in an untimely manner.

¹⁵ There is no indication in the record that appellant provided a statement to his immediate superior such that he satisfied the provisions of sections 8119 and 8122(a) of FECA. *See supra* notes 7 and 8. Moreover, the employing establishment would not have otherwise been apprised of the possible link between work factors and the claimed pulmonary condition such that appellant satisfied the provisions of sections 8119 and 8122(a). Appellant periodically completed asbestos questionnaires during his federal employment, but he did not provide any indication on the forms that he felt he might have an asbestos-related condition caused by his work. In addition, there is no indication that the employing establishment conducted testing that would have detected the possibility of such a condition prior to appellant's retirement in April 2007.

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2013 decision of the Office of Workers' Compensation Programs is affirmed as modified to reflect that appellant's claim is denied on the basis of untimeliness.

Issued: June 25, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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